



## Criminal Jury Instruction Committee Report

By: Charles Vetzner\*

*\*Charles Vetzner 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 approved a revised version of SM-16. This is a special material digesting the law concerning collateral attacks on prior convictions. Such collateral attacks have become a cottage industry in OWI cases because the number of valid priors affects the penalty for the charged offense and, in the case of fifth offense or greater, could affect whether the current charge is a felony or misdemeanor. The most notable aspect of the revised version of the SM is the Committee's struggle with *State v. Deilke*, 2004 WI 104. *Deilke* held that challenging a prior OWI conviction in the context of a current OWI prosecution may constitute a breach of the plea agreement in the prior case. The SM reflects some disquietude about the opinion. It notes that *Deilke* does not allow the prior conviction to be challenged as part of the new prosecution and that the authority to reopen convictions where the sentence has been fully served is unclear.

The second degree sexual assault instruction—J.I. No. 1208—was revised to provide three supplemental alternative explanations of the force or threat of force element. The first alternative addresses the prototypical force that “compelled the victim to submit.” The second concerns force from a prior event that “continued to weigh on” the victim. The final option is forcible sexual contact. The Committee took this approach in an attempt to harmonize court decisions that provided several disparate explanations of the element. Depending on the facts of a particular case, it may be inappropriate to utilize any of these three alternatives. Conversely, it may be appropriate to submit more than one of these explanations.

After discussions spanning several meetings, the Committee made modest revisions in the eyewitness identification instruction—J.I. No. 141. The changes could be viewed as more stylistic than substantive although the instruction now cautions the jury that identification is an issue in the case and “you should give it your careful attention.” The instruction also states that the credibility of an identification witness should be considered “in the same way you consider credibility of any other witness.” The changes agreed upon are primarily adapted from the identification instruction in the 1980 draft of Pattern Criminal Federal Jury Instructions approved by the Seventh Circuit.

The Committee had considerable difficulty agreeing on the proper approach to take in crafting an instruction. Some members felt any identification instruction at all was unnecessary and that the general credibility of witnesses instruction (J.I. No. 300) was sufficient. That view was unsatisfactory to the majority of the Committee given the special importance of eyewitness testimony and remaining questions about its reliability.

However, the Committee was not willing to develop a lengthy list of factors that should be considered in weighing reliability. Instead, the Committee believed that advocacy by counsel is a more appropriate method to stress particular factors that bear on accuracy of the identification. There was debate about whether one particular factor—cross-racial identification—warranted inclusion in the instruction. The

Committee was aware that in *State v. McMorris*, 213 Wis.2d 156, 170 & n. 9, 570 N.W.2d 384 (1997), the Wisconsin Supreme Court had identified cross-racial identification as a circumstance warranting concern about the reliability of the identification. In the end, that judicial statement was deemed inadequate to justify special mention in a pattern instruction, especially when the *McMorris* language was compared to decisions in supreme courts of a few states that expressly directed an instruction cautioning factfinders about the reliability of cross-racial identification.

Ultimately, the Wisconsin appellate courts' apparent lack of concern about the text of No. 141 or even the submission of such an instruction in the first place deterred the Committee from making major changes in the current form of the instruction. For example, a few Committee members initially felt jurors should be told to evaluate eyewitness identifications with special caution. That concept could be compared to Wis. J.I. No. 245—the testimony of accomplices instruction that informs jurors that such testimony should be considered “with caution and great care, giving it the weight you believe it is entitled to receive.” However, No. 245 is supported by case law; no similar Wisconsin decision supports utilizing this language regarding identification evidence.

The action of the Committee does not mean that the revised version of No. 141 will be invariably used for the foreseeable future. First, at least two cases on the current Wisconsin Supreme Court docket bear on eyewitness identifications, and the decisions in those cases may yet change the legal landscape in this area.

More importantly, the text of No. 141 only emphasizes the need for trial counsel to develop a record, including proffered expert testimony, about the reliability of identifications and the implications of particular factors influencing the identification in each case. Such a record can then be used to request nonpattern language, including a caution similar to that in J.I. No. 245. In short, zealous advocacy by defense counsel at the trial and appellate level could ultimately result in decisions supporting, if not requiring, stronger identification instructions. ■