



Criminal Jury Instruction Committee Report

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A legislative committee prompted by the Avery exoneration initiated a bill that required recording of police interrogations. The proposal became law—Wis. Stat. § 968.073—and had a companion measure to advise the jury of the recording requirement when any statements admitted into evidence were elicited without either compliance with the recording requirement or meeting a delineated exception. The Jury Instruction Committee concluded that the jury instruction mandate in Wis. Stat. § 972.115(2)(a) should be made part of Wis. J.I. No. 180, the confession instruction. The Committee decided that the instruction should essentially track the statutory language, explaining that:

It is the policy of this state to make an audio or audio and visual recording of a custodial interrogation of a person suspected of committing a felony. You may consider the absence of an audio or audio and visual recording of the interrogation in evaluating the evidence relating to the interrogation and the statement in this case.

The penalties for sexual exploitation of a child and possession of child pornography, Wis. Stat. §§ 948.05 and 948.12 were increased unless the defendant was under the age of 18. The Committee revised the instructions for these crimes by using a special verdict to secure a jury determination of whether the defendant was 18 or older at the time of the offense. A similar change was made to the pattern instruction for possession of drug paraphernalia with the intent to manufacture methamphetamine. Wis. Stat. § 961.573(3). That law now increases the penalty if two conditions are met: the defendant is 18 years old or older and the crime was committed in the presence of a child 14 years old or younger.

The Committee approved two jury instructions for invasion of privacy, Wis. Stat. § 942.08. One area of discussion concerned the appropriate instruction of a “surveillance device,” as used in the statute. The law defined this term as a device “used, designed to be used or primarily intended to be used to observe the activities of a person.” Wis. Stat. § 942.08(1)(c). Your reporter thought these alternatives were similar to the alternative definitions of a dangerous weapon. Wis. J.I. No. 910. In that regard, the selection of the appropriate alternative can determine whether the instruction is correct and whether the evidence is sufficient. *See, e.g., State v. Antes*, 74 Wis. 2d 317, 324-326, 246 N.W.2d 671 (1976). Nevertheless, the Committee decided to use a single simplified definition that a surveillance device means “any device that can be used to observe activities of another person.”

New jury instructions for driving violations were approved in light of revised penalties. Operating knowingly without a valid license and causing death or great bodily harm is a Class A misdemeanor and is the subject of J.I. No. 2612.

The same penalty applies to operating with knowledge that the person's license was revoked or suspended and causing death or great bodily harm. That circumstance is covered in J.I. No. 2623.

The scope of predicate felonies for invocation of felony murder, Wis. Stat. § 940.03, has been expanded and paradoxically includes two misdemeanors—battery and battery to an unborn child. As a result the Committee approved a revised version of J.I. No. 1030.

Recent legislation amended the definition of “sexual contact” in three different statutes: Wis. Stat. §§ 939.22(34), 940.225(5)(b), and 948.01(5). In light of the revised definitions, the Committee approved new jury instructions of the term for sexual assault trials (J. I. No. 1200A) and sexual assault of a child trials (J.I. No. 2101A).

The second degree sexual assault statute where the alleged victim was under the influence of an intoxicant has been revised. Although the main purpose of the change was apparently to include alcohol in the definition of an intoxicant, the new law altered the elements of the offense. It now prohibits sexual intercourse or contact with a person under the influence if the intoxication rendered the person incapable of giving consent and if the defendant had actual knowledge that the person was incapable of giving consent. The changes are embodied in an amended version of J.I. No. 1212. The prior language in element #4 concerning knowledge of intoxication has been removed (since the law now requires knowledge of being incapable of giving consent). The instruction also deleted an optional paragraph explaining the use of “consent evidence” and used the statutory phrase “actual knowledge” in explaining the degree of awareness that the defendant must have of the person's condition.

A few of the myriad changes made to ch. 980 found their way into a revision the pattern instruction on the elements at a commitment trial—J.I. No. 2502. The most significant include elimination of the second element, *i.e.*, that the petition was filed within 90 days of release from custody and modification of the definition of “sexually motivated” to include sexual humiliation or degradation of the victim.

The Committee approved a new version of SM-32, addressing the procedure for accepting a guilty plea. No major changes were made. However, the voluminous footnotes provide a compendium of the law in this area.