



Criminal Jury Instruction Committee Report

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The Committee approved new operating after revocation instructions with the new penalty structure: the offense is criminal if there was a prior OAR within five years or the revocation resulted from an OWI-related offense. If the first circumstance is alleged, proof of the prior conviction is not treated as an element. Proof of a prior OWI offense is, however, an element to be proved, subject to stipulation by the defense. The new instructions are JI No. 2620-2622.

The eyewitness identification instruction—JI No. 141—was revised only one year after the Committee had made extensive changes to the pattern instruction. The new round of changes was triggered by discussion of the Wisconsin Supreme Court decision in *State v. Dubose*, 2005 WI 126, 285 Wis.2d 143, 699 N.W.2d 582. Among the changes is new language that is intended to clarify that the jury may be required to evaluate the reliability of both in-court and out-of-court identifications. The new instruction also utilizes language from the credibility of witnesses instruction: “[G]ive the [identification] evidence the weight you believe it should receive.” Finally, the commentary to the instruction makes note of *State v. Shomberg*, 2006 WI 9, ___ Wis.2d ___, 709 N.W.2d 370, which obliquely suggested that trial courts admit expert testimony concerning the suggestiveness of identification procedures.

In *State v. Harvey*, 2006 WI App 26, ___ Wis.2d ___, 710 N.W.2d 482, the court held that the jury instruction definition of cunnilingus was erroneous. In response, the Committee changed the definition of both cunnilingus and fellatio in JI No. 1200B. The new definition describes oral “contact,” rather than oral “stimulation.”

In response to a letter from an attorney, the Committee added to the commentary in the instruction on the elements for carrying a concealed weapon—JI No. 1335. The new discussion calls attention to the possible conflict between the general framework of the statutory prohibition and the provisions in Wis. Stat. § 167.31(2)(b) concerning the proper method to transport a firearm in a motor vehicle.

The Committee added to the bail jumping instruction—JI No. 1795. The third element concerns intentionally failing to comply with the terms of the bond. In 2004 the Committee revised the instruction to require, that when the violation is a new criminal offense, the crime be identified and the elements be enumerated. Now the Committee has revisited that topic and added that those elements must be proven beyond a reasonable doubt.

The article by Erik Guenther in the Winter 2005 issue of the *Wisconsin Defender* regarding the pattern instruction on reasonable doubt (JI No. 140) prompted a discussion of the current instruction in general and,

in particular, the following language: “While it is your duty to give the defendant the benefit of every reasonable doubt, you should not search for doubt. You are to search for the truth.” In the end, the Committee decided to make no changes. The Committee was particularly reluctant to tamper with the quoted part of the instruction since it had been expressly approved in *State v. Avila*, 192 Wis.2d 870, 889-90, 532 N.W.2d 423 (1995).