2600 OPERATING WHILE INTOXICATED: INTRODUCTORY COMMENT

CONTENTS

Scope

Material describing issues relating to "drunk driving" offenses was first published as Wis JI-Criminal 2660-2665 Introductory Comment in 1982. It outlined the major changes in Wisconsin law made by Chapters 20 and 184, Laws of 1981. The most significant of those changes was the creation of offenses based on the alcohol concentration of the driver. The material was significantly revised in 1993 to emphasize the changes made by 1991 Wisconsin Act 277. The most significant of those changes, at least in terms of its effect on the jury instructions, was the creation of "0.08" as the level of prohibited alcohol concentration for offenders with two or more prior offenses.

In 2004, this material was republished as Wis JI-Criminal 2600 and substantially expanded to collect all explanatory material relating to "operating while intoxicated offenses" – those in the Motor Vehicle Code and in the Criminal Code. "Operating while intoxicated" is used as the general term to cover operating "while under the influence" and "with a prohibited alcohol concentration." Footnotes to instructions for specific offenses refer to material contained here.

I. Motor Vehicle Code Offenses Apply "On a highway."

Section 346.61 provides that statutes defining reckless driving and operating while intoxicated – §§ 346.62 to 346.64 – apply to "highways" and to "all premises held out to the public for use of their motor vehicles, whether such premises are publicly or privately owned and whether or not a fee is charged for the use thereof." Section 346.66 makes the same provision for violations relating to accidents and accident reporting – §§ 346.67 to 346.70. There is no similar restriction for Criminal Code offenses.

A. "Highway."

"Highway" is defined by sec. 340.01(22):

> (22) "Highway" means all public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel. It includes those roads or driveways in the state, county or municipal parks and in state forests which have been opened to the use of the public for the purpose of vehicular travel and roads or driveways upon the grounds of public schools, as defined in s. 115.01(1), and institutions under the jurisdiction of the county board of supervisors, but does not include private roads or driveways as defined in sub. (46).

Section 346.01(1m), as created by 2009 Wisconsin Act 129, provides:

> In this chapter, in addition to the meaning given in s. 340.01(22), "highway" includes a private road or driveway that is subject to an agreement for traffic regulation enforcement under s. 349.03(5).

"Highway" includes the entire platted or dedicated right-of-way of a public road; it is not limited to the paved portion or the paved portion plus the shoulder. E.J.H. v. State, 112 Wis.2d 439, 234 N.W.2d 77 (1983). That a vehicle was operated "on a highway" may be proved circumstantially. State v. Mertes, 2008 WI App 179, 315 Wis.2d 756, 762 N.W.2d 813.

B. "Premises held out for the public . . ."

The Committee Notes to the 1957 revision of the Motor Vehicle Code provide as follows with respect to § 346.61:

> Legislative Council Note, 1957: Most provisions of this chapter are applicable only upon highways. This section gives the sections relating to reckless and drunken driving somewhat broader applicability. They will apply in such areas as parking lots, filling stations and loading platforms. This is a change in the law, for the attorney general has ruled that the present law relating to drunken driving applies only to driving on highways. 38 Atty. Gen. 184 (1949). Broader applicability, however, is in the interest of public safety and also is consistent with § 11-101 of the UVC. [Bill 99-S]

The phrase "held out to the public" has been interpreted in three Wisconsin appellate decisions. In City of Kenosha v. Phillips, 142 Wis.2d 549, 419 N.W.2d 236 (1988), the supreme court held that the privately-owned American Motors parking lot was not "held out to the public" because it is the intent of the owner that governs. The owner's intent was to hold the lot open to its employees, but not to the general public. The statute was amended by 1995 Wisconsin Act 127 to specifically include employee parking lots.

In City of LaCrosse v. Richling, 178 Wis.2d 856, 505 N.W.2d 448 (Ct. App. 1993), the court held that the parking lot of a bar and restaurant was "held out to the public" because potential customers are part of "the public." "We believe the appropriate test is whether, on any given day, potentially any resident of the community with a driver's license and access to a motor vehicle could use the parking lot in an authorized manner." 178 Wis.2d 856, 860. The Richling test was applied in State v. Carter, 229 Wis.2d 200,

598 N.W.2d 619 (Ct. App. 1999), to hold that a parking lot of a closed gas station was also "held out to the public."

"The roadways of the Geneva National Community [a gated community] were 'held out to the public for use of their motor vehicles' because on any given day any licensed driver could enter the community unchallenged. . ." State v. Tecza, 2008 WI App 79, ¶22, 312 Wis.2d 395, 751 N.W.2d 896.

C. Instructing the jury.

The fact that the driving or operating took place on a highway or on "premises held out to the public . . ." is one that must be established before the defendant may be found guilty of this offense. However, the Committee concluded that in the typical case, it is not necessary to provide for finding this fact as a separate element of the crime. Rather, it is sufficient to combine it with the "drove or operated" element.

In a case where the "highway" issue is contested, or if a case involves operating on "premises held out to the public . . .," the instruction should be modified to provide additional information to the jury. See Wis JI-Criminal 2605, PREMISES OTHER THAN HIGHWAYS, which is drafted for use with the following offenses:

- reckless driving in violation of § 346.62 [Wis JI-Criminal 2650-2654].
- operating under the influence in violation of § 346.63 [Wis JI-Criminal 2660-2669].
- failure to stop and render aid in violation of § 346.67 [Wis JI-Criminal 2670].

D. Criminal Code offenses are not limited to "highways."

Criminal Code offenses are not limited to incidents that occur on highways or any other designated premises.

II. "Motor Vehicle" and "Vehicle."

Motor Vehicle Code statutes refer to both "motor vehicles" and "vehicles" while the Criminal Code refers only to "vehicles." The definitions of the terms are slightly different.

A. Motor Vehicle Code offenses.

Most, but not all, Motor Vehicle Code offenses apply to the driving or operation of a "motor vehicle." The exceptions are offenses under § 346.63(2) involving causing injury. Those offenses apply to offenses committed by driving or operating a "vehicle." The Committee assumed that this difference was intentional on the part of the legislature, justified by the fact that offenses involving injury are considered to be more serious than simple operating offenses, thus leading to the inclusion of a broader category of conduct – namely, the operation of devices which do not fall within the definition of "motor vehicle." As to the use of "vehicle," this rationale was cited with approval in State v. Smits, 2001 WI App 45, ¶16, 241 Wis.2d 374, 626 N.W.2d 42.

There are differences in how the two terms are defined; compare the following.

Section 340.01(35) defines "motor vehicle" as follows:

> "Motor vehicle" means a vehicle, including a combination of 2 or more vehicles or an articulated vehicle, which is self-propelled, except a vehicle operated exclusively on a rail. "Motor vehicle" includes, without limitation, a commercial motor vehicle or a vehicle which is propelled by electric power obtained from overhead trolley wires but not operated on rails. A snowmobile and an all-terrain vehicle shall only be considered motor vehicles for purposes made specifically applicable by statute.

Section 340.01(74) defines "vehicle" as follows:

> "Vehicle" means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except railroad trains. A snowmobile or electric personal assistive mobility device shall not be considered a vehicle except for purposes made specifically applicable by statute.

B. Criminal Code offenses apply to "vehicles."

All Criminal Code offenses apply to operating a "vehicle." Section 939.22(44) defines "vehicle" as follows:

> "Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

This definition "clearly includes a tractor for purposes of . . . § 940.09." State v. Sohn, 193 Wis.2d 346, 360, 535 N.W.2d 1 (Ct. App. 1995).

III. "Drive" and "Operate."

Motor Vehicle Code statutes generally apply to persons who "drive or operate" while the Criminal Code generally refers to "operation or handling."

A. Motor Vehicle Code.

Most, but not all, Motor Vehicle Code offenses are defined to apply to any person who "drives" or "operates." The exceptions are offenses under § 346.63(2) involving causing injury. Those offenses apply to offenses committed by "operating."

Section 346.63(3)(a) defines "drive" as follows:

> "Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.

Section 346.63(3)(b) defines "operate" as follows:

> "Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.

The statutory definition of "operate" was originally based on case law. See Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955). The definition in § 346.63(3)(b) has been interpreted in Milwaukee County v. Proegler, 95 Wis.2d 614, 291 N.W.2d 608 (Ct. App. 1980); Monroe County v. Kruse, 76 Wis.2d 126, 250 N.W.2d 375 (1977); and, State v. Modory, 204 Wis.2d 538, 555 N.W.2d 399 (1996). "Operating" may be proved by circumstantial evidence – the presence of the vehicle at the gas station, the person's presence behind the wheel, his responses during questioning, the unlikelihood of the passenger's ability to operate due to his incoherent condition and the absence of any evidence the passenger was the driver. State v. Mertes, 2008 WI App 179, ¶17, 315 Wis.2d 756, 762 N.W.2d 813.

In Village of Cross Plains v. Haanstad, 2006 WI 16, ¶23, 288 Wis.2d 579, 709 N.W.2d 447, the court concluded that the defendant did not "operate" a vehicle where ". . . Haanstad was merely sitting in the driver's seat of a parked vehicle. Although the engine was running, the uncontested evidence shows that Haanstad was not the person

who left the engine running. She never physically manipulated or activated the controls necessary to put the vehicle in motion."

Also see "What Constitutes Driving, Operating, Or Being In Control Of Motor Vehicle For Purposes Of Driving While Intoxicated Statute Or Ordinance," 93 A.L.R.3d 7 (1979).

B. Criminal Code.

Criminal Code offense definitions also contain an anomaly. Section 940.09, Homicide by intoxicated use of vehicle or firearm, defines the offense to apply to causing death by "the operation or handling" of a vehicle or firearm. Section 940.25, Injury by intoxicated use of a vehicle, defines the offense to apply to causing great bodily harm by "the operation" of a vehicle. The instructions for all violations of §§ 940.09 and 940.25 involving vehicles use "operate" and use the definition provided in § 346.63(3)(b), because the Criminal Code does not include a definition of the term. The instructions for violations of § 940.09 involving firearms use "handling" because the Committee concluded that it is the term that fits best with types of instrumentalities involved with those offenses.

IV. Overview: The Significance of Prior Offenses.

A. "Prior offenses" defined.

"Prior offenses" is used here as a short reference to the full statement used in the statutes: "prior convictions, suspensions, or revocations, as counted under § 343.307(1)." This includes convictions for operating while intoxicated and suspensions or revocations for refusal to submit to a chemical test for alcohol. Prior offenses from other jurisdictions are counted if the statutes are "substantially similar" or "in conformity with" Wisconsin law. For example, § 343.307(1)(a) refers to violations of a local ordinance "in conformity with" § 346.63(1). Section 343.307(1)(d) refers to convictions under the law of another jurisdiction that prohibits, for example, use of a motor vehicle while intoxicated "as those or substantially similar terms are used in that jurisdiction's laws."

In State v. List, 2004 WI App 230, 277 Wis.2d 836, 691 N.W.2d 366, the defendant argued that a prior adjudication in Illinois should not count as a "conviction" under § 343.307(1)(d). His Illinois case resulted in placement on supervision which, if successfully completed, "shall be deemed without adjudication of guilt and shall not be termed a conviction for purposes of disqualification or disabilities imposed by law upon conviction of a crime." The court of appeals disagreed, holding that § 343.307(1)(d)

applies to "convictions under the law of another jurisdiction that prohibits . . . use of a motor vehicle while intoxicated . . ." ¶7. It is not concerned with how the disposition is treated under the laws of that other jurisdiction. It is a conviction under the Wisconsin definition of that term: ". . . a determination that a person has violated . . . the law . . . regardless of whether or not the penalty is rebated, suspended, or probated, in this state or any other jurisdiction. Wis. Stat. § 340.01(9r)." ¶10. However, an administrative suspension following an OWI arrest (in Missouri) does not constitute a prior offense under § 343.307. State v. Machgan, 2007 WI App 263, 306 Wis.2d 752, 743 N.W.2d 832. Also see, State v. Puchacz, 2010 WI App 30, 323 Wis.2d 741, 780 N.W.2d 736. [Michigan convictions for operating while visibly impaired are priors under § 343.307.]

In State v. Carter, 2010 WI 132, 330 Wis.2d 1, ___ N.W.2d ___, the Wisconsin Supreme Court held that suspensions of a driver's operating privilege under the Illinois "zero tolerance" law are convictions under § 343.307(1)(d).

B. Motor Vehicle Code offenses: The civil-criminal distinction.

The first offense for operating while intoxicated under the Motor Vehicle Code is punished as a civil forfeiture. The same conduct is punished as a crime "if the number of convictions under ss. 940.09(1) and 940.25 in the person's lifetime, plus the total number of suspensions, revocations and convictions counted under s. 343.307(1) within a 10-year period equals 2 . . ." Section 346.65(2)(b). The ten-year period is "measured from the dates of the refusals or violations that resulted in the revocation or convictions." Section 346.65(2c).

Case law has resolved most of the issues raised by this penalty scheme. The fact of a prior conviction is not an element of the criminal charge. State v. McCallister, 107 Wis.2d 532, 319 N.W.2d 865 (1982). The penalty provisions apply "regardless of the sequence of offenses." State v. Banks, 105 Wis.2d 32, 48, 313 N.W.2d 67 (1981). A second offense must be charged as a crime; it may not be charged as a forfeiture offense. County of Walworth v. Rohner, 108 Wis.2d 713, 324 N.W.2d 682 (1982). An uncounseled first offense may be used as the basis for making the second offense a crime because there is no right to counsel in a forfeiture proceeding. State v. Novak, 107 Wis.2d 31, 318 N.W.2d 364 (1981).

C. As the basis for a reduced prohibited alcohol concentration [PAC].

The so-called per se offense of operating with a prohibited alcohol concentration was created by Chapter 20, Laws of 1981. After being referred to by several terms, including "blood alcohol concentration" or "breath alcohol concentration," the term

presently used in the statutes is "prohibited alcohol concentration" [PAC]. See §§ 340.01(1v) and 340.01(46m).

The prohibited level was originally set at "0.10 or more" for all offenders. In 1993, the level was changed to 0.08 for persons with two or more prior offenses. 1991 Wisconsin Act 277. 1999 Wisconsin Act 109 revised the level again, reducing it to 0.02 for persons with three or more prior offenses. 2003 Wisconsin Act 30 [effective date: September 30, 2003] reduced the generally applicable level to 0.08, retaining the 0.02 level for persons with three or more prior offenses.

The existence of the prior offenses is presented as an element of the crime for offenses involving the 0.02 level. See the discussion at Section VI, below.

It is the number of priors that the person had at the time he or she drove or operated the vehicle that determines the applicable PAC level. State v. Sowatzke, 2010 WI App 81, 326 Wis.2d 227, 784 N.W.2d 700.

D. As the basis for increased penalties.

Penalties for violations of § 346.63 increase with the number of prior offenses. See § 346.65(2). Felony penalties apply as follows:

- a fourth offense is a Class H felony if the person has a prior offense within the 5-year period preceding the current offense – § 346.65(2)(am)4m.
- a fifth or sixth offense is a Class H felony – § 346.65(2)(am)5.
- a seventh, eighth, or ninth offense is a Class G felony; the confinement portion of bifurcated sentence shall be not less than three years – § 346.65(2)(am)6.
- a tenth or subsequent offense is a Class F felony; the confinement portion of bifurcated sentence shall be not less than four years – § 346.65(2)(am)7.

Penalties for violations of § 940.09 increase if the person has a prior offense. See § 940.09(1)(c). A first offense is a Class D felony. If the person has a prior, the offense is a Class C felony.

In State v. Banks, 105 Wis.2d 32, 48, 313 N.W.2d 67 (1981), the court held that enhanced penalties apply when the required number of convictions have accumulated within the period specified "regardless of the order in which the offenses were committed and the convictions were entered." This standard was applied in State v. Matke, 2005 WI App 4,278 Wis.2d 403, 692 N.W.2d 265, where the court held that Matke was properly sentenced for 6th offense OWI even though he had only three priors at the time he

committed that offense. He was convicted of two additional OWI offenses before being sentenced on what is properly treated as a 6th offense. The court acknowledged that language in a prior decision, State v. Skibinski, 2001 WI App. 109, 244 Wis.2d 229, 629 N.W.2d 12, is arguably inconsistent with this conclusion. But the court held it was not bound by that language because it " was plainly not necessary to our disposition . . . and, indeed, was contrary to the result we reached. Moreover, because [it] . . . is inconsistent with controlling supreme court precedent, we are not obligated to apply it here." ¶16.

Although the number of priors is a fact that determines the applicable penalty level, it is not an issue that is presented to the jury. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

E. Collateral attack on prior convictions.

Convictions used to provide the basis for the penalty for third and subsequent offenses are subject to collateral attack in the prosecution for the current offense. See, State v. Foust, 214 Wis.2d 567, 570 N.W.2d 605 (Ct. App. 1997). The same should be true for convictions used to support the application of the 0.02 level of alcohol concentration. The only defect that may be raised is denial of the right to counsel at the time of a prior criminal conviction. See SM-16, COLLATERAL ATTACK ON PRIOR CONVICTIONS.

V. Operating With a Prohibited Alcohol Concentration.

A. Changes in the prohibited level.

The so-called per se offense of operating with a prohibited alcohol concentration [PAC] was created by Chapter 20, Laws of 1981. After being referred to by several terms, including "blood alcohol concentration" or "breath alcohol concentration," the term presently used in the statutes is "prohibited alcohol concentration."

The level was originally set at 0.10 or more. In 1993, the level was changed to 0.08 for persons with two or more prior convictions, refusals, etc. 1991 Wisconsin Act 277. 1999 Wisconsin Act 109 revised the level again, reducing it to 0.02 for persons with three or more priors. 2003 Wisconsin Act 30 [effective date: September 30, 2003] reduced the generally applicable level to 0.08, retaining 0.02 for the person with three or more priors.

B. "Prohibited alcohol concentration" defined.

Section 340.01(46m), as amended by 2003 Wisconsin Act 30, reads as follows:

(46m) "Prohibited alcohol concentration" means one of the following:

(a) If the person has 2 or fewer prior convictions, suspensions or revocations, as counted under s. 343.307(1), an alcohol concentration of 0.08 or more.

[(b) – repealed]

(c) If the person is subject to an order under § 343.301 or if the person has 3 or more prior convictions, suspensions or revocations, as counted under s. 343.307(1), an alcohol concentration of more than 0.02.

The reference to a person "subject to an order under § 343.301" was added by 2009 Wisconsin Act 100. [Effective date: July 1, 2010.] It means that persons required to install an ignition interlock device under § 343.301 are subject to the reduced PAC level of 0.02.

Section 340.01(1v) defines "alcohol concentration" as follows:

(1v) "Alcohol concentration" means any of the following:
(a) The number of grams of alcohol per 100 milliliters of a person's blood.
(b) The number of grams of alcohol per 210 liters of a persons's breath.

C. The constitutionality of the "per se" offense.

The constitutionality of penalizing the "status" of having an alcohol concentration of 0.10% or more was upheld in State v. Muehlenberg, 118 Wis.2d 502, 347 N.W.2d 914 (Ct. App. 1984):

> . . . . [a] person of common intelligence can, with a fair degree of definiteness, believe himself or herself to be in jeopardy of violating the statute if a significant quantity of alcohol has been consumed. . . . That is the point at which they are on notice – they have "clear warning" that if they drive, they do so at their own risk. 118 Wis.2d 502, 508-09.

In State v. McManus, 152 Wis.2d 113, 447 N.W.2d 654 (1989), the court held that § 346.63(1) defines a per se breath alcohol offense and is constitutional in doing so. Individuals are not free to litigate the "partition ratio" that is used to calculate the prohibited breath alcohol level.

D. PAC level and penalties for third and subsequent offenses.

Section 346.65(2)(g) provides for increased fines for OWI offenders with three, four, five, or six priors. The level of increase depends on the alcohol concentration level:

- 0.17 to 0.199 minimum and maximum fines are doubled.
- 0.20 to 0.249 minimum and maximum fines are tripled.
- 0.25 or more minimum and maximum fines are quadrupled.

Because the alcohol concentration level increases the maximum fine, which is part of the criminal penalty for the offense, the Committee concluded that it is a fact which must be submitted to the jury. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

The Committee recommends handling the penalty-increasing factors by submitting an additional question after the instruction on the operating under the influence or operating with a prohibited alcohol concentration offense is given. See Wis JI-Criminal 2663C ALCOHOL CONCENTRATION LEVEL.

VI. Prior Offenses/Being Subject To An Ignition Interlock Order as an Element of the 0.02 Offense.

Until the generally applicable PAC level was changed from 0.10 to 0.08, the level was reduced to 0.08 for those offenders with two or more priors. 2003 Wisconsin Act 30 [effective date: September 30, 2003] reduced the generally applicable level to 0.08 and retained 0.02 for the person with three or more priors. See § 340.01(46m)(c). Because priors reduce the applicable PAC level, the same issues arise under current law with respect to offenses involving the 0.02 level that applied under prior law to 0.08 offenses.

The most difficult issue originally posed to the Committee by the definition of "prohibited alcohol concentration" was whether the fact of prior offenses was a fact that must be submitted to the jury. The Committee concluded that it was a fact for the jury but recognized that this may create practical problems.

The Committee's conclusion was confirmed by the decision in State v. Ludeking, 195 Wis.2d 132, 138, 536 N.W.2d 119 (Ct. App. 1995), which held that the fact of prior convictions was an element of the "0.08" offense:

> The plain language of § 340.01(46m)(b), defines 'prohibited alcohol concentration' to include two separate components: (1) percentage of blood alcohol concentration . . . , and (2) number of prior convictions [or suspensions or revocations]. (Emphasis in original.)

The court also acknowledged the potential for prejudice that exists when the defendant's prior record is presented to the jury but pointed to the cautionary paragraph included in the standard instruction as a way to offset that prejudicial impact. See Section VI., C., below.

The Committee reached the same decision with respect to the person being subject to an ignition interlock order. See Wis JI-Criminal 2660D, where being subject to an order under § 343.301 is included as a bracketed third element. It is not to be submitted to the jury if the defendant admits being subject to the order.

A. State v. Alexander: Stipulation to the "status element."

The potential for prejudice was addressed, and eliminated in many cases, by the Wisconsin Supreme Court's decision in State v. Alexander, 214 Wis.2d 627, 571 N.W.2d 662 (1997). In Alexander, the court referred to the prior offenses element as a "status element" and held that if the defendant admits having two or more prior convictions, suspensions, or revocations, the "admission dispenses with the need for proof of the status element, either to a jury or to a judge." 214 Wis.2d 627, 645. When there is an admission of the status element, "admitting any evidence of the defendant's prior convictions, suspensions or revocations and submitting the status element to the jury . . . [is] an erroneous exercise of discretion." 214 Wis.2d 627, 650. The court's rationale for removing an element in this situation was that the status element involves facts "entirely outside the gravamen of the offense" and "adds nothing to the State's evidentiary depth or descriptive narrative." 214 Wis.2d 627, 648-49.

The court gave explicit direction to the trial courts as to how to handle this situation:

> When a circuit court is faced with the circumstances presented in this case, the circuit court should simply instruct the jury that they must find beyond a reasonable doubt that: 1) the defendant was driving or operating a motor vehicle on a highway; and 2) the defendant had a prohibited alcohol concentration at the time . . . The "prohibited alcohol concentration" means 0.08 . . .
> 214 Wis.2d 627, 650-51.

The Committee originally implemented the approach approved in Alexander by placing the "status element" in brackets in the instructions for 0.08 offenses. If the defendant admitted the "status element," the instruction was to be given with two elements: driving or operating a motor vehicle; and having an alcohol concentration of more than 0.08. If the defendant did not admit the "status element," the instruction was to be given with a third element: having two or more prior convictions, suspensions, or revocations as counted under § 343.307(1).

The same approach is now recommended in the instructions for the 0.02 offenses. See, for example, Wis JI-Criminal 2660C.

Regarding stipulations, see Wis JI-Criminal 162A Law Note: Stipulations.

B. Defining the priors for the jury.

The jury instructions adopted the language of the statute by wording the applicable elements as follows:

> 3. The defendant had three or more convictions, suspensions, or revocations, as counted under § 343.307(1).
> [See, for example, Wis JI-Criminal 2660C.]

The reference to "as counted under § 343.307(1)" is not completely satisfactory, but the Committee could not develop a better alternative. Section 343.307(1) contains six subsections detailing the kind of prior convictions, suspensions, or revocations that are to be counted. Some of these subsections have their own cross-references to other statutes. Generally, what counts are prior convictions for operating while intoxicated and prior suspensions or revocations for refusal to take a chemical test for alcohol. Offenses in other jurisdictions may count if the laws of the jurisdiction are "substantially similar to" or "in conformity with" Wisconsin law. See Section IV.,A., above.

All of this is too technical to submit to the jury. The Committee concluded that a simple reference to § 343.307(1) was the best way to proceed. It is assumed that evidence will be presented that the person's driving record shows the requisite number of prior offenses "as counted under § 343.307(1)" and thus the reference to the statute will be familiar to the jury.

C. Minimizing prejudice to the defendant.

If the prior offenses are submitted to the jury, there is a risk of unfair prejudice to the defendant. The instructions suggest that at the defendant's request, a cautionary instruction be given that limits the jury's use of the potentially prejudicial evidence to its proper purpose. (See § 901.06 which requires that a cautionary instruction be given upon request whenever evidence is admitted for a limited purpose.) The suggested instruction is modeled after those used in similar situations and provides as follows:

> Evidence has been received that the defendant had prior convictions, suspensions, or revocations. This evidence was received as relevant to the status of the defendant's driving record, which is an issue in this case. It must not be used for any other purpose and, particularly, you should bear in mind that conviction, suspension, or revocation at some previous time is not proof that the defendant operated a motor vehicle with a prohibited alcohol concentration on this occasion.
>
> Wis JI-Criminal 2660C.

Of course, there are doubts about the efficacy of cautionary instructions like this. Defendants may prefer to keep the evidence from being admitted altogether. That option is now possible if there is an admission of the "status element" per the Alexander decision. See the discussion in VI.,A., above.

D. Being Subject To An Ignition Interlock Order

Like having three or more prior offenses, being subject to an ignition interlock order under § 343.301 reduces the PAC level to "more than 0.02." The Committee concluded that the fact of being subject to an order under § 343.301 should be handled in the same way as the facts of having three or more prior offenses. See Wis JI-Criminal 2660D.

VII. Alcohol Test Results; Evidence of Test Refusal.

A. Admissibility.

The basis for admissibility of alcohol test results is § 885.235(1g), which reads in part as follows:

> (1g) In any action or proceeding in which it is material to prove that a person was under the influence of an intoxicant or had a prohibited alcohol concentration or a specified alcohol concentration while operating or driving a

> motor vehicle . . . evidence of the amount of alcohol in the person's blood at the time in question, as shown by chemical analysis of a sample of the person's blood or urine or evidence of the amount of alcohol in the person's breath, is admissible on the issue of whether he or she was under the influence of an intoxicant or had a prohibited alcohol concentration or a specified alcohol concentration if the sample was taken within 3 hours after the event to be proved. The chemical analysis shall be given effect as follows without requiring any expert testimony as to its effect: . . .

The instructions contain the following statement, intended to address the admissibility issue:

> The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of operating a vehicle is evidence of the defendant's alcohol concentration at the time of the (driving) (operating).
> [See, for example, Wis JI-Criminal 2663.]

Whether the test result is accorded any additional evidentiary significance depends on the applicability of other provisions in § 885.235.

Test results from a test taken more than three hours after operating may be admissible and may be accorded evidentiary significance if there is sufficient support from expert testimony. State v. Fonte, 2005 WI 77, 281 Wis.2d 654, 698 N.W.2d 594.

B. Instructing on evidentiary significance.

Section 885.235 provides the statutory authority for according evidentiary significance to alcohol test results. The subsection generally applicable to operating while intoxicated offenses is § 885.235(1g)(c), which reads as follows:

> The fact that the analysis shows that the person had an alcohol concentration of 0.08 or more is prima facie evidence that he or she was under the influence of an intoxicant and is prima facie evidence that he or she had an alcohol concentration of 0.08 or more.

There is a gap in the authority provided by the statute: it does not address the prima facie effect of test results of 0.02 or more, which would be relevant for offenders with three or more priors, or who are subject to an ignition interlock order, who are charged with the "more than 0.02" offense.

The instructions for more than 0.08 and under the influence offenses advise the jury that a test result showing a prohibited alcohol concentration is sufficient evidence upon which to base a finding that the person was under the influence or had that alcohol concentration at the time of the driving. But the jury is also advised that they are not required to make that finding and that they may do so only if they are so satisfied beyond a reasonable doubt from all the evidence in the case. In the Committee's judgment, this is the type of instruction required by Wis. Stat. § 903.03, which governs jury instructions on "presumptions" and "prima facie evidence."

Instructions for 0.02 offenses contain only the general reference to test results being admissible because § 885.235 does not accord test results showing more than 0.02 any prima facie effect.

C. The blood-alcohol curve.

The presence of a prohibited alcohol concentration at the time of operation is the significant issue. The relevance of a test result showing a prohibited alcohol concentration at some time after operation will vary, depending on many factors, including the person's physical condition, what the person had to eat, what the person drank, the length of time over which the drinks were consumed, etc. The problem of the so-called blood-alcohol curve is discussed in State v. Vick, 104 Wis.2d 678, 312 N.W.2d 489 (1981).

Vick presented a situation where the defendant claimed his blood was absorbing alcohol at the time he was arrested and that therefore the blood alcohol concentration had not reached the prohibited level at the time of driving but only reached that level later at the time of the test. If the evidence in a case presents this problem, the instruction on the prima facie effect of test results may not be appropriate since there may be no "rational connection" between the alcohol concentration at the time of the test and a prohibited alcohol concentration at the time of driving. (See Ulster Co. v. Allen, 442 U.S. 140 (1979), for a discussion of the "rational connection" requirement when instructing the jury on statutory presumptions.)

The Committee concluded that where there is a problem with the "blood-alcohol curve," it is preferable to treat the test result as relevant evidence rather than instruct the jury to give it "prima facie effect." The following is recommended:

> Evidence has been received that, within three hours after the defendant's alleged (driving) (operating) of a motor vehicle, a sample of the defendant's (breath) (blood) (urine) was taken. An analysis of the sample has also been received.

> This is relevant evidence that the defendant had a prohibited alcohol concentration at the time of the alleged (driving) (operating). Evidence has also been received as to how the body absorbs and eliminates alcohol. You may consider the evidence regarding the analysis of the (breath) (blood) (urine) sample and the evidence of how the body absorbs and eliminates alcohol along with all the other evidence in the case, giving it just such weight as you determine it is entitled to receive.
> Wis JI-Criminal 234, BLOOD-ALCOHOL CURVE.

In State v. Fischer, 2010 WI 6, 322 Wis.2d 265, 778 N.W.2d 629, the defendant sought to introduce an expert's opinion testimony, based in part on the results of a preliminary breath test, to support a blood alcohol curve argument. The court held that the testimony was properly excluded:

> Wisconsin Stat. § 343.303 expressly bars PBT results in OWI cases, and to allow Wis. Stat. § 907.03 to trump that prohibition would simply nullify that provision and would consequently present a variety of needless obstacles to the investigation, prosecution, and defense of drunk driving cases. ¶4.

The court held that exclusion does not violate the defendant's constitutional right to present a defense because, even assuming the evidence is relevant and necessary, ". . . in an OWI prosecution, even if a defendant establishes a constitutional right to present an expert opinion that is based in part on PBT results, the right to do so is outweighed by the State's compelling interest to exclude that evidence." ¶5.

Fischer was granted relief as a result of his petition for habeas corpus relief in federal court. Fischer v. Ozaukee County Circuit Court, 10-C-553, E.D. Wis. Sept. 29, 2010. The federal magistrate judge concluded that "the Wisconsin Supreme Court's decision affirming the exclusion of Fischer's expert's testimony involved an unreasonable application of federal law." Slip opinion, page 18. The state's motion to alter or amend that judgment was denied. Fischer v. Van Hollen, 10-C-553, E.D. Wis. Jan. 7, 2011.

D. Reliability of testing devices.

The instructions include the following paragraph regarding the reliability of the standard devices used to test breath or blood samples for alcohol concentration:

> The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by

the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.
[See, for example, Wis JI-Criminal 2663.]

The intent of the paragraph is to advise the jury that the state need not prove the reliability of the underlying principles upon which the breath test is based. The reliability of those principles has been satisfactorily established so that evidence of test results is admissible without a preliminary establishment in every case that those principles are valid. The testing device involved must be one whose reliability has been established. See Chapter Trans. 311, Wis. Admin. Code.

This concept is sometimes referred to as a "prima facie presumption of reliability (or accuracy)," see, for example, City of Madison v. Bardwell, 83 Wis.2d 891, 900, 266 N.W.2d 618 (1978); State v. Trailer Service, Inc., 61 Wis.2d 400, 407, 212 N.W.2d 683 (1973); and State v. Neitzel, 95 Wis.2d 191, 203, 289 N.W.2d 828 (1980). The Committee concluded that the jury should not be instructed in terms of a "presumption" but should simply be advised that the validity of the underlying scientific principles need not be established. However, the jury must be satisfied that the test procedure was proper and that the operator was qualified, and the defendant may challenge the test results on those grounds. West Allis v. Rainey, 36 Wis.2d 489, 496, 153 N.W.2d 514 (1967).

The presumption of accuracy also applies to the test results of the "Intoximeter 3000." State v. Dwinnell, 119 Wis.2d 305, 349 N.W.2d 739 (Ct. App. 1984).

The state is not required affirmatively to prove compliance with the procedures spelled out in the Wisconsin Administrative Code (Trans. 311.05 - 311.09) as a foundation for the admission of breathalyzer test results. City of New Berlin v. Wertz, 105 Wis.2d 670, 314 N.W.2d 911 (Ct. App. 1981). However, the jury should be afforded the opportunity to weigh alleged failures to conform with standards and regulations in determining the weight to accord the breathalyzer results. Wertz, at 677. The required procedures for test device certification are discussed in County of Dane v. Winsand, 2004 WI App 86, 271 Wis.2d 786, 679 N.W.2d 885.

E. The alcohol concentration chart.

Challenges to the accuracy of test results sometimes involve reliance on the DOT-published chart estimating blood alcohol concentration by reference to the number of drinks consumed, adjusted for body weight and time. The chart is admissible in drunk driving cases. State v. Hinz, 121 Wis.2d 282, 360 N.W.2d 56 (Ct. App. 1984). For an

instruction on the use of the chart, see Wis JI-Criminal 237, ALCOHOL CONCENTRATION CHART.

F. Evidence of test refusal.

In State v. Albright, 98 Wis.2d 663, 298 N.W.2d 196 (Ct. App. 1980), the court of appeals reaffirmed that evidence of a defendant's refusal to take a chemical test was relevant and constitutionally admissible in a drunk driving prosecution. "A reasonable inference from refusal to take a mandatory breathalyzer test is consciousness of guilt. The person is confronted with a choice of the penalty for refusing a test, or taking a test which constitutes evidence of his sobriety or intoxication. Perhaps the most plausible reason for refusing the test is consciousness of guilt, especially in view of the option to taking an alternative test." 98 Wis.2d 663, 668-69. The evidence being relevant and there being no right to refuse to take a test, the court held there was no rationale for prohibiting comment on the refusal.

Previous decisions of the Wisconsin Supreme Court had reached the same conclusion, see State v. Draize, 88 Wis.2d 445, 276 N.W.2d 784 (1974); City of Waukesha v. Godfrey, 41 Wis.2d 401, 164 N.W.2d 314 (1969); State v. Kroening, 274 Wis. 266, 79 N.W.2d 810 (1956); and City of Barron v. Covey, 271 Wis. 10, 72 N.W.2d 387 (1955).

The defendant's explanation for the refusal is also admissible. Since the relevance of the refusal is that it tends to indicate a consciousness of guilt,

> [t]he corollary of that rule is that any evidence that tends to rebut or diminish the force of that permissible inference is also relevant, for it tends to make less probable the fact of intoxication – a fact of consequence in this action, and, therefore, equally admissible. Thus, evidence that would tend to show that the refusal was for reasons unrelated to a consciousness of guilt or the fear that the test would reveal the intoxication, tends to abrogate, or at least diminish, the reasonableness of the inference to be drawn from an unexplained refusal to take the alcohol test.

State v. Bolstad, 124 Wis.2d 576, 585-86, 370 N.W.2d 576 (1985).

In State v. Mallick, 210 Wis.2d 427, 565 N.W.2d 245 (Ct. App. 1997), the court held that evidence of refusal to perform field sobriety tests was admissible.

In South Dakota v. Neville, 459 U.S. 553 (1983), the U.S. Supreme Court upheld the admissibility of evidence of test refusal. The Court did not base its decision on the distinction that refusal is a physical, rather than a testimonial, act. Instead, the Court held that admissibility does not violate the 5th Amendment privilege against self-incrimination because no impermissible coercion is involved: ". . . a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and this is not protected by the privilege against self-incrimination." 459 U.S. 553, 564. The defendant in Neville also argued that the due process clause prohibited reference to the refusal because he was not specifically warned that his refusal could be used against him at trial. The Court rejected this argument as well, holding that the "failure to warn was not the sort of implicit promise to forego use of evidence that would unfairly 'trick' respondent if the evidence were later offered against him at trial," 459 U.S. 553, 566.

See Wis JI-Criminal 235, REFUSAL OF DEFENDANT TO FURNISH SAMPLE FOR ALCOHOL TEST.

VIII. Defining "Under the Influence."

A. Definition for Motor Vehicle Code offenses.

The presently published instructions for Motor Vehicle Code offenses use the following definition of "under the influence":

> "Under the influence of an intoxicant" means that the defendant's ability to operate a vehicle was impaired because of consumption of an alcoholic beverage.
>
> Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.
>
> It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.
>
> Wis JI-Criminal 2663.

Modifications of this definition are routinely requested and tend to focus on three related issues:

- adding the phrase ". . . to a degree which renders him or her incapable of safely driving";
- adding "materially" to modify the word "impaired"; and,
- restoring a longer, two-paragraph, explication of "under the influence" which is generally attributed to Fond du Lac v. Hernandez, a 1969 decision of the Wisconsin Supreme Court.

B. "Incapable of safely driving."

There is undeniably a reasonable basis for the argument that "incapable of safely driving" is an appropriate addition to the definition. It is seemingly supported by the statutory language as it now appears in § 346.63(1)(a) and by case law that quotes or restates the statute.

§ 346.63(1)(a) reads as follows:

(1) No person may drive or operate a motor vehicle while:
(a) Under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving; or . . .

Despite this apparent textual basis, the Committee has concluded that "incapable of safely driving" does not apply to cases involving operating under the influence of "an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog."

The Committee has interpreted the statute as presenting three options, each represented by a clause in the statute that begins with "under the influence." The three separate options are:

- under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog;

- under the influence of any other drug to a degree which renders him or her incapable of safely driving;

- under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving.

Under this reading of the statute, the "incapable of safely driving" phrase applies only to offenses involving the second two options – those involving the influence of a drug or the combined influence of an intoxicant and a drug.

The Committee's grammatical construction is supported by the legislative history. The references to "incapable of safely driving" were added to § 346.63(1)(a) by 1983 Wisconsin Act 459. Before the 1983 revision, Wisconsin had a relatively simple statute:

> **346.63 Operating under influence of intoxicant. (1)** No person may drive or operate a motor vehicle while:
>
> (a) Under the influence of an intoxicant or a controlled substance or a combination of an intoxicant and a controlled substance; or
>
> (b) The person has blood alcohol concentration of .10% or more . . . . Section 346.63, 1981-82 Wis. Stats.

The amendment made to sub. (1)(a) by 1983 Wisconsin Act 459 is shown below, with the new language underscored:

> (a) Under the influence of an intoxicant or a controlled substance or a combination of an intoxicant and a controlled substance, <u>under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving</u>; or . . .

The Committee considered this to be strong support for its grammatical construction of the statute and reflected its conclusion in the published instructions by omitting "incapable of safely driving" from the regular under the influence instructions but including it in Wis JI-Criminal 2666, which is drafted for under the influence of a drug offenses. The conclusion was explained in a footnote to Wis JI-Criminal 2666, but was not referred to in the other instructions.

At least two appellate decisions have quoted the statute or paraphrased it in a way that suggests that "incapable of safely driving" applies to "under the influence of an intoxicant" cases. See, <u>State v. Waalen</u>, 130 Wis.2d 18, 27,386 N.W.2d 47 (1986); and, <u>County of Jefferson v. Renz</u>, 222 Wis.2d 424, 444, 588 N.W.2d 267 (Ct. App. 1998), reversed on other grounds, 231 Wis.2d 293, 603 N.W.2d 541 (1999). In neither of these cases was the specific statutory interpretation issue considered on its merits or necessary

to the decision. The Committee concluded that these two references were not a sufficient basis for changing the interpretation described above.

The Committee's conclusion that "incapable of safely driving" does not apply to the regular definition of "under the influence" was adopted in State v. Hubbard, 2008 WI 92, ¶52, 313 Wis.2d 1, 752 N.W.2d 389: "The phrase 'to a degree which renders him incapable of safely driving' does not affect the definition of 'under the influence' in the Criminal Code."

C. "Materially" impaired.

The presently published instructions present a seeming inconsistency. Those for Motor Vehicle Code offenses define "under the influence" by stating that "the defendant's ability to operate a vehicle was impaired . . ." Those for Criminal Code offenses define "under the influence" by stating that "the defendant's ability to operate a vehicle was materially impaired . . ." [Emphasis added]. This state of affairs has a long history; the basic steps are set forth below.

"Under the influence" is not defined in the Motor Vehicle Code, but is defined in the Criminal Code as "materially impaired". See § 939.22(42). Before 1978, the instructions for Motor Vehicle Code offenses used a definition based on case law from other states. [This definition was implicitly approved in Fond du Lac v. Hernandez. See Section VIII., D., below.] At that time, there was only one Criminal Code drunk driving crime (Homicide By Intoxicated Use . . .) and it used the § 939.22(42) definition.

In 1978, the Motor Vehicle Code instructions were revised, the Criminal Code instruction was revised, and a new Criminal Code instruction was added, for Injury [Great Bodily Harm] By Intoxicated Use . . . in violation of § 940.25. All the instructions used the same, case-law-based, definition previously used only in the Motor Vehicle Code instructions.

In 1982, a question was raised about the propriety of using the case law definition for Criminal Code offenses because it could be interpreted as stating a less demanding test than that required by the "materially impaired" standard set forth in § 939.22(42). This led the Committee to conclude that there was no reason to have different definitions for Motor Vehicle Code and Criminal Code offenses because crimes were defined in both Codes in identical language. The Committee decided that because "under the influence" was defined in the Criminal Code, that definition should also be used for Motor Vehicle Code offenses. [The Committee was aware that a Criminal Code definition does not

automatically apply outside the Criminal Code, but thought it was sensible to use it in this situation.]

So the Committee adopted a new definition of "under the influence" in 1982 applicable to all drunk driving offenses and including "materially impaired." In an attempt to provide some guidance to the jury on the meaning of that phrase, the new instruction included the following:

> It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be materially, that is substantially, impaired.
> Wis JI-Criminal 2663, c. 1982.

The 1982 revision was not universally acclaimed. Several judges contacted the Committee to express dissatisfaction with it, but the Committee was not convinced that it should be changed. The issue reached the Wisconsin appellate courts when a trial judge declined to use the definition in the published instruction for a Motor Vehicle Code case, using instead the pre-1982 definition. The defendant appealed, claiming that it was error to fail to include "materially impaired." The Wisconsin Court of Appeals affirmed, holding that the definition used by the trial court correctly stated the law and that the Criminal Code definition did not apply to Motor Vehicle Code offenses. State v. Waalen, 125 Wis.2d 272, 371 N.W.2d 401 (Ct. App. 1985). The Wisconsin Supreme Court affirmed on slightly different grounds, holding that the definition for Motor Vehicle Code offenses is equivalent to the Criminal Code definition but that the Committee erred in equating "materially" with "substantially":

> Requiring "substantial impairment" of an individual's ability to operate a vehicle before that person could be found "under the influence" would be inconsistent with the expressed legislative intent because it would not provide maximum safety for all users of state highways. Rather, "material impairment" under sec. 939.22(42), Stats., exists when a person is incapable of driving safely, or "is without proper control of all those faculties . . . necessary to avoid danger to others."
> State v. Waalen, 130 Wis.2d 18, 27, 386 N.W.2d 47 (1986) (citations omitted)

In response to Waalen, the Committee revised the Motor Vehicle Code instructions to delete reference to "materially," with a footnote indicating that the decision appeared to approve the use of that term for Motor Vehicle Code offenses. The Committee concluded that use of "materially" invited definition but that it could not be helpfully defined without running afoul of the legislative intent recognized in Waalen. The

Criminal Code instructions continued to use "materially" because it is part of the Criminal Code definition of "under the influence," but deleted reference to "substantially."

In State v. Hubbard, 2008 WI 92, 313 Wis.2d 1, 752 N.W.2d 839, the court concluded that the trial court did not err in responding to a jury question about the meaning of "materially impaired." The trial court told the jury to give the words their plain and ordinary meaning and declined to respond with language from Waalen to which the prosecution had objected. The supreme court affirmed: ". . . Hubbard's argument that 'the Waalen language' defined 'materially impaired' to give the term a 'technical' or 'peculiar' meaning in the context of criminal law is untenable." 2008 WI 92, ¶54.

D. Fond du Lac v. Hernandez: Case law definition.

The third issue relates to two paragraphs that are attributed to Fond du Lac v. Hernandez, 42 Wis.2d 473, 167 N.W.2d 408 (1969). In fact, equivalent material appeared in the uniform instructions from 1966 until 1982 and it was that definition that was used in the Hernandez case. It read as follows:

> The expression "under the influence of an intoxicant" covers not only all the well-known and easily recognized conditions and degrees of intoxication, but any abnormal mental or physical condition which is the result of indulging in any degree in intoxicating liquors (including beer) and which tends to deprive him of that clearness of intellect and control of himself which he would otherwise possess.
>
> A person who is even to the slightest extent under the influence of an intoxicant in the common and well-understood acceptation of the term is – to some degree at least – less able either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle as powerful and dangerous a mechanism as a modern motor vehicle with safety to himself and the public. Not every man who has consumed alcoholic beverages falls within the ban of the (statute) (ordinance). If that consumption of alcoholic beverages does not cause him to be influenced in the ordinary and well-understood meaning of the term, he is not under the influence of an intoxicant within the meaning of the statute.
>
> Wis JI-Criminal 2663, c. 1966.

The instruction given by the trial court in the Waalen case was based on these two paragraphs, omitting only the first sentence of the second paragraph. In reviewing that

instruction, the supreme court quoted the full Hernandez version and stated that in Hernandez, "[w]e rejected Hernandez's challenge to the instruction, implicitly affirming the validity of the language of the instruction." State v. Waalen, 130 Wis.2d 18, 26, 386 N.W.2d 47 (1986).

[NOTE: At the risk of providing more detail than anyone needs, the apparent original source of the two paragraphs is Hasten v. State, 35 Ariz. 427, 280 Pac. 670 (1929), where they are part of a longer discussion of the meaning of "under the influence." Hasten was referred to on another issue in Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955), and was extensively quoted in the state's brief in that case.]

As mentioned above, the Committee made major changes in these two paragraphs in the 1982 version of the instruction at the same time that "materially" was added. The two changes influenced one another: the two paragraphs were believed to communicate a less stringent standard than that required by "materially impaired." They were edited and reorganized to yield the two paragraphs that are in the current instructions:

> Not every person who has consumed alcoholic beverages is "under the influence" as that term is used here. What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle.
>
> It is not required that impaired ability to operate be demonstrated by particular acts of unsafe driving. What is required is that the person's ability to safely control the vehicle be impaired.
> Wis JI-Criminal 2663, c. 1993.

The Criminal Code instructions use these paragraphs, but add "materially" before "impaired" in the last sentence.

IX. Operating With a Detectable Amount of a Restricted Controlled Substance.

2003 Wisconsin Act 97 created or amended nine statutes to provide that no person may drive or operate a motor vehicle while "[t]he person has a detectable amount of a restricted controlled substance in his or her blood." The statute applies to offenses committed on or after the Act's effective date: December 19, 2003.

A. Statutes affected.

The new or amended statutes are:

- § 346.63(1)(am): driving or operating
- § 346.63(2)(a)3.: causing injury
- § 940.09(1)(am): causing death
- § 940.09(1)(cm): causing death of an unborn child
- § 940.09(1g)(am): causing death by handling a firearm
- § 940.09(1g)(cm): causing death of an unborn child by handling a firearm
- § 940.25(1)(am): causing great bodily harm
- § 940.25(1)(cm): causing great bodily harm to an unborn child
- § 941.20(1)(bm): operating or going armed with a firearm

There are three published instructions for "detectable amount" cases:

- Wis JI-Criminal 2664B for violations of § 346.63(1)(am);
- Wis JI-Criminal 1266 for violations of § 940.25(1)(am); and,
- Wis JI-Criminal 1187 for violations of § 940.09(1)(am).

B. "Restricted controlled substance" defined.

"Restricted controlled substance" is defined as follows in § 340.01:

(50m) 'Restricted controlled substance' means any of the following:
(a) A controlled substance included in schedule I other than tetrahydrocannabinol.
(b) A controlled substance analog, as defined in s. 961.01(4m), of a controlled substance described in par. (a).
(c) Cocaine or any of its metabolites.
(d) Methamphetamine.
(e) Delta-9-tetrahydrocannabinol.

[The same definition is found in several other statutes. See, for example, § 939.22(33).

C. Valid prescription defense.

All the statutes recognizing the "detectable amount . . ." offense also recognize a defense for cases involving "a detectable amount of methamphetamine, gamma-hydroxybutyric acid, or delta-9-tetrahydrocannabinol" that applies if the person proves,

by a preponderance of the evidence, that he or she had a valid prescription for the substance. See, for example, § 346.63(1)(d).

D. Constitutionality.

Two decisions of the Wisconsin Court of Appeals have upheld the constitutionality of the "detectable amount" statutes.

In State v. Smet, 2005 WI App 263, 288 Wis.2d 525, 709 N.W.2d 474, the court held that § 346.63(1)(am) does not overstep the state's police power by not requiring any showing of impairment. The "legislature reasonably and rationally could have determined that, as a class, those who drive with unprescribed illegal chemicals in their blood represent a threat to public safety." ¶16. Further, the statute is not fundamentally unfair and does not offend principles of equal protection.

In State v. Gardner, 2006 WI App 92, 292 Wis.2d 682, 715 N.W.2d 720, the court held that § 940.25(1)(am) is constitutional. It does not create a "presumption of guilt" or create a "status offense." The court noted that "cases across the country challenging this same issue are repeatedly resolved in favor of upholding the legislative action. . . . We join those jurisdictions in concluding that our legislature acted reasonably when it created an offense prohibiting operation of a vehicle with any amount of a controlled substance in one's system." ¶20.

X. Offenses Involving Injury or Death: The Affirmative Defense.

Both the Motor Vehicle Code and the Criminal Code define offenses involving causing harm by operating while intoxicated. See § 346.63(2), causing injury, § 940.09, causing death, and § 940.25, causing great bodily harm. Each of the statutes also provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the [harm] would have occurred even if he or she had been exercising due care and he or she had not been under the influence . . . or did not have a prohibited alcohol concentration . . ." The defense is addressed in the instructions by providing an alternative ending for use in cases where there is "some evidence" of the defense.

The 2004 revision of the instructions incorporated the defense into the offense instructions. It had formerly been addressed in separate instructions: Wis JI-Criminal 2662 for Motor Vehicle Code offenses and Wis JI-Criminal 1188 for Criminal Code offenses. Those instructions have been withdrawn.

A. Constitutionality.

The affirmative defense was added to the statutes by Chapter 20, Laws of 1981, which eliminated the requirement that "causal negligence" be established in addition to operating while under the influence. See, §§ 346.63(2), 940.09, and 940.25, 1979 Wis. Stats. The Committee concluded at that time that the intent of the legislature was to remove any required causal connection between the harm and any negligence by the defendant or the defendant's being under the influence. Thus, the instructions tried to make it clear that only simple operation must be causal, not operation under the influence, and not negligent operation. Trying to explain this concept to the jury without creating confusion is difficult. The following paragraph was included in the body of earlier versions of the instructions. Because some found the statement confusing, it was moved to the footnotes, to be used by those who believe it adds clarity.

> It is not required that the [harm] was caused by any drinking of alcohol or by any negligent or improper operation of the vehicle. What is required is that the [harm] was caused by the defendant's operation of the vehicle.

The constitutionality of eliminating causal negligence as an element and providing the affirmative defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). [The U.S. District Court for the Western District of Wisconsin reached the same conclusion, using a slightly different analysis; see, Caibaiosai v. Barrington, 643 F.Supp. 1007 (W.D. Wis. 1986).] Caibaiosai involved § 940.09, but the other offenses are defined in an identical manner.

The defense is closely related to the cause element of these offenses but, in the Committee's judgment, deals with a different issue and may apply even if the defendant's operation was the cause of harm. If the defendant's operation caused the harm, the defense allows the defendant to avoid liability if it is established that the harm would have occurred even if the defendant had not been under the influence and had been exercising due care. This distinction is essential to the conclusion that the affirmative defense is constitutional: the defense must relate to an issue that is not covered by the offense definition. See, Caibaiosai, supra, and Patterson v. New York, 432 U.S. 197 (1977).

The phrase "had been exercising due care" was added to the defense by 1989 Wisconsin Act 275.

B. The substance of the defense.

The Caibaiosai decision held that the defense provided in § 940.09(2) "is meant to provide a defense for the situation where there is an intervening cause between the intoxicated operation of the automobile and the death of an individual." 122 Wis.2d 587, 596. A footnote to the quoted material cited the Black's Law Dictionary definition of "intervening cause": "In criminal law, a cause which comes between an antecedent and a consequence; it may be either independent or dependent, but in either case it is sufficient to negate criminal responsibility." 122 Wis.2d 587, 596, n. 4.

A different definition of "intervening cause," based on State v. Nester, 336 S.E.2d 187, 189 (W.Va. 1985), was adopted by the Wisconsin Court of Appeals in State v. Turk, 154 Wis.2d 294, 296, 453 N.W.2d 163 (Ct. App.):

> An intervening cause is a new and independent force which breaks the causal connection between the original act or omission and the injury, and itself becomes the direct and immediate cause of the injury. The fact that the victim did not take precautionary steps which may have prevented his eventual demise is not an intervening cause.

In the Turk case, a defendant charged with causing great bodily harm by operating a vehicle while under the influence of an intoxicant under § 940.25 claimed that the injury was caused by the victim's failure to wear seat belts. Turk upheld the trial court's determination that the failure to wear seat belts was irrelevant to the defense, relying on the above rule.

C. Burden of persuasion.

The statutes expressly place the burden on the defendant to prove the defense "by a preponderance of the evidence." The instructions describe the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."

D. Conduct of the victim.

The instructions recognize that evidence of the conduct of the victim may be relevant to the affirmative defense and provide the following for use in that kind of case:

Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care does not by itself provide a defense to the crime charged against the defendant. Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the [harm] would have occurred even if the defendant had not been under the influence and had been exercising due care.

[See, for example, Wis JI-Criminal 1185.]

This was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to relate the rule in § 939.14, Criminal conduct or contributory negligence of victim no defense, to the affirmative defense. Although Lohmeier dealt with a Criminal Code case, the Committee concluded that its holding would also apply to Motor Vehicle Code offenses under § 346.63(2), so all offenses involving the causing of harm address the defense the same way.

The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the paragraph is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted.

XI. Two-Charge Cases.

Both Motor Vehicle Code and Criminal Code offenses apply to operating under the influence and with a prohibited alcohol concentration. In each instance, there is statutory authority for charging two counts based on the same incident and submitting those counts to the jury. For example, § 346.63(1)(c) provides:

> A person may be charged with and a prosecutor may proceed upon a complaint based upon a violation of any combination of par. (a), (am), or (b) for acts arising out of the same incident or occurrence. If the person is charged with violating any combination of par. (a), (am), or (b), the offenses shall be joined. If the person is found guilty of any combination of par. (a), (am), or (b) for acts arising out of the same incident or occurrence, there shall be a single conviction for purposes of sentencing and for purposes of counting convictions under §§ 343.30(1q) and 343.305. Paragraphs (a), (am), and (b) each require proof of a fact for conviction which the others do not require.

The constitutionality of this two-charge procedure was upheld in State v. Bohacheff, 114 Wis.2d 402, 338 N.W.2d 446 (1983). The court held that the Double Jeopardy Clause is not offended because of the express limitation that there be only one conviction. Also see, State v. Raddeman, 2000 WI App 190, 238 Wis.2d 628, 618 N.W.2d 258.

Bohacheff dealt with a challenge to the criminal complaint, so it did not address the problems presented at a trial where both charges are submitted to the jury. The Committee concluded that § 346.63(1)(c) clearly suggests that both charges should be submitted and that the jury should make a finding as to each charge. If the jury returns a guilty verdict on both, judgment of conviction should be entered on the count on which the prosecutor moves for judgment. The remaining count should be dismissed.

Wis JI-Criminal 2668 is intended to serve as a model for forfeiture cases where two charges based on the same incident are submitted to the jury: one alleging operating under the influence in violation of § 346.63(1)(a); the other alleging operating with a prohibited alcohol concentration in violation of § 346.63(1)(b). It is a combination of Wis JI-Criminal 2660A and Wis JI-Criminal 2663A and attempts to streamline the instructions in a two-charge case by avoiding the reading of the complete instruction for each charge. Wis JI-Criminal 2669 provides a similar model for criminal charges under § 346.63.

A model is also published for violations of § 940.09 involving two charges. See Wis JI-Criminal 1189, which can be adapted for use for violations of § 940.25.

COMMENT

This Introductory Comment was originally published as Wis JI-Criminal 2660-2665 in 1982 and revised in 1986, 1993, 1998, and 2004. The 2004 revision renumbered it as Wis JI-Criminal 2600. This revision was approved by the Committee in February 2011.

This Introductory Comment was first published in 1982 to outline the major changes in Wisconsin's drunk driving law made by Chapters 20 and 184, Laws of 1981, and was revised periodically to outline additional statutory changes. The 2004 revision changed its approach, setting it up as a collection of all explanatory material relating to "operating while intoxicated offenses" – those in the Motor Vehicle Code and in the Criminal Code. Footnotes to instructions for specific offenses refer to material contained here.