



Criminal Jury Instruction Committee Report

By: Jeffren Olsen

At its meetings so far in 2008, the Jury Instruction Committee has continued its task of putting all of the instructions into the newer standard format. In addition, the Committee finished reviewing the enactments of the 2007-08 legislative session to determine whether to draft instructions for any newly created statutes or revise existing instructions to take account of amendments to the corresponding statute. Finally, the Committee revised some instructions in light of appellate decisions dealing with the crime covered by the instruction.

The following are the new and revised instructions that are likely to be the most significant to our practice:

JI-314 Defendant Wearing a Restraining Device in the Presence of Jurors

This is a new instruction admonishing the jury that the fact the defendant is wearing a restraining device (shackles, stun belt, etc.) is not to be considered in reaching a verdict. It is in response to *State v. Champlain*, 2008 WI App 5, 307 Wis. 2d 232, 744 N.W.2d 889, which held that if a defendant wears a restraint in the presence of the jury, the court should instruct the jury that the restraint is not to be considered in assessing the proof and determining guilt.

JI-1245 Battery or Threat to a County, City, Village, or Town Employee

This instruction was drafted for use in cases involving charges under Wis. Stat. § 940.208, which was created effective April 11, 2008, by 2007 Wisconsin Act 193.

JI-1246 Mayhem

This instruction was revised in light of *State v. Quintana*, 2008 WI 33, ___ Wis. 2d ___, 748 N.W.2d 447, which held that the phrase “other bodily member” in Wis. Stat. § 940.21 “encompasses all bodily parts, including a person’s forehead.”

JI-1255 Strangulation and Suffocation

This instruction was drafted for use in cases with charges under Wis. Stat. § 940.235, which prohibits a person from “intentionally impeding the normal breathing or circulation of blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person.” The statute was created effective April 4, 2008, by 2007 Wisconsin Act 127.

Act 127 also amended the definition of “dangerous weapon” in Wis. Stat. § 939.22(10) by adding to the list of objects that are deemed to be dangerous weapons a “ligature or other instrumentality” that could be used to impeded breathing or circulation. The Committee therefore decided to amend JI-910, which sets out the

definition in § 939.22(10).

JI-1395 Invasion of Privacy: Looking into a Dwelling Unit

This instruction was revised to cover the amendment to Wis. Stat. § 942.08(2)(d) by 2007 Wisconsin Act 198, effective April 11, 2008. Act 198 added language to the statute to cover peeping from a common area of a multi-unit dwelling or condominium. The statute previously covered only persons who go onto another's private property without consent before looking into the dwelling.

JI-1775A Escape: Individual with Custody Injured

2007 Wisconsin Act 226, effective May 31, 2008, created Wis. Stat. § 946.42(4), which increases the penalty for escape by five years if a person having custody of the escapee is injured “during the course of the escape.” This instruction creates a special jury question for cases in which that enhancer is alleged. The jury must answer the question “Was an individual who had custody of the defendant injured during the course of the escape?”

JI-1920 Bomb Scares

The Committee revised this instruction to reflect the decision in *State v. Robert T.*, 2008 WI App 22, 307 Wis. 2d 488, 746 N.W.2d 564. In that decision the Court of Appeals held that Wis. Stat. § 947.015 must be read with the limitation that only a false bomb scare that constitutes a “true threat” can be charged. A “true threat” is a category of speech that is not protected by the First Amendment. *See State v. Perkins*, 2001 WI 46, 243 Wis.2d 141, 626 N.W.2d 762.

JI-2102 through JI-2102E First Degree Sexual Assault of a Child

As you probably know by now, 2007 Wisconsin Act 80 made substantial modifications to Wis. Stat. § 948.02(1). The Act corrected the conflicts that resulted when the 2005-06 legislature enacted two laws (2005 Acts 430 and 437) that made competing and inconsistent changes to the statute.

Act 80 created five types of first degree sexual assault of a child, one of which is a Class A penalty and four of which carry minimum mandatory terms of confinement in prison ranging from 5 years to 25 years.

JI-2102 is an introductory comment that summarizes the elements of the offenses and the applicable maximum and minimum penalties. JI-2102A through JI-2102E are the specific instructions, one for each of the five offenses.

Act 80 also changed Wis. Stat. § 948.025, the repeat sexual assault of a child statute. Because the repeat sexual assault offense requires three or more violations of the regular child sexual assault statute, the five new offenses under § 948.02(1) create many, many possible factual permutations—and complications—that could form a basis for charging under § 948.025. Because of the complications, the Committee is still working on a revised standard instruction for § 948.025 (JI-2107). The revision will probably not be approved until later this year.

JI-2143 Exposing a Child to Harmful Material

This is a new instruction covering Wis. Stat. § 948.11(2)(am), which prohibits verbally communicating a harmful description or narrative account to a child. It reflects the recent decision in *State v. Ebersold*, 2007 WI App 232, 306 Wis. 2d 371, 742 N.W.2d 876, holding that the verbal communication may be oral or written, and that the statute covers a message sent to a child via an Internet chat room.

JI-2150 and JI-2150A Neglecting a Child

2007 Wisconsin Act 80 amended Wis. Stat. § 948.21(1) to create two new categories of neglecting a child. Before Act 80, the crime was a Class A misdemeanor unless death resulted, in which case it was a Class D felony. Act 80 created Class H and F felonies for cases in which bodily harm or great bodily harm result, respectively. JI-2150 covers the basic misdemeanor offense, while JI-2150A was amended to provide alternative language that covers all of the felony offenses.

JI-5301 Election Fraud—Unqualified Elector

This is a new instruction that covers violations of Wis. Stat. §§ 12.13(1)(a) and 12.60(1)(a), which prohibit a person from intentionally voting in an election if the person does not have the necessary elector qualifications or residency requirements. ■