SM-6 JURY INSTRUCTIONS ON LESSER INCLUDED OFFENSES

CONTENTS

Scope

This Special Material attempts to provide a framework for deciding when it is proper to instruct the jury on a lesser included offense. There are two tests to consider: first, whether an offense is a lesser included offense of the crime charged; and second, whether the evidence supports an instruction on the lesser included offense. If both tests are satisfied, an instruction must be given upon request of either party.

I. When is a crime a lesser included offense of the charged crime?

The authority for convicting a defendant of a lesser included offense and the standard for determining when an offense is "lesser included" are found in § 939.66 of the Wisconsin Statutes:

> Conviction of included crime permitted. Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime but not both. An included crime may be any of the following:
>
> (1) A crime which does not require proof of any fact in addition to those which must be proved for the crime charged.
>
> (2) A crime which is a less serious type of criminal homicide than the one charged.
>
> (2m) A crime which is a less serious or equally serious type of battery than the one charged.
>
> (2p) A crime which is a less serious or equally serious type of violation under s. 948.02 than the one charged.
>
> (2r) A crime which is a less serious type of violation under s. 943.23 than the one charged.
>
> (3) A crime which is the same as the crime charged except that it requires recklessness or negligence while the crime charged requires a criminal intent.

(4) An attempt in violation of s. 939.32 to commit the crime charged.

(4m) A crime of failure to timely pay child support under s. 948.22(3) when the crime charged is failure to pay child support for more than 120 days under s. 948.22(2).

(5) The crime of attempted battery when the crime charged is sexual assault, sexual assault of a child, robbery, mayhem, or aggravated battery or an attempt to commit any of them.

(6) A crime specified in s. 940.285(2)(b)4. or 5. when the crime charged is specified in ss. 940.19(2) to (6), 940.225(1), (2), or (3), or 940.30.

(6c) A crime that is a less serious type of violation under s. 940.285 than the one charged.

(6e) A crime that is a less serious type of violation under s. 940.295 than the one charged.

(7) The crime specified in s. 940.11(2) when the crime charged is specified in s. 940.11(1).

The principle which allows conviction for a lesser included offense upon an information charging a greater offense is that the defendant has received adequate notice of the lesser offense since it does not require proof of any fact not required for the greater.[1]

In order to instruct the jury on a lesser included offense, the offense must qualify under one of the subsections of § 939.66. A trial court is not permitted to instruct or submit a verdict on a lesser crime which is not included in the charged crime.[2] The subsections of § 939.66 are an exhaustive list of the categories of lesser included offenses; if an offense does not fit within one of these categories, it is not "lesser included" and it may not be submitted to the jury.

The subsections of § 939.66 break down into two groups. One group states general principles relating to lesser included offenses that can apply across the range of criminal statutes. Consisting of subsections (1), (2), (3), and (4), this group has been part of the statute since it was originally enacted as part of the 1956 Criminal Code revision. The rest of the subsections constitute the second group which states special rules for specific statutes or groups of statutes. Only subsection (5) was part of § 939.66 as originally enacted. These special rules have become necessary for two reasons. First, the general lesser included offense rules are strictly interpreted to focus solely on the statutorily-defined elements

rather than on the facts of the case. (See the discussion below.) Second, new criminal statutes tend to be drafted in a way that does not follow the principles of the 1956 Criminal Code revision. The result is that the general principles do not identify offenses that should logically be included offenses, making special rules necessary.

The discussion below considers each of the general rules and then the special rules as a group.

A. Section 939.66(1): "A crime which does not require proof of a fact in addition to those which must be proved for the crime charged."

The key to applying this subsection is understanding that it is concerned with the statutorily required elements of the crimes and not with the particular facts alleged or proved in the case at hand.[3] "When determining whether a crime is a lesser included offense under sec. 939.66(1), the determinative factor is the statutorily defined elements of the respective crimes."[4] Language in earlier decisions of the Wisconsin Supreme Court, especially State v. Melvin,[5] implicitly approving consideration of the peculiar facts of the case in determining lesser included offenses, has not been followed in subsequent cases,[6] and the strict "statutory elements" test now appears to be clearly established.

In properly applying § 939.66(1), one must compare the statutory definition of the charged crime with the statutory definition of the alleged lesser included crime. If the lesser crime includes any element not included in the definition of the charged crime, the lesser crime is not an "included" offense.

Thus, in Randolph v. State,[7] where the facts involved the shooting of the victim by the defendant, it was held that injury by conduct regardless of life and reckless use of a weapon were not included in the crime of attempted murder. Both the lesser offenses require proof of facts not required for attempted murder. Injury by conduct regardless of life requires proof of injury; reckless use of a weapon requires proof that a weapon was used. Attempted murder requires proof of neither injury nor use of a weapon, although both facts were part of the case against Randolph.

Other illustrations of the "statutory elements" test are found in the following cases:

- State v. Verhasselt[8] – injury by negligent use of a weapon is not included within injury by conduct regardless of life;
- State v. Smith[9] – pointing a weapon is not included within armed robbery;
- State v. Driscoll[10] – indecent liberties with a child is not included within sexual

intercourse with a child;

- State v. Elbaum[11] – resisting an officer is not included within battery to a police officer.

- State v. Hagenkord[12] – injury by conduct regardless of life is not an included offense when the charge is first degree sexual assault.

- State v. Carrington[13] – reckless use of a weapon, in violation of § 941.20(1)(a) is not a lesser included offense of endangering safety while armed, in violation of § 941.30 and § 939.63(1).

- State v. Peck[14] – possession of a controlled substance is not a lesser included offense of manufacturing a controlled substance.

- State v. Martin[15] – battery is not a lesser included offense of second degree sexual assault [sexual contact] under § 940.225(2)(a).

- State v. Clemons[16] – possession of a controlled substance is not a lesser included offense of first degree reckless homicide under § 940.02(2)(a), causing death by the delivery of a controlled substance.

- State v. Rundle[17] – reckless child abuse causing great bodily harm under § 948.03(3)(a) is not a lesser included offense of intentional child abuse causing bodily harm under § 948.03(2)(b).

In many of these situations, it can be argued that the strict "statutory elements" test leads to an unfair, or at least excessively rigid, result. (Some of the rigidity is relieved by other subsections of § 939.66 which are discussed below.) This rigidity or unfairness is compounded by the fact that the lesser included offense test has also been adopted for the purposes of determining when multiple convictions are possible. See, for example, State v. Elbaum, 54 Wis.2d 213, 194 N.W.2d 660 (1971). Under this rule, multiple convictions are allowed whenever one offense is not "included" within the other under the definition of § 939.66.[18]

The "elements only" approach and alternative lesser included offense tests were thoroughly reviewed in State v. Carrington.[19] The Wisconsin Supreme Court reaffirmed the "elements only" test but acknowledged two qualifications. First, a "penalty enhancer" may be considered in determining what the statutory elements of the charged offense are. Thus, a charge of endangering safety by conduct regardless of life, with the addition of the penalty enhancer provided in § 939.63 – while possessing or using a dangerous weapon –

includes an element of possessing or using a dangerous weapon which becomes part of the lesser included offense analysis. Second, the Carrington decision acknowledged that the charging document may be referred to in one situation: where a statute provides alternative elements, courts should look to the charging document to determine the greater crime to which the elements only test applies.[20]

Wisconsin is not alone in its commitment to the strict statutory elements test. In United States v. Schmuck, 840 F.2d 384 (7th Cir. 1988), the court, en banc, reversed a panel decision and reaffirmed that the strict "comparison-of-the-elements" test is the proper one to use in federal prosecutions in the 7th Circuit. The panel had adopted a more flexible, "inherent relationship" test, which allowed consideration of the facts alleged in the charge and the evidence presented. The en banc opinion held that the elements test is better for three reasons: 1) it is more consistent with the "necessarily included" standard in Rule 31(c) of the Federal Rules of Criminal Procedure; 2) it avoids problems in giving notice to the defendant; and 3) it is consistent with the test used for double jeopardy purposes. The en banc decision was affirmed by the United States Supreme Court, with the Court emphasizing that the comparison-of-the-statutory-elements test is what is required by Rule 31(c). The court also found that the

> elements test is far more certain and predictable in its application than the inherent relationship test . . . [it] permits both sides to know in advance what jury instructions will be available . . . [and] promotes judicial economy by providing a clearer rule of decision and by permitting appellate courts to decide whether jury instructions were wrongly refused without reviewing the entire evidentiary record for nuances of reference.

United States v. Schmuck, 489 U.S. 705, 720-21 (1989)

B. Section 939.66(2): "A crime which is a less serious type of criminal homicide than the one charged."

Section 939.66(2) provides a special standard for homicides: all less serious types of criminal homicide are considered to be included within all more serious types of homicide. The evidence must support the giving of the instruction on the lesser offense, but in the proper case, instruction on any homicide offense could be proper, even though the "statutory elements" test of § 939.66(1) is not satisfied.[21]

This rule can be applied without difficulty in most cases. The Wisconsin Supreme Court has compared the maximum penalties to determine if one homicide is less serious than another. State v. Davis, 144 Wis.2d 852, 425 N.W.2d 411 (1988). Thus, for any given homicide offense, all other homicides with lower maximum penalties are included crimes

and should be submitted to the jury if the evidentiary standard is satisfied.

Determining when one homicide is "less serious" than another has become more complicated than one would expect it to be because some homicide offenses have the same penalty. For example, both second degree intentional homicide under § 940.05 and first degree reckless homicide under § 940.02(1) are Class B felonies; both second degree reckless homicide under § 940.06 and homicide by intoxicated use of a vehicle under § 940.09(1) are Class D felonies. In State v. Wolske, 143 Wis.2d 175, 420 N.W.2d 60 (Ct. App. 1988), convictions for a count of negligent homicide and a count of homicide by intoxicated use of a vehicle for each victim of the defendant's operation of a boat were upheld. The court held that the crimes have different elements and that since the penalties were the same, one was not "less serious" than the other. The specific situation addressed in Wolske will not recur because penalties have changed. But the same situation can arise with other statutes.

In State v. Patterson, 2010 WI 130, 329 Wis.2d 599, 790 N.W.2d 909, the defendant gave a controlled substance to a 17-year-old girl and she died as a result of using the substance. Patterson was convicted of 1st degree reckless homicide under § 940.02(2) and of contributing to the delinquency of a child with death as a consequence under § 948.40(4)(a). The court affirmed the two convictions, concluding the offenses are not "multiplicitous" because they require proof of different facts. Further, the court concluded that contributing to the delinquency of a child with death as a consequence is not a "less serious type of criminal homicide" for purposes of Wis. Stat. § 939.66(2). "Rather than being a homicide statute, Wis. Stat. § 948.40(4)(a) is more akin to other offenses spread throughout the statutes that proscribe certain conduct and impose a more serious punishment where death results. . . [T]he legislature did not intend contributing to the delinquency of a child with death as a consequence to be a type of criminal homicide." Patterson, ¶¶24, 25.

Non-homicide offenses may also be lesser included offenses of homicides but to so qualify, they must satisfy one of the other subsections of § 939.66.

C. Section 939.66(3): "A crime which is the same as the crime charged except that it requires recklessness or negligence while the crime charged requires a criminal intent."

The threshold requirement for application of § 939.66(3) is that the lesser crime be "the same as" the crime charged, except for the recklessness or intent element. This requirement has been interpreted to involve the same strict comparison of statutory elements that applies under § 939.66(1). Therefore, subsection (3) does not apply where the lesser offense involves any element not contained within the charged offense.[22] For

example, first degree reckless injury, requiring "criminal recklessness" and "utter disregard for human life" is not the "same crime" as aggravated battery and does not meet the test under sub. (3).[23]

The second requirement for the application of subsection (3) is that the charged offense must require a showing of criminal intent. Under the Criminal Code, when criminal intent is an element of a crime it is indicated by the terms "intentionally," "with intent to," "with intent that," or by forms of the verbs "know" or "believe."[24] If none of these "intent words" appear in the statute defining the greater offense, subsection (3) does not apply.[25]

A third requirement for the application of subsection (3) is that the lesser offense require "recklessness or negligence." When recklessness is an element of a crime, it is indicated by the term "reckless" or "recklessly." See § 939.24(2). When criminal negligence is an element of a crime, it is indicated by the term "negligent." See § 939.25(2).

D. Section 939.66(4): "An attempt in violation of § 939.32 to commit the crime charged."

An attempt to commit the charged crime is always a lesser included offense under subsection (4). An implicit qualification on this rule is that the attempt must in fact be a crime. This qualification was recognized by the Wisconsin Supreme Court in State v. Melvin,[26] where the court held that a defendant was not entitled to an instruction on attempted homicide by reckless conduct because there was no such offense; one cannot attempt to commit a crime which only requires reckless conduct.[27]

Note that several crimes are defined to punish an attempt equally with the completed crime: § 161.41, Possession of a Controlled Substance; §§ 940.41-.49, Intimidation of Witnesses and Victims; § 948.07, Child Enticement; and § 948.605(3), Discharge of Firearm in a School Zone. In these situations, of course, the attempt is not lesser included with respect to the completed crime.

E. The crime-specific provisions.

Several subsections of § 939.66 declare specific offenses to be included crimes of other offenses. These have become necessary to preserve lesser included offenses where they are logically appropriate but where the statutory drafting style and the strict statutory elements test combine to eliminate them. The individual subsections are discussed briefly below.

1. Section 939.66(2m): "A crime which is a less serious or equally serious type of battery than the one charged."

This provision was created in 1987, apparently in response to the decision in State v. Richards,[28] which applied the strict comparison-of-the-statutory-elements test to hold that simple battery was not a lesser included offense of aggravated battery. Since that time, § 940.19, the principal battery statute, has been extensively revised and numerous special battery statutes have been created. See §§ 940.20, 940.201, 940.203, 940.205, 940.207, and 940.208.

In determining whether one battery offense is "less serious" than another, the appropriate test is probably the same as that used for homicide offenses: comparing the maximum penalties. (See the discussion of § 939.66(2) in section I. B., above.) Note that unlike the similar provision for homicides in § 939.66(2), this subsection includes "equally serious" types of battery – that is, those with the same penalties.

2. Section 939.66(2p): "A crime which is a less serious or equally serious type of violation under s. 948.02 than the one charged."

This subsection relates to sexual assault of a child. As amended by 2007 Wisconsin Act 80, § 948.02 defines five first degree offenses [one Class A felony and four Class B felonies], one second degree offense [Class C felony], and one offense involving failure to act by a person responsible for the welfare of a child [Class F felony].

3. Section 939.66(2r): "A crime which is a less serious type of violation under s. 943.23 than the one charged."

This subsection relates to offenses defined in the statute titled, "Operating a Vehicle Without the Owner's Consent." (Included are offenses referred to as "carjacking." See § 943.23(1g).) The maximum penalties are compared to determine whether an offense is "less serious."[29]

4. Section 939.66(4m): "A crime of failure to timely pay child support under s. 948.22(3) when the crime charged is failure to pay child support for more than 120 days under § 948.22(2)."

This subsection relates to the felony nonsupport offense prohibited by § 948.22(2) and the misdemeanor offense defined in sub. (3) of the same statute. The distinguishing feature is the duration of the failure to pay support: if it is 120 days or more, the offense is a felony; if less than 120 days, the offense is a misdemeanor.

5. Section 939.66(5): "The crime of attempted battery when the crime charged is sexual assault, sexual assault of a child, robbery, mayhem, or aggravated battery or an attempt to commit any of them."

Under this subsection, attempted battery is an included offense of sexual assault, sexual assault of a child, robbery, mayhem, and aggravated battery, and of an attempt to commit any of those offenses, even though attempted battery may require proof of elements not contained in the enumerated offenses. The Wisconsin Supreme Court has held that this subsection limits attempted battery as an included offense only of the offenses listed.[30] This may be an overstatement, since attempted battery may well be an included offense of crimes not enumerated in subsection (5) if other subsections of § 939.66 are satisfied. For example, it would be an included crime under subsection (4) where battery is charged.

6. Section 939.66(6): "A crime specified in s. 940.285(2)(b)4. or 5. when the crime charged is specified in ss. 940.19(2) to (6), 940.225(1), (2), or (3), or 940.30."

The "crime[s] specified in s. 940.285(2)(b)4. or 5." are misdemeanor offenses involving abuse of individuals at risk. This provision makes them included offenses of felony battery crimes [§ 940.19(2) to (6)], first, second, and third degree sexual assault [§ 940.225(1), (2), or (3)], and false imprisonment [§ 940.30].

7. Section 939.66(6c): "A crime that is a less serious type of violation under s. 940.285 than the one charged."

Section 940.285 defines several different offenses involving the abuse of individuals at risk. The maximum penalties are compared to determine whether an offense is "less serious."[31]

8. Section 939.66(6e): "A crime that is a less serious type of violation under s. 940.295 than the one charged."

Section 940.295 defines several different offenses involving the abuse and neglect of patients and residents of various facilities. The maximum penalties are compared to determine whether an offense is "less serious."[32]

9. Section 939.66(7): "The crime specified in s. 940.11(2) when the crime charged is specified in s. 940.11(1)."

"The crime specified in s. 940.11(2)" is hiding or burying a corpse; the "crime specified in s. 940.11(1)" is mutilating, disfiguring, or dismembering a corpse.

II. If an offense is "lesser included," when is it proper to submit an instruction on that offense?

Once it has been determined that a crime is a lesser included offense of the charged crime, the trial judge must decide whether the evidence warrants the giving of the instruction. The evidentiary standard is necessary because juries are not to be given the discretion to pick and choose the offense of which the defendant should be found guilty.[33] "Juries cannot rightly convict of the lesser merely from sympathy or for the purpose of reaching an agreement. They are bound by the evidence. . . ."[34]

A. The general rule.

The evidentiary standard for determining when the instruction on the lesser crime should be given was stated as follows in Zenou v. State:

> . . . . if the evidence, in one reasonable view, would suffice to prove guilt of the higher degree beyond a reasonable doubt, and if, under a different, but reasonable view, the evidence would suffice to prove guilt of the lower degree beyond a reasonable doubt, but leave a reasonable doubt as to some element included in the higher degree but not in the lower, the court should, if requested, submit the lower degree as well as the higher.[35]

The court in Zenou went on to describe why the lesser included offense instruction is proper when this test is met:

> . . . . Both the state and the defendant have a right to have the lower degree submitted so that the jury will not be subjected to the choice of either acquitting or convicting of the higher degree where it is really convinced of only the lower degree. Ordinarily, if a court is in doubt, it should submit both degrees upon request.[36]

The test has been upheld in the face of a challenge to its constitutionality. In Ross v. State,[37] the court rejected the defendant's contention that an instruction should be given whenever there is any evidence probative of the lesser offense.[38] The court held that the test did not deny the defendant due process by requiring that there be a reasonable basis in the evidence for the instruction on the lesser offense. To add instructions on offenses not supported by a reasonable basis would not be in the defendant's interest, said the court, since it would make compromise verdicts more likely in cases where acquittal would otherwise have been proper.

In State v. Bergenthal, the court elaborated on the application of the evidentiary standard:

> The key word in the rule is "reasonable." The rule does not suggest some near automatic inclusion of all lesser but included offenses as additional options to a jury. Only if "under a different, but reasonable view," the evidence is sufficient to establish guilt of the lower degree and also leave a reasonable doubt as to some particular element included in the higher degree but not the lower, should the lesser crime also be submitted to the jury. However, there is not to be read into the rule the requirement that "there are not reasonable grounds on the evidence to convict of the greater offense." That goes too far. Where the defendant is able to demonstrate that there is no reasonable view of the evidence that warrants conviction on the greater offense, and the trial court agrees, there remains no issue on such charge to go to the jury. The purpose of multiple verdicts is to cover situations where under different, but reasonable, views of the evidence there are grounds either for conviction of the greater or of the lesser offense. The lesser degree verdict is not to be submitted to the jury unless there exists reasonable grounds for conviction of the lesser offense and acquittal on the greater.[39]

There are, therefore, two requirements established by the evidentiary standard: 1) reasonable grounds for acquittal on the offense charged (and on other instructed offenses greater than that requested); 2) reasonable grounds for conviction on the lesser offense requested. In assessing the "reasonableness," the evidence should be viewed in the light most favorable to the defendant.[40]

In homicide cases, where all less serious types of homicide are included crimes under § 939.66(3), there must be reasonable grounds for acquittal on all degrees of homicide which are more serious than the offense on which an instruction is requested.[41] However, in at least one situation, full application of this test is not necessary: where the evidence supports instructing on the complete privilege of self defense, an instruction on "imperfect self defense" should always be submitted on request.[42] Thus, in a case where first degree intentional homicide is charged and the evidence supports submitting the complete privilege of self defense, an instruction on second degree intentional homicide under § 940.01(2)(b) (unnecessary defensive force) is always appropriate. A similar situation occurs where first degree intentional homicide is charged and the evidence supports an instruction on the defense of voluntary intoxication: it is error to refuse to instruct on first degree reckless homicide as a lesser included offense.[43]

B. A "reasonable view of the evidence" and inconsistent defenses.

Questions may arise in applying the general evidentiary rule in cases where submitting the lesser included offense appears to be inconsistent with defense testimony or the apparent defense theory of the case. For example, should a lesser offense involving recklessness be submitted where a defendant charged with an intentional crime claims to

have acted in self defense? Or, should a lesser offense be submitted where the defense is entirely exculpatory?[44]

In the Committee's judgment, these questions are best resolved by applying the general test to all the evidence by deciding whether a reasonable view of the evidence supports any lesser included offense instruction that is requested. Trial courts "must recognize the fact that a jury could disbelieve the defendant's version of the facts."[45] Courts should look at all the evidence and the reasonable inferences it supports to determine what offenses are supported by different, but reasonable, views of that evidence.[46]

In State v. Thomas,[47] the Wisconsin Court of Appeals stated this rule in the following way:

> We hold that the defendant or the state may request and receive lesser included offense instructions, even when the defendant has given exculpatory testimony, if under a reasonable but different view of the record, the evidence and any testimony other than that part of the defendant's testimony which is exculpatory supports acquittal on the greater charge and conviction on the lesser charge.

III. The necessity of a request for a lesser included offense instruction; the trial judge's sua sponte authority or obligation to give such an instruction.

A. The general rules.

Wisconsin case law establishes three general rules relating to the trial judge's duty and authority to instruct on lesser included offenses. Assuming that an offense qualifies as "included" under § 939.66 and that the evidentiary test is satisfied, the following rules apply.

First, it is error not to submit the lesser included offense if requested by the state or the defendant.[48] Both the state and the defendant have the right to request that a lesser offense be submitted, "so that the jury will not be subjected to the choice of either acquitting or convicting of the higher degree where it is really convinced of only the lower degree."[49] If the state requests an instruction on a lesser included offense and the evidentiary test is met, an instruction is required, even if the defendant opposes it.[50]

Second, in the absence of a request by the state or the defendant, it is not error for the trial court to fail to instruct on a lesser included offense.[51] This is the general rule for all sua sponte instructions in Wisconsin[52] and contrasts with the duty of California trial judges, for example, who must instruct on all "general principles of law" even in the absence of a request.[53] In California this duty extends to lesser included offenses[54] and is apparently

intended to protect the defendant from incompetent counsel.[55]

Third, if no request has been made, Wisconsin trial courts apparently have the authority, as opposed to the duty or obligation, to instruct on a lesser included offense. The Wisconsin Supreme Court has held that "(t)he determining of instructions is not entirely within the control of the defendant because the court may without any request instruct on the degrees of the offense the evidence will sustain. . . ."[56]

While these general rules sound clear, reconciling them with each other and with other principles raises some difficult issues.

B. No duty to instruct sua sponte versus "plain error."

The Wisconsin rule appears to eliminate the trial judge's obligation to give lesser included offense instructions sua sponte,[57] but this may not be the case in practice. This is because failure to instruct, even in the absence of a request, may be reviewed by an appellate court and may be grounds for reversal where it amounts to "plain error."[58] Further, instructions which "misstate the law" may also be reviewed in the absence of proper objection.[59] It is likely that the failure to instruct on a lesser included offense that is fairly raised by the evidence could be characterized as "affecting substantial rights" or that instructions which omit a fairly raised lesser included offense could be characterized as "misstating the law." Thus, although the Wisconsin trial judge is not specifically required to give an instruction on a lesser included offense in the absence of a request, it may be a good idea for the judge to explore the issue in a proper case. The possible problems with doing so are discussed below.

C. Sua sponte instructions versus trial strategy.

One of the primary reasons for the Wisconsin rule requiring a request for a lesser included offense instruction is the recognition that requesting or not requesting a lesser included offense instruction is largely a matter of trial strategy.[60] The theory is that the defendant may choose to test the state's evidence on the greater offense and take the chance that it will be found to be insufficient, requiring an acquittal. For the trial judge to instruct on an included crime where the defendant has chosen to go "all or nothing" on the charged crime alone may raise questions of unfair interference with trial strategy.

D. Anticipating problems at the instruction conference.

The Committee recommends that the possible problems regarding the submission of lesser included offenses be anticipated and dealt with at the instruction conference. The defendant must be present; the conference must be recorded and should raise all appropriate

considerations. It is good practice to ask the state and the defendant if instructions on lesser included offenses are requested.[61] If requests are not made for offenses that the trial judge believes may be raised by the evidence, specific inquiry should be made regarding the defendant's strategic decision not to request submission of that offense. The Committee recommends that the defendant be addressed personally in this regard even though the Wisconsin Supreme Court has held that a defendant is bound by counsel's decision not to request an instruction.[62] Given the potential importance of the decision[63] and the close relationship of the judge's sua sponte instruction authority[64] to the need to protect defendants from ineffective counsel, it may be significant to have the record indicate that the defendant fully participated in the decision.[65]

IV. Instructing the jury on the transition between the charged crime and a lesser included crime.

Wis JI-Criminal 112 and 122[66] offer suggested uniform instructions for the transition between the instruction on the charged crime and the instruction for a lesser included crime. The specific issue with which these instructions deal is what result must be reached with regard to the charged crime before moving on to the included crime. The objective is to advise the jury of its options without having any coercive effect on free deliberation.

Wis JI-Criminal 112 and 122 resolve the issue by advising the jury to make every reasonable effort to reach unanimous agreement on the charged crime before moving on to the lesser included crime. This advice is contained in the following paragraph:

> You should make every reasonable effort to agree unanimously on your verdict on the charge of (name charged crime) before considering the offense of (name lesser included crime). However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the offense of (name charged crime), you should consider whether the defendant is guilty of (name lesser included crime).[67]

The basis for this instruction is the assumption that it would be error for the instruction to require the jury to be unanimous in finding the defendant not guilty of the charged crime before considering the lesser offense. This conclusion has not been explicitly adopted by the Wisconsin Supreme Court,[68] but is implicit in two earlier decisions[69] and has been adopted in other states.[70]

At the other extreme from requiring unanimity on the charged crime is to allow the jury to consider any of the submitted offenses without regard to sequence. This theory was rejected on the ground that it is reasonable to ask that the jury's attention first be focused on the charged crime.

V. Other issues.

A. Instructing on an offense for which the statute of limitations has run.

In State v. Muenter, 138 Wis.2d 374, 406 N.W.2d 415 (1987), the Wisconsin Supreme Court held that an instruction should be given on a lesser included offense even if the statute of limitations has run on that crime. Muenter was charged with several felonies in violation of the State Banking Code. The jury was instructed on lesser included misdemeanor offenses on which the statute of limitations had run and found the defendant guilty of those misdemeanors. On appeal, the court held that "the running of the statute of limitations does not preclude the jury from reaching a verdict convicting the defendant of a crime; it rather precludes the trial court from entering a judgment of conviction on the finding of guilt."[71] The court concluded that this result does not "work a fraud upon the jury's verdict." The evidentiary support for submitting the lesser included offense must, of course, still exist.[72]

B. Attorney argument regarding lesser included offenses.

In State v. Neuser, 191 Wis.2d 131, 528 N.W.2d 49 (Ct. App. 1995), a conviction was reversed because the prosecutor engaged in improper argument regarding the court's submission of a lesser included offense. The following remarks were made: "As to the lesser included offense, the court did not submit that. The defense requested that and the court granted the request. It's not the court ordering that it be done." 191 Wis.2d 131, 137. The court of appeals held that this statement was improper for two reasons: it misstated the law, and it presumed to speak for the trial court. The court described the proper scope of argument:

> The question of whether a lesser included offense is to be submitted is a legal issue which is resolved between the court and counsel. It does not involve the jury, and the proceedings relative to the question are not played out before the jury. With the court having made that decision, it is not within the province of either counsel to opine to the jury why the court may have chosen to do so. Rather, the role of counsel is to argue whether the evidence supports the greater, the lesser or neither charge.

191 Wis.2d 131, 138.

COMMENT

Wis JI-Criminal SM-6 was originally published in 1980 and revised in 1995 and 2014. This revision

was approved by the Committee in August 2023; it amended formatting errors.

1. Remington and Joseph, "Charging, Convicting, And Sentencing The Multiple Criminal Offender." 1961 Wis. L. Rev. 528, 546.

2. Clark v. State, 62 Wis.2d 194, 205, 214 N.W.2d 450 (1974).

3. State v, Verhasselt, 83 Wis.2d 647, 266 N.W.2d 342 (1978); Randolph v. State, 83 Wis.2d 630, 266 N.W.2d 334 (1978); Geitner v. State, 59 Wis.2d 128, 207 N.W.2d 837 (1973); State v. Smith, 55 Wis.2d 304, 198 N.W.2d 630 (1972).

4. Verhasselt, cited in note 3, supra, at 664.

5. 49 Wis.2d 246, 181 N.W.2d 490 (1970).

6. See cases cited in note 3, supra.

7. 83 Wis.2d 630, 266 N.W.2d 334 (1978). Under current law, reckless injury under § 940.23 is the equivalent offense to "injury by conduct regardless of life," the offense at issue in Randolph.

8. 83 Wis.2d 647, 266 N.W.2d 342 (1978).

9. 55 Wis.2d 304, 198 N.W.2d 630 (1972).

10. 53 Wis.2d 699, 193 N.W.2d 851 (1972).

11. 54 Wis.2d 213, 194 N.W.2d 660 (1972).

12. 100 Wis.2d 452, 302 N.W.2d 42 (1981).

13. 134 Wis.2d 260, 397 N.W.2d 484 (1986).

14. 143 Wis.2d 624, 422 N.W.2d 160 (Ct. App. 1988).

15. 156 Wis.2d 399, 456 N.W.2d 892 (Ct. App. 1990).

16. 164 Wis.2d 506, 476 N.W.2d 283 (Ct. App. 1991).

17. 166 Wis.2d 715, 480 N.W.2d 518 (Ct. App. 1992).

18. See a full critique of the strict test of Randolph in NOTE: Criminal Law – Critique of Wisconsin's Lesser Included Offense Rules 1979 Wis. L. Rev. 896.

19. 134 Wis.2d 260, 397 N.W.2d 484 (1986).

20. 134 Wis.2d 260, 271, citing State v. Hagenkord, 100 Wis.2d 452, 482-83, 302 N.W.2d 421 (1981).

21. Harris v. State, 68 Wis.2d 436, 441, 228 N.W.2d 645 (1975).

22. State v. Randolph, cited in note 3, supra.

23. State v. Eastman, 185 Wis.2d 405, 518 N.W.2d 257 (Ct. App. 1994). The same result was reached under prior law, where cases held that the "conduct evincing a depraved mind" standard failed to meet the test under sub. (3) because the standard was distinct from, and not a species of, recklessness or negligence. See State v. Randolph, cited in note 3, supra; and State v. Weso, 60 Wis.2d 404, 407-410, 210 N.W.2d 442 (1973).

24. Wis. Stat. § 939.23(1).

25. Under the pre-1989 homicide statutes, cases had held that if the charged offense contained the "conduct evincing a depraved mind" standard, subsection (3) does not apply, because that standard does not embody criminal intent. See, for example, State v. Verhasselt, cited in note 3, supra. The same result occurs under current law, where it is clear that first degree reckless offenses are crimes involving "criminal recklessness," which is clearly defined as requiring awareness of the risk, not criminal intent. See § 939.24.

26. 49 Wis.2d 246, 181 N.W.2d 490 (1970).

27. Note that recklessly endangering safety under § 941.30 provides the equivalent to an attempt to commit reckless homicide or reckless injury: the conduct is the same in the sense of creating an unreasonable and substantial risk and the mental state – awareness of the risk – is the same, but death or injury need not be caused; it is sufficient that the safety of another be endangered.

28. State v. Richards, 123 Wis.2d 1, 365 N.W.2d 7 (1985).

29. Comparing the maximum penalties is the test used in determining whether one homicide offense is less serious than another under § 939.66(2). See discussion at section I., B.

30. State v. Melvin, 49 Wis.2d 246, 181 N.W.2d 490 (1970).

31. Comparing the maximum penalties is the test used in determining whether one homicide offense is less serious than another under § 939.66(2). See discussion at section I., B.

32. Comparing the maximum penalties is the test used in determining whether one homicide offense is less serious than another under § 939.66(2). See discussion at section I., B.

33. Weisenbach v. State, 138 Wis. 152, 119 N.W. 843 (1909).

34. State v. Melvin, 49 Wis.2d 246, 253, 181 N.W.2d 490 (1970).

35. Zenou v. State, 4 Wis.2d 655, 668, 91 N.W.2d 208 (1958).

36. Zenou, 4 Wis.2d 655, 91 N.W.2d 208 (1958). This standard has been cited with approval in many subsequent decisions of the Wisconsin Supreme Court. See, for example, State v. Bergenthal, 47 Wis.2d 668, 178 N.W.2d 16 (1970); State v. Anderson, 51 Wis.2d 557, 560, 187 N.W.2d 335 (1971); Day v. State, 55 Wis.2d 756, 759, 201 N.W.2d 42 (1972); State v. Garcia, 73 Wis.2d 174, 242 N.W.2d 919 (1976).

37. 61 Wis.2d 160, 211 N.W.2d 827 (1973).

38. The defendant in Ross relied on the more liberal rule that applies in at least some federal courts, that the lesser offense should be submitted where there is "any evidence . . . however weak . . . tending to bear upon the issue of the lesser included offense." Belton v. United States, 382 F.2d 150, 155 (D.C. Cir. 1967).

39. State v. Bergenthal, 47 Wis.2d 668, 675, 178 N.W.2d 16 (1970).

40. Garcia v. State, 73 Wis.2d 174, 186, 242 N.W.2d 919 (1976); Ross v. State, 61 Wis.2d 160, 211 N.W.2d 827 (1973).

41. Harris v. State, 68 Wis.2d 436, 228 N.W.2d 645 (1975); Jones (George Michael) v. State, 70 Wis.2d 41, 233 N.W.2d 430 (1975).

42. State v. Gomaz, 141 Wis.2d 302, 310, 414 N.W.2d 626 (1987).

43. State v. Brown, 118 Wis.2d 377, 348 N.W.2d 593 (Ct. App. 1984), reached this conclusion under pre-1989 Wisconsin homicide law with regard to what was then first and second degree murder. The same result would occur under current statutes. But see State v. Holt, 128 Wis.2d 110, 382 N.W.2d 679 (Ct. App. 1985), holding that if there really was not sufficient evidence to support the intoxication instruction, the instruction on the less serious degree of homicide is not required.

44. These sorts of questions were discussed in two decisions of the Wisconsin Supreme Court. See State v. Sarabia, 118 Wis.2d 655, 348 N.W. 2d 527 (1984), and State v. Johnnies, 76 Wis.2d 578, 251 N.W.2d 807 (1977). Also see State v. Simpson, 125 Wis.2d 375, 373 N.W.2d 673 (Ct. App. 1985), on reconsideration of 118 Wis.2d 454, 347 N.W.2d 920 (Ct. App. 1984).

45. State v. Gomaz, 141 Wis.2d 302, 308, 414 N.W.2d 626 (1987); State v. Sarabia, 118 Wis.2d 655, 663, 348 N.W.2d 527 (1984).

46. See Dickey, Schultz, and Fullin, The Importance of Clarity in the Law of Homicide, 1989 Wis. L. Rev. 1323, 1391.

47. 128 Wis.2d 93, 107, 381 N.W.2d 567 (Ct. App. 1985). For other cases applying this evidentiary rule, see State v. Seibert, 141 Wis.2d 753, 416 N.W.2d 900 (Ct. App. 1987), and State v. Simpson, cited in note 44, supra.

48. Neunfeldt v. State, 29 Wis.2d 20, 138 N.W.2d 25 (1965).

49. Zenou v. State, 4 Wis.2d 655, 668, 91 N.W.2d 208 (1958).

50. State v. Fleming, 181 Wis.2d 546, 510 N.W.2d 837 (Ct. App. 1993). Indications by the prosecution before and during trial that a lesser included offense instruction would not be requested are not binding in the absence of a formal agreement or stipulation.

51 Neunfeldt v. State, 29 Wis.2d 20, 138 N.W.2d 25 (1965); Williamson v. State, 31 Wis.2d 677,

143 N.W.2d 486 (1966); Green v. State, 38 Wis.2d 361, 156 N.W.2d 477 (1968).

52. See, for example, Bergeron v. State, 85 Wis.2d 595, 271 N.W.2d 386 (1978).

53. People v. Wade, 348 P.2d 116 (1959).

54. People v. Sedeno, 518 P.2d 913 (1974); People v. Flannel, 603 P.2d 1 (1979); People v. Wickersham, 650 P.2d 311 (1982).

55. People v. Wade, 348 P.2d 116 (1959).

56. Neunfeldt v. State, 29 Wis.2d 20, 32, 138 N.W.2d 25 (1965). Also see State v. Amundson, 69 Wis.2d 554, 230 N.W.2d 775 (1975), where the giving of an instruction on the defense of entrapment, sua sponte, was upheld even though the defendant objected to the giving of the instruction.

57. See cases cited in note 51, supra.

58. Bergeron v. State, 85 Wis.2d 595, 271 N.W.2d 386 (1978). Also see Virgil v. State, 84 Wis.2d 166, 189-90, 267 N.W.2d 852 (1978) for the definition of "plain error" adopted by the Bergeron decision.

59. Wray v. State, 87 Wis.2d 367, 373, 275 N.W.2d 731 (1978); Lambert v. State, 73 Wis.2d 590, 607, 243 N.W.2d 524 (1976).

60. Turner v. State, 64 Wis.2d 45, 218 N.W.2d 502 (1974).

61. Finalizing the instructions at the instruction conference may help to avoid the issue addressed in State v. Thurmond, 2004 WI App 49, 270 Wis.2d 477, 677 N.W.2d 655. Thurmond was tried before a jury on charges of first degree sexual assault, kidnapping, and attempted armed robbery. During deliberations that lasted for two days, the jury forwarded several questions to the judge; the judge reinstructed on reasonable doubt and later gave Wis JI-Criminal 520. After the jurors indicated they had reached agreement on one count, the state requested an additional instruction on second degree sexual assault and attempted "un-armed" robbery. The jury returned verdicts finding the defendant guilty of second degree sexual assault and kidnapping, and not guilty of attempted robbery. The court of appeals reversed the convictions, relying primarily on the likelihood that the jury may have believed that the trial court was recommending the finding of guilt to the lesser included offenses. And, the fact that the verdict came relatively quickly after the additional instructions were given suggests that the jury failed to thoughtfully consider the lesser included offenses. The court did not adopt a per se rule prohibiting giving lesser included offense instructions in this situation and noted it could find little guidance in Wisconsin law on this question.

62. Green v. State, 38 Wis.2d 361, 156 N.W.2d 477 (1968).

63. In homicide cases in particular, the lesser included offense issue may be almost as important as guilt or innocence. The difference between conviction on first degree intentional homicide (mandatory life imprisonment) and on second degree intentional homicide or reckless homicide is obviously great. It should be a matter of record that the defendant was fully aware of the consequences of not requesting a lesser included offense instruction in a homicide case.

Added support for the suggestion that the trial judge inquire on the record is offered by the decision

of the United States Supreme Court in Beck v. Alabama, 447 U.S. 625 (1980). Beck reviewed the Alabama procedures for imposing the death penalty which included a statutory prohibition on submitting lesser, noncapital offenses to the jury. The Supreme Court held that the Alabama procedure violated the defendant's right to due process, "by introducing a level of uncertainty and unreliability into the fact-finding process that cannot be tolerated in a capital case." 447 U.S. 625, 643. While Beck is concerned with the death penalty, its reasoning should be equally applicable to noncapital cases, at least to the extent of assuring that the defendant has actively participated in and agreed with the decision not to request the submission of lesser included offenses supported by the evidence.

64. The problems discussed here were acknowledged by the Wisconsin Supreme Court in State v. Felton, 110 Wis.2d 485, 329 N.W.2d 161 (1983). Felton noted the following statement from Price v. State, 37 Wis.2d 117, 130, 154 N.W.2d 202 (1967):

> [T]he battle might be so unequal due to the disparity of the skill of counsel that justice would require, in the unusual case, that such instructions [referring to instructions offered sua sponte] be offered for counsel's consideration.

65. Wisconsin appellate courts have not held that the decision on requesting a lesser included offense instruction is solely for the defendant. Three court of appeals cases have dealt with the issue in the context of claims of ineffective assistance of counsel. In State v. Ambuehl, 145 Wis.2d 343, 425 N.W.2d 649 (Ct. App. 1988), the defendant sought to establish ineffective assistance of counsel on the ground that defense counsel did not adequately consult with her on the question of requesting an instruction on a lesser included offense. The court rejected the claim but apparently accepted the defendant's argument that the decision on requesting lesser included offense instructions is one for the defendant to make, not defense counsel. Two more recent decisions suggest that the decision is one of trial strategy for defense counsel to make. See State v. Eckert, 203 Wis.2d 497, 510, 553 N.W.2d 539 (Ct. App. 1996): ". . . a defendant does not receive ineffective assistance of counsel where defense counsel has discussed with the client the general theory of defense, and when based on that general theory, trial counsel makes a strategic decision not to request a lesser-included instruction because it would be inconsistent with, or harmful to, the general theory of defense." Also see, State v. Kimbrough, 2001 WI App 138, 246 Wis.2d 648, 630 N.W.2d 752.

A footnote to the previous version of this special material [c. 1995] cited the commentary to the ABA Standards for Criminal Justice, Standard 4-5.2, (2d ed. 1980), stating that the defendant should be the one to decide whether to seek submission to the jury of lesser included offenses. In the current third edition of the standards, the decision on lesser included offenses is not listed as one of those that is for the defendant personally and the comment quoted above has been deleted and replaced with the following: "It is also important in a jury trial for defense counsel to consult fully with the accused about any lesser included offenses the trial court may be willing to submit to the jury."

66. Wis JI-Criminal 112 is for cases where there is a single defendant; Wis JI-Criminal 122 is for cases with co-defendants.

67. Wis JI-Criminal 112 (copyright 2000).

68. The court of appeals discussed this issue in State v. McNeal, 95 Wis.2d 63, 288 N.W.2d 874 (Ct. App. 1980). The defendant challenged a transition instruction that told the jury to consider the lesser included offense only if they found the defendant not guilty of the charged crime. The court held that the defendant had waived the right to challenge the instruction, but then went on to say that the instruction

correctly stated the law, citing Dillon v. State, 137 Wis. 655, 119 N.W. 352 (1909). The Committee reads Dillon as being concerned primarily with the order in which the offenses are considered and as being implicit support for the approach to transition recommended here. See the discussion in note 68, below.

69. In Payne v. State, 199 Wis. 615, 227 N.W. 258 (1929), the jury foreman specifically asked the trial court whether the jury had to reach unanimous agreement whether the defendant was guilty or not guilty of the charged crime before considering lesser included offenses. On appeal, the defendant claimed the trial judge's response was such that it told the jury unanimous agreement was required. The supreme court held that the trial judge's complete response would not give the jury that impression, implying that there was merit to the defendant's claim that it would have been error to require unanimous agreement before moving to the lesser included offenses.

In Dillon v. State, 137 Wis. 655, 119 N.W. 352 (1909), the instructions were described as telling the jury to consider the lesser included offense upon "its failure to find the defendant guilty of some higher degree of offense." In one view, the failure to agree unanimously on guilt on the charged crime is a "failure to find the defendant guilty."

For a more complete discussion of the Committee's conclusion on this issue, see the Comment to Wis JI-Criminal 112.

70. See State v. Ogden, 35 Or. App. 1, 580 P.2d 1049 (1978), and People v. Johnson, 83 Mich. App. 1, 268 N.W.2d 259 (1978).

71. State v. Muenter, 138 Wis.2d 374, 387, 406 N.W.2d 415 (1987).

72. See State v. Wilson, 149 Wis.2d 878, 440 N.W.2d 534 (1989).