



Criminal Jury Instruction Committee Report

By: Jefren Olsen*

**Jefren Olsen is an Assistant State Public Defender in the Madison Appellate Office. He attends the Criminal Jury Instruction Committee meetings on behalf of the State Public Defender.*

The Committee is continuing its task of going through all of the instructions one by one to update them and put them into the newer standard format. In addition, the Committee has revised some instructions and adopted a few new ones. The release of the new and revised instructions is set for April 2008.

The following are the new and revised instructions that are most significant or interesting:

JI-412 Party to Crime: Withdrawal from a Conspiracy
JI-570 Conspiracy as a Crime

The Committee added a comment to JI-570 explaining that withdrawal is not a defense to a charge of conspiracy under Wis. Stat. § 939.31. At the same time the Committee added a comment to JI-412 noting that withdrawal is a defense to party to a crime liability under Wis. Stat. § 939.05(2)(c) and referring to JI-570 and the different rule under inchoate conspiracy.

JI-521 Instruction on Jury Deliberations

This is a new instruction that provides the jury with some “suggestions” to help deliberations “proceed in a smooth and timely way.” It was drafted after the Committee reviewed *State v. Anderson*, 2006 WI 77, 291 Wis.2d 673, 717 N.W.2d 74, which reversed a jury verdict in part because the judge let the jury replay a videotape of a pretrial interview of the victim during deliberations and refused the jury’s request to have portions of the testimony read back.

The Committee decided to create this instruction to give the jury some information up front about how to get assistance from the court during deliberations. However, the instruction ultimately went further and provided general advice about deliberations—*e.g.*, “be thoughtful and do not rush” and “keep the deliberations focused on the evidence and the law” and “listen to one another and be respectful of each other’s opinions.” The instruction was drawn from other guides that are already available (and in some counties are provided to prospective jurors), including guides adopted by the state court system’s Records Management Committee and the Chief Judges’ Subcommittee on Jury Treatment and Selection.

JI-1453C Theft by Fraud: Failure to Disclose Information as a “Representation”

This is a new instruction covering a recently recognized theory of liability under Wis. Stat. § 943.20(1)(d), the theft by fraud statute.

A person commits theft by fraud under § 943.20(1)(d) if he or she obtains title to property of another person by intentionally deceiving the other person with a false representation that the defendant knows is false and that the defendant makes with intent to defraud the other person. In *State v. Ploeckelman*, 2007 WI App 31, 299 Wis. 2d 251, 729 N.W.2d 784, the court of appeals held that a defendant may make a false representation by *failing* to disclose a fact to another party to a transaction, if the fact is material to the transaction, the other party would reasonably expect disclosure of the fact, and the defendant knows that the other party enters into the transaction under a mistake as to the fact.

The defendant in *Ploeckelman* was a dairy farmer. He knew that his milk hauler was altering the samples of the milk he sold to a cheese maker, which caused the cheese maker to think the milk was higher quality and therefore pay him more for it. He argued that he did not make any affirmative statement to the cheese maker about the quality of his milk, but he also didn't tell the cheese maker about the alteration of the samples. The court held that the defendant's knowledge of that fact and his failure to tell the cheese maker made his representation regarding his milk materially misleading and subjected him to prosecution for theft by fraud.

The Committee initially considered incorporating the theory of liability in *Ploeckelman* into the existing instruction for theft by fraud (JI-1453A), but because of the separate elements needed to satisfy the test under the case, the Committee decided to draft a separate instruction. The use of this theory of liability may perhaps be rare in our practice, but it should be taken note of as it may considerably broaden the scope of § 943.20(1)(d) and, should you be faced with defending a prosecution under the theory, you will have to be aware of the multiple elements that must be proven for the state to meet its burden.

JI-1770 to 1775 Escape

In addition to updating the format and notes of the escape statutes, the Committee got rid of two existing instructions by combining them with others.

Specifically, the Committee combined two existing instructions (1770 and 1771) to create one instruction (new 1770) for escaping after arrest for a forfeiture offense. Existing JI-1770 covered the basic offense under § 946.42(2)(a), while JI-1771 added the element under sub. (3)(e) that the defendant left the state to avoid apprehension. The additional element is now simply listed as an alternative to be added to the instruction if the defendant is charged under sub. (3)(e).

The committee also combined existing JI-1772, which covered escape after legal arrest, and JI-1773, which covered escape from an officer at the time of arrest.

Finally, the Committee approved new instruction JI-1775, which covers escape by someone who is under a Ch. 980 detention or commitment order. *See* Wis. Stat. § 946.42(3m) (effective August 1, 2006).

JI-2123 Sexual Exploitation of a Child by a Person Responsible for the Child's Welfare

This is a new instruction covering charges under Wis. Stat. § 948.05(2). The knottiest issue in drafting the instruction was what the defendant must know or intend concerning the recording or displaying of the sexually explicit conduct. The Committee concluded that, in addition to knowingly permitting, allowing or encouraging the child to engage in the conduct, the defendant must intend that the conduct be recorded or displayed in any way.

JI-2196

Registered Sex Offender and Photographing Minors

This is a new instruction covering charges under Wis. Stat. § 948.14, which was created by 2005 Wisconsin Act 432 (effective June 6, 2006). ■