STATE OF WISCONSIN, CIRCUIT COURT, WAUKESHA COUNTY

State of Wisconsin, Plaintiff,

-vs-

Morgan Geyser, Defendant
Name

Plea Questionnaire/ Waiver of Rights

Case No. 14-CF-596

I am the defendant and intend to plea as follows:

Charge/Statute	Plea	Charge/Statute	Plea
Attempt First Degree Homicide, ptac - NGI	☒ Guilty ☐ No Contest		☐ Guilty ☐ No Contest
	☐ Guilty ☐ No Contest		☐ Guilty ☐ No Contest

☐ See attached sheet for additional charges.

I am 15 years old. I have completed 9 years of schooling.

I ☐ do	☒ do not	have a high school diploma, GED, or HSED.
I ☒ do	☐ do not	understand the English language.
I ☒ do	☐ do not	understand the charge(s) to which I am pleading.
I ☐ am not	☒ am	currently receiving treatment for a mental illness or disorder.
I ☐ have not	☒ have	had any alcohol, medications, or drugs within the last 24 hours.

Constitutional Rights

I understand that by entering this plea, I give up the following constitutional rights:

MG ☒ I give up my right to a trial.

MG ☒ I give up my right to remain silent and I understand that my silence could not be used against me at trial.

MG ☒ I give up my right to testify and present evidence at trial.

MG ☒ I give up my right to use subpoenas to require witnesses to come to court and testify for me at trial.

MG ☒ I give up my right to a jury trial, where all 12 jurors would have to agree that I am either guilty or not guilty.

MG ☒ I give up my right to confront in court the people who testify against me and cross-examine them.

MG ☒ I give up my right to make the State prove me guilty beyond a reasonable doubt.

I understand the rights that have been checked and give them up of my own free will.

Understandings

- I understand that the crime(s) to which I am pleading has/have elements that the State would have to prove beyond a reasonable doubt if I had a trial. These elements have been explained to me by my attorney or are as follows: ☒ **See attached sheet.**
  WI Crim JI 1070, WI Crim JI 400, WI Crim JI 580, WI Crim JI 650, WI Crim JI 605.
- I understand that the judge is not bound by any plea agreement or recommendations and may impose the maximum penalty. The maximum penalty I face upon conviction is: *See attached Addendum.
- I understand that the judge must impose the mandatory minimum penalty, if any. The mandatory minimum penalty I face upon conviction is: None
- I understand that the presumptive minimum penalty, if any, I face upon conviction is: None

  The judge can impose a lesser sentence if the judge states appropriate reasons.

Understandings

- I understand that if I am placed on probation and my probation is revoked:
  - if sentence is withheld, the judge could sentence me to the maximum penalty, or
  - if sentence is imposed and stayed, I will be required to serve that sentence.
- I understand that if I am not a citizen of the United States, my plea could result in deportation, the exclusion of admission to this country, or the denial of naturalization under federal law.
- I understand that if I am convicted of any felony, I may not vote in any election until my civil rights are restored.
- I understand that if I am convicted of any felony, it is unlawful for me to possess a firearm.
- I understand that if I am convicted of any violent felony, it is unlawful for me to possess body armor.
- ~~I understand that if I am convicted of a serious child sex offense, I cannot engage in an occupation or participate~~ in a volunteer position that requires me to work or interact primarily and directly with children under the age of ~~16~~.
- ~~I understand that if any charges are read-in as part of a plea agreement they have the following effects:~~
  - ~~Sentencing – although the judge may consider read-in charges when imposing sentence, the maximum penalty will not be increased.~~
  - ~~Restitution – I may be required to pay restitution on any read-in charges.~~
  - ~~Future prosecution – the State may not prosecute me for any read-in charges.~~
- I understand that if the judge accepts my plea, the judge will find me guilty of the crime(s) to which I am pleading based upon the facts in the criminal complaint and/or the preliminary examination and/or as stated in court.

Voluntary Plea

I have decided to enter this plea of my own free will. I have not been threatened or forced to enter this plea. No promises have been made to me other than those contained in the plea agreement. The plea agreement will be stated in court or is as follows: ☐ **See Attached**

Both sides stipulate to NGI and agree the doctor reports allow the Court to make the NGI finding. Both sides free to argue as to whether institutional care or conditional release is appropriate.

Defendant's Statement

I have reviewed and understand this entire document and any attachments. I have reviewed it with my attorney (if represented). I have answered all questions truthfully and either I or my attorney have checked the boxes. I am asking the court to accept my plea and find me guilty.

▶ x Morgan Geyser — Defendant

9/26/17 — Date

Attorney's Statement

I am the attorney for the defendant. I have discussed this document and any attachments with the defendant. I believe the defendant understands it and the plea agreement. The defendant is making this plea freely, voluntarily, and intelligently. ~~I saw the defendant sign and date this document.~~

Attorney

9/26/17 — Date

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

STATE OF WISCONSIN,

Plaintiff, Case No. 2014-CF-000596

Vs.

MORGAN E. GEYSER,

Defendant.

PLEA QUESTIONNAIRE/WAIVER OF RIGHTS ADDENDUM

Maximum penalties: 60 years – 40 years IC, 20 years ES but both sides stipulate to the NGI finding so Ms. Geyser will be committed to the Department of Health Services. The Department will conduct a predisposition investigation prior to disposition. The Court may commit the Defendant to the Department of Health Services for a period not to exceed 40 years.

Dated this 26th day of September, 2017.

KUCHLER & COTTON, S.C.

Electronically signed by
Anthony D. Cotton
State Bar No. 1055106

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1070 ATTEMPTED FIRST DEGREE INTENTIONAL HOMICIDE — §§ 939.32, 940.01(1)(a)

The defendant is charged with attempted first degree intentional homicide.

Statutory Definition of the Crime

The crime of attempted first degree intentional homicide, as defined in § 939.32 and § 940.01 of the Criminal Code of Wisconsin, is committed by one who, with intent to commit first degree intentional homicide, does acts toward the commission of that crime which demonstrate unequivocally, under all of the circumstances, that he or she had formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

Elements of the Crime That the State Must Prove

MG 1. The defendant intended to kill (name of victim).

"Intent to kill" means that the defendant had the mental purpose to take the life of another human being or was aware that (his) (her) conduct was practically certain to cause the death of another human being.

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2. The defendant did acts toward the commission of the crime of (name intended crime) which demonstrate unequivocally, under all of the circumstances, that the defendant intended to kill and would have killed (name of victim) except for the intervention of another person or some other extraneous factor.

Meaning of "Unequivocally"

"Unequivocally" means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts, under the circumstances.

Meaning of "Another Person"

"Another person" means anyone but the defendant and may include the intended victim.

Meaning of "Extraneous Factor"

An "extraneous factor" is something outside the knowledge of the defendant or outside the defendant's control.

When May Intent Exist?

While the law requires that the defendant acted with intent to kill, it does not require that the intent exist for any particular length of time before the act is committed. The act need not be brooded over, considered, or reflected upon for a week, a day, an hour, or even for a minute. There need not be any appreciable time between the formation of the intent and the act. The intent to kill may be formed at any time before the act, including the instant before the act, and must continue to exist at the time of the act.

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Deciding About Intent

You cannot look into a person's mind to find intent. Intent to kill must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

Intent and Motive

Intent should not be confused with motive. While proof of intent is necessary to a conviction, proof of motive is not. "Motive" refers to a person's reason for doing something. While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict. Evidence of motive does not by itself establish guilt. You should give it the weight you believe it deserves under all of the circumstances.

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant intended to kill (name of victim) and that the defendant's acts demonstrated unequivocally that the defendant intended to kill and would have killed (name of victim) except for the intervention of another person or some other extraneous factor, you should find the defendant guilty of attempted first degree intentional homicide.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 1070 was originally published in 1990. This revision was approved by the Committee in December 2000 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction combines the general attempt instruction, Wis JI-Criminal 580, with the instruction for first degree intentional homicide, Wis JI-Criminal 1010. See the footnotes to those instructions for explanations of definitions, etc.

Several adaptations of the general approach recommended by Wis JI-Criminal 580 were possible, which shortened the instruction. Only one element of first degree intentional homicide carries over to the attempt: intent to kill. For a discussion of the law of attempt generally, see the Comment to Wis JI-Criminal 580. For explanation of the Committee's approach to instructing on first degree intentional homicide, see the Comment to Wis JI-Criminal 1010.

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400 PARTY TO CRIME: AIDING AND ABETTING: DEFENDANT EITHER DIRECTLY COMMITTED OR INTENTIONALLY AIDED THE CRIME CHARGED

Party to a Crime

MG

Section 939.05 of the Criminal Code of Wisconsin provides that whoever is concerned in the commission of a crime is a party to that crime and may be convicted of that crime although that person did not directly commit it.

Two Ways in Which Defendant Can Be a Party to a Crime

The State contends[1] that the defendant was concerned in the commission of the crime of (name crime charged) by either directly committing it or by intentionally aiding and abetting the person who directly committed it. If a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly committed it.

Definition of Aiding and Abetting

A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, (he) (she) knowingly either:

- assists the person who commits the crime; or
- is ready and willing to assist and the person who commits the crime knows of the willingness to assist.

To intentionally aid and abet (name crime charge), the defendant must know that another person is committing or intends to commit the crime of (name crime charged) and have the purpose to assist the commission of that crime.[2]

[USE THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.]

[However, a person does not aid and abet if (he) (she) is only a bystander or spectator and does nothing to assist the commission of a crime.]

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State's Burden of Proof – Party To A Crime

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant directly committed the crime of (name crime charged) or intentionally aided and abetted the commission of that crime.

Unanimous Agreement Not Required Regarding Theory Of Party To A Crime

All twelve jurors do not have to agree whether the defendant directly committed the crime or aided and abetted the commission of the crime. However, each juror must be convinced beyond a reasonable doubt that the defendant was concerned in the commission of the crime in one of those ways.[3]

Statutory Definition of the Crime

(Name crime charged), as defined in § _____ of the Criminal Code of Wisconsin, is committed by one who (state the elements of the crime).[4]

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the following _____[5] elements of (name crime charged) were present.

Elements of the Crime That the State Must Prove

DEFINE THE ELEMENTS OF THE CHARGED CRIME. USE THE APPROPRIATE UNIFORM INSTRUCTIONS, OMITTING THE LAST TWO PARAGRAPHS. USE "THE DEFENDANT OR (NAME OF OTHER PERSON)" IN PLACE OF "THE DEFENDANT" THAT IS TYPICALLY USED IN THE UNIFORM INSTRUCTION. IF THE NAME IS NOT KNOWN, USE "THE DEFENDANT OR ANOTHER PERSON."[6]

Jury's Decision

If you are satisfied beyond a reasonable doubt that the defendant directly committed all _____[7] elements of (name crime charged) or that the defendant intentionally aided and abetted the commission of that crime, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

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COMMENT

Wis JI-Criminal 400 was originally published in 1962 and revised in 1994. This revision was approved by the Committee in April 2005 and involved adoption of a new format, nonsubstantive changes to the text, and updating of the Comment.

The originally published version of Wis JI-Criminal 400 (© 1962) provided a single model that included all of the alternative theories of party to crime liability in § 939.05. The 1994 revision provided a series of separate instructions, based on the Committee's conclusion that the basis for liability is more clearly set forth where the instruction addresses only the theories supported by the evidence.

In addition to providing separate instructions, the 1994 revision provided more specifically for integrating the elements of the underlying crime with the facts required for party to crime liability. This structure is believed to be more effective in emphasizing that someone, if not the defendant charged in the instant case, directly committed the crime. Instructions illustrating how several of the models would be implemented are also provided, titled "EXAMPLE."

This instruction is one of three in the series that provides for submitting more than one theory of liability to the jury: directly committing the crime; and aiding and abetting the person who directly committed the crime. Wis JI-Criminal 401 is drafted for the case where aiding and abetting and being a member of a conspiracy are submitted. Wis JI-Criminal 402 is drafted for the case where all three alternatives are submitted.

For an illustration of how this instruction would be applied in a burglary case, see Wis JI-Criminal 400 EXAMPLE.

1. It is recommended, but not required, that the state indicate in the charging document that a party to crime theory of liability will be relied upon. LaVigne v. State, 32 Wis.2d 190, 194, 145 N.W.2d 175 (1966). The statement "the State contends that . . ." is used because it is broad enough to cover cases where the party to crime theory is charged and those where it was not charged but develops based on the evidence presented at trial.

2. The definition of "intentionally" deals with the clear-cut case where the defendant acted with the purpose to assist the commission of the crime charged. "Intentionally" is also defined to include one who is aware that his or her conduct is practically certain to cause the result specified. See § 939.23(3) and Wis JI-Criminal 923A. For a case involving the "natural and probable consequences" variation of aiding and abetting, see Wis JI-Criminal 406.

3. The jurors need not be instructed that they must unanimously agree on the basis of liability, that is, whether the defendant directly committed the crime or aided and abetted its commission. Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979).

4. Here summarize the definition of the underlying crime. This can usually be done by using the statement found in the first paragraph of the uniform instruction.

5. Insert the appropriate number of elements from the uniform instruction for the crime charged.

6. The primary change required in integrating the instruction for the underlying crime is to phrase it in terms of either the defendant or another person committing the crime rather than by using only "the

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defendant." In the type of party to crime case covered by this instruction, either the defendant or the other person may have directly committed the crime.

Wis JI-Criminal 400 EXAMPLE illustrates the integration of the instructions for a burglary case.

7. Insert the appropriate number of elements from the uniform instruction for the crime charged.

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580 ATTEMPT — § 939.32

MG

The defendant is charged with attempted (name intended crime).

Statutory Definition of the Crime

The crime of attempted (name intended crime), as defined in § 939.32 and § ____[1] of the Criminal Code of Wisconsin, is committed by one who, with intent to commit (name intended crime), does acts toward the commission of that crime which demonstrate unequivocally, under all of the circumstances, that he or she had formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements[2] were present.

Elements of the Crime That the State Must Prove

1. The first element of attempted (name intended crime) requires that the defendant intended[3] to commit the crime of (name intended crime).

The crime of (name intended crime) is committed by one who

LIST THE ELEMENTS OF THE INTENDED CRIME AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTIONS AS NECESSARY.[4]

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The crime charged against the defendant in this case, however, is not (name intended crime) as defined but an attempt to commit the crime of (name intended crime).

2. The second element of attempted (name intended crime) requires that the defendant did acts toward the commission of the crime of (name intended crime) which demonstrate unequivocally, under all of the circumstances, that the defendant intended to and would have committed the crime of (name intended crime) except for the intervention of another person or some other extraneous factor.[5]

Meaning of "Unequivocally"

"Unequivocally" means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts, under the circumstances.[6]

Meaning of "Another Person"

"Another person" means anyone but the defendant and may include the intended victim.

Meaning of "Extraneous Factor"

An "extraneous factor"[7] is something outside the knowledge of the defendant or outside the defendant's control.[8]

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

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Jury's Decision

If you are satisfied beyond a reasonable doubt that all the elements of attempted (name intended crime) have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 580 was originally published in 1967 and revised in 1979, 1988, 1995, 2001, and 2002. The 2002 revision involved nonsubstantive changes to the text and revision of the directions in the text at footnote 4. This revision was approved by the Committee in December 2012; it updated the Comment.

Subsection (1) of § 939.32 states the general rule that attempt liability applies only to felonies, plus four specified misdemeanors: § 940.19 Battery; § 940.195 Battery to an unborn child; § 943.20 Theft; and, § 943.74 Theft of farm-raised fish. These subsections enumerate all the offenses which may be prosecuted as 'attempts'." State v. Cvorovic, 158 Wis.2d 630, 634, 462 N.W.2d 897 (Ct. App. 1990). Thus, "attempted fourth degree sexual assault" is not a prosecutable offense. Ibid.

Several offenses are defined to include attempts as violations of the statute involved. These are included in the list found at subsections (1)(c) through (g) of § 939.32. Uniform instructions for these offenses suggest building in the substance of Wis JI-Criminal 580 in summary form. See, for example, Wis JI-Criminal 1290-1296, Intimidation of Victims and Witnesses under §§ 940.42-.46; Wis JI-Criminal 2134, Child Enticement under § 948.07; and Wis JI-Criminal 6030, Possession of a Controlled Substance under § 961.41.

The general rule is that the maximum fine and maximum term of imprisonment for an attempt is half that for the completed crime. § 939.32(1g)(a) and (b)1. The maximum penalty for attempts to commit Class A felonies is that for a Class B felony. Subsections (1g)(b)2. specifies how penalty enhancement provisions affect the penalties. Subsection (1m) specifies how bifurcated sentences are to be structured for attempts.

An issue that has received extensive attention in connection with attempt is commonly discussed in terms of "impossibility": Is a person guilty of an attempt if it was "impossible" for the crime to be committed under the circumstances? This issue was addressed in State v. Kordas, 191 Wis.2d 124, 528 N.W.2d 483 (Ct. App. 1993), where the defendant was charged with an attempt to receive stolen property based on his buying a motorcycle from an undercover police officer. The police had made representations to Kordas that the cycle was stolen when, in fact, it had been provided to the Milwaukee Police Department for educational purposes. The trial court dismissed the charge, holding that it was "legally impossible" to attempt to receive stolen property where, in fact, the property is not stolen. The court of appeals reversed:

> . . . Kordas did in fact possess the necessary criminal intent to commit the crime of receiving stolen property. The extraneous factor — that the motorcycle was not stolen — was unknown to him and had no impact on his intent. Thus the legal impossibility not apparent to Kordas should not absolve him from the offense of attempt to commit the crime he intended. 191 Wis.2d 124, 130 (citations omitted).

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On the crime of attempt generally, see State v. Damms, 9 Wis.2d 183, 100 N.W.2d 592 (1960), and Oakley v. State, 22 Wis.2d 298, 125 N.W.2d 657 (1964). Also see: State v. Henthorn, 218 Wis.2d 526, 581 N.W.2d 544 (Ct. App. 1998), finding the evidence insufficient to support a charge of attempt to obtain a controlled substance by fraud; and State v. Briggs, 218 Wis.2d 61, 579 N.W.2d 783 (Ct. App. 1998), holding that the crime of attempted felony murder does not exist.

1. For example, if the crime charged is attempted burglary, the first part of this sentence would read: "The crime of attempted burglary, as defined in § 939.32 and § 943.10 of the Criminal Code of Wisconsin . . ."

2. The instruction identifies two elements for this offense: (1) intent to commit the crime; and (2) acts which demonstrate unequivocally that the defendant intended to commit and would have committed the crime except for the intervention of another person or some other extraneous factor.

In Berry v. State, 90 Wis.2d 316, 280 N.W.2d 204 (1979), the Wisconsin Supreme Court agreed with this analysis by reversing a decision of the Wisconsin Court of Appeals (see Berry v. State, 87 Wis.2d 85, 273 N.W.2d 376 (Ct. App. 1978)), which had concluded that proof of failure to complete the crime was an essential element of attempt. The supreme court held that "[f]ailure, if and by whatever means the actor's efforts are frustrated, is relevant only insofar as it may negate any inference that the actor did in fact possess the necessary criminal intent to commit the crime in question." 90 Wis.2d 316, 327. This conclusion is consistent with this instruction.

3. See State v. Weeks, 165 Wis.2d 200, 477 N.W.2d 642 (Ct. App. 1991), which discusses the meaning of the intent required for attempts after the 1989 revision of the statute defining "intent." (See § 939.23, discussed in Wis JI-Criminal 923A and 923B.)

4. List the elements set forth in the uniform instruction for the intended crime. Elements beginning with "the defendant" should be modified by deleting those words. Other minor modifications may also be required. The defendant charged with an attempt will not have completed the crime and therefore will not have committed each of the elements. However, the defendant must have intended that all elements of the crime be completed and must have acted with the intent and knowledge required for the completed crime. The Committee recommends including definitions from the uniform instructions when requested or when the evidence has focused on an issue addressed by a definition. Note that some definitions include requirements that are of equal importance to elements of crimes. See, for example, the definitions of "sexual contact" provided in Wis JI-Criminal 1200A and 2101A.

See Wis JI-Criminal 581 EXAMPLE and 582 EXAMPLE for illustrations of how the elements of burglary and armed robbery would be integrated with the general pattern instruction for attempt cases involving attempted burglary and attempted armed robbery. Wis JI-Criminal 1070 provides a model for attempted first degree intentional homicide.

5. The presence of an "extraneous factor" is not a fact which must be separately proved by the state. Rather, it helps define the intent which the defendant must have. See State v. Stewart, 143 Wis.2d 28, 420 N.W.2d 44 (1988), discussed in note 8, below.

"Extraneous factor" is retained in the instruction for several reasons: it is part of the statutory definition; it does help the jury understand the intent required; and, as a practical matter, most attempt cases do involve an "extraneous factor" that has interrupted the defendant's activities.

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The "extraneous factor" issue is discussed in State v. Damms, supra, and Adams v. State, 57 Wis.2d 515, 204 N.W.2d 657 (1973).

6. The "unequivocal act" requirement is discussed in State v. Damms, 9 Wis.2d 183, 100 N.W.2d 592 (1960), and Bethards v. State, 45 Wis.2d 606, 173 N.W.2d 634 (1970).

7. See note 5, supra.

8. The version of Wis JI Criminal 580 in effect from 1967 to the time of the 1988 revision included a footnote on "voluntary desistance" at this point in the text. The note suggested that:

> [w]here there is evidence that the defendant voluntarily desisted, or there is evidence that because of facts that were known to the defendant, it was impossible for him to commit the crime, insert the following paragraph in the instruction:
>
> If the defendant did not commit the crime of _____ (because he voluntarily desisted) or (because of facts, known to the defendant, which made it impossible for him to commit the crime), he is not guilty of attempted _____.

Wis JI-Criminal 580 © 1980.

This reference was deleted in 1988 because of the decision of the Wisconsin Supreme Court in State v. Stewart, 143 Wis.2d 28, 420 N.W.2d 44 (1988). In Stewart, the defendant and Moore confronted a person in a semi-enclosed bus stop shelter. They demanded that the person "give us some change" three or four times in an increasingly loud voice. At one point, Stewart reached into his coat, whereupon Moore told him to "put that gun away." Then a third associate, Levy, stepped into the bus shelter and said to Stewart and Moore: "Come on, let's go." The three men left, though Moore later returned and made small talk with the person from whom money had been requested.

The Wisconsin Supreme Court affirmed Stewart's conviction for attempted robbery. The court did not decide the case on the more narrow grounds of sufficiency of the evidence or whether the victim's resistance and Levy's intervention constituted an "extraneous factor." Rather, the court stated a broader rationale, interpreting § 939.32(3) as follows:

> [T]o prove attempt, the state must prove an intent to commit a specific crime accompanied by sufficient acts to demonstrate unequivocally that it was improbable the accused would desist of his or her own free will. The intervention of another person or some other extraneous factor that prevents the accused from completing the crime is not an element of the crime of attempt. If the individual, acting with the requisite intent, commits sufficient acts to constitute an attempt, voluntary abandonment of the crime after that point is not a defense.

143 Wis.2d, 28, 31.

The court dealt with three issues raised by the defendant. First, the court found the evidence was sufficient to support "the first element of attempted robbery — intent to commit robbery." 143 Wis.2d 28, 37. Second, the court found that Stewart "went far enough" in pursuance of this intent to constitute an attempt. The court rejected Stewart's contention that:

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> . . . sufficient acts are not committed until the intervention of another person or extraneous factor prevents completion of the crime. If there is no such intervention, the defendant argues, the acts taken toward the criminal end are too few to constitute an attempt. In effect the defendant argues that § 939.32(3) requires the state to prove that "the intervention of another person or some other extraneous factor" impeded the defendant's completion of the crime.

143 Wis.2d 28, 38.

Rather, the court concluded that the statute does not require that the defendant's conduct be interrupted by another person or some other extraneous factor:

> When the accused's acts demonstrate unequivocally that the accused will continue unless interrupted, that is, when the acts demonstrate that the accused will probably not desist from the criminal course, then the accused's dangerousness is manifest. Accordingly we reject defendant's assertion that § 939.32(3) requires the state to prove the intervention of another person or an extraneous factor.
>
> The purpose of the language in § 939.32(3) relating to intervention of another person and extraneous factor is to denote that the actor must have gone far enough toward completion of the crime to make it improbable that he would change his mind and desist. The conduct element of § 939.32(3) is satisfied when the accused engages in conduct which demonstrates that only a circumstance beyond the accused's control would prevent the crime, whether or not such a circumstance actually occurs. An attempt occurs when the accused's acts move beyond the incubation period for the crime, that is, the time during which the accused has formed an intent to commit the crime but has not committed enough acts and may still change his mind and desist. In other words the statute requires a judgment in each case that the accused has committed sufficient acts that it is unlikely that he would have voluntarily desisted from commission of the crime.

143 Wis.2d 28, 41-42.

The third issue considered was Stewart's claim that the "voluntary abandonment of criminal conduct after the attempt was complete but before the crime of robbery was consummated excuses him from criminal liability." 143 Wis.2d 28, 44. The court held that § 939.32(3) does not expressly recognize voluntary abandonment as a defense and further held that State v. Hamiel, 92 Wis.2d 656, 285 N.W.2d 639 (1979), did not embrace such a defense either. In the absence of express legislative recognition of the voluntary abandonment (or "voluntary desistance") defense, the court held it was not proper for the court to create it.

Therefore, after Stewart, it is clear that once the defendant "has gone far enough" to constitute an attempt, a decision to end the conduct will not relieve the person of criminal liability for an attempt to commit a crime. Deciding when the attempt has really occurred will continue to be a potentially difficult factual question after Stewart, which the jury will have to resolve by reference to the legal standard provided by § 939.32: Do the defendant's acts demonstrate unequivocally that he intended to commit a crime?

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605 INSTRUCTION ON THE ISSUE OF THE DEFENDANT'S CRIMINAL RESPONSIBILITY — MENTAL DISEASE OR DEFECT[1]

MG You have just heard testimony about the defendant's mental condition at the time of the offense. You will now be asked to determine whether the defendant is not responsible by reason of mental disease or defect.[2]

Two Questions

This issue will be presented to you in the form of two questions.[3]

1. At the time the crime was committed, did the defendant have a mental disease or defect?
2. As a result of the mental disease or defect, did the defendant lack substantial capacity either to appreciate the wrongfulness of the conduct or to conform that conduct to the requirements of law?

You will be asked to answer the second question only if you answer the first question "yes."

The Defendant's Burden of Proof

Before you may answer a question "yes," the defendant must satisfy you to a reasonable certainty by the greater weight of the credible evidence[4] that the answer to that question should be "yes."

Evidence has greater weight when it has more convincing power than the evidence opposed to it. Credible evidence is evidence which in the light of reason and common sense is worthy of belief.[5]

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The First Question

The first question is: At the time the crime was committed, did the defendant have a mental disease or defect?

Meaning of "Mental Disease or Defect"

Mental disease or defect is an abnormal condition of the mind which substantially affects mental or emotional processes.[6]

The term "mental disease or defect" identifies a legal standard that may not exactly match the medical terms used by mental health professionals. You are not bound by medical labels, definitions, or conclusions as to what is or is not a mental disease or defect to which the witnesses may have referred.[7]

You should not find that a person is suffering from a mental disease or defect merely because the person committed a criminal act, or because of the unnaturalness or enormity of the act, or because a motive for the act may be lacking.[8]

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE

[Temporary passion or frenzy prompted by revenge, hatred, jealousy, envy, or the like does not constitute a mental disease or defect.][9]

[An abnormality manifested only by repeated criminal or otherwise antisocial conduct does not constitute a mental disease or defect.][10]

[A voluntarily induced state of intoxication by drugs or alcohol or both does not constitute a mental disease or defect.][11]

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[A temporary mental state which is brought into existence by the voluntary taking of drugs or alcohol does not constitute a mental disease or defect.][12]

[Chronic use of drugs or alcohol may produce a condition that can constitute a mental disease or defect if the condition has become permanent.][13]

Jury Decision on the First Question

If you answer the first question "yes," you must go on to answer the second question. If you answer the first question "no," you should not consider the second question.

The Second Question

The second question is: As a result of the mental disease or defect, did the defendant lack substantial capacity either to appreciate the wrongfulness of the conduct or to conform that conduct to the requirements of law?[14]

If You Answer Both Questions "Yes"

If you answer both of these questions "yes," the defendant will be found to be not responsible for the offense, and will be committed to the Department of Health Services and will be placed in an appropriate institution unless the court determines that the defendant would not pose a danger to (himself) (herself) or to others if released under conditions ordered by the court.[15] In deciding whether the defendant is responsible for the criminal conduct, you are to consider only the issue of the defendant's mental condition at the time the offense was committed.

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Verdict

Agreement by ten or more jurors is sufficient to become the verdict of the jury.[16] Jurors have a duty to consult with one another and to deliberate for the purpose of reaching agreement. At least the same ten jurors should agree in all the answers made. I ask you to be unanimous if you can.

At the bottom of the verdict, you will find a place provided where dissenting jurors, if any, will sign their names and state the answer or answers with which they do not agree. Either the blank lines or the space below them may be used for that purpose.

COMMENT

Wis JI-Criminal 605 is part of a series of instructions which replaces the instructions formerly numbered 600-CPC through 655-CPC. Wis JI-Criminal 605 and comment were originally published in 1980 and revised in 1982, 1984, 1988, 1990, and 2003. The 2003 revision involved combining both mental disease and mental defect in a single instruction, adoption of the new format and changes to the text. This revision was approved by the Committee in December 2010 and involved minor editorial changes.

This instruction is for the second stage of the trial held upon the defendant's special plea of not guilty by reason of mental disease or defect. The second stage is to be held before the same jury that found that the defendant committed the crime, except that a new jury may be drawn if the jury has been discharged before reaching a verdict on the second plea or if an appellate court has reversed the judgment as to the second plea but not the first. § 971.165(1)(c)2. and 3. Also see State v. Sarinske, 91 Wis.2d 14, 280 N.W.2d 725 (1979); State v. Grennier, 70 Wis.2d 204, 234 N.W.2d 316 (1975). If the defendant coupled a guilty plea with the special plea, a jury would have to be convened if one is requested on the issue of criminal responsibility. The usual procedures for accepting a guilty plea must have been followed to assure that the plea was voluntarily entered and that a factual basis for the plea exists. State v. Duychak, 133 Wis.2d 307, 395 N.W.2d 795 (Ct. App. 1986).

In State v. Leach, 124 Wis.2d 648, 370 N.W.2d 240 (1985), reversing (as to this issue) 122 Wis.2d 339, 363 N.W.2d 234 (Ct. App. 1984), the Wisconsin Supreme Court held that the defendant may be held to a burden of producing sufficient evidence on the responsibility issue before it need be submitted to the jury. See page 5 of the Introductory Comment that precedes Wis JI-Criminal 601.

1987 Wisconsin Act 86 (effective date: November 28, 1987) created § 971.165(2) which provides that a five-sixths verdict applies at the second phase.

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650 ADVICE TO A PERSON FOUND NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT

THE FOLLOWING SHOULD BE READ TO A PERSON WHO IS FOUND NOT GUILTY BY REASON OF MENTAL DISEASE OR DEFECT AND COMMITTED TO THE DEPARTMENT OF HEALTH SERVICES

"The court is required to inform you that Section 941.29 of the Wisconsin Statutes provides that if you possess a firearm at any time after being found not guilty of a felony by reason of mental disease or defect you may be sentenced to a term of imprisonment not to exceed 10 years or to pay a fine not to exceed $25,000, or both.[1]

INCLUDE THE FOLLOWING IF THE PERSON HAS BEEN FOUND NOT GUILTY OF A VIOLENT FELONY BY REASON OF MENTAL DISEASE OR DEFECT[2]

["The court is required to inform you that Section 941.291 of the Wisconsin Statutes provides that if you possess a body armor at any time after being found not guilty of a violent felony by reason of mental disease or defect you may be sentenced to a term of imprisonment not to exceed 15 years or to pay a fine not to exceed $50,000, or both.]

"The court has ordered that you be committed to the Department of Health Services and placed in an institution for the reason that you have been found not guilty of (name of crime) by reason of mental disease or defect. You have the right to appeal the finding that you committed (name of crime).[3] You also have the right to appeal this court's decision to place you in an institution.[4] And you have the right to ask the court to order that you be released from the institution on conditions after you have been there for at least six months.[5]

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"You should discuss all of these matters with your attorney. Your attorney is directed to explain these rights to you and to take all necessary actions on your behalf to assure that any rights you wish to pursue are preserved."

COMMENT

This was originally published as SM-50A in 1974 and was revised in 1980 and 1990. It was revised and renumbered as JI 650 in 2004. This revision was approved by the Committee in December 2010 and involved minor editorial changes.

With the exception of the advice regarding possession of a firearm and body armor (see notes 1 and 2, below), the advice provided here is not explicitly required by statute or case law. However, the Committee recommends that it be given, since similar advice is required for all defendants convicted of criminal offenses. See § 973.18(2) and SM-33, INFORMATION ON POSTCONVICTION RELIEF.

1. Section 971.17(1g) requires that "the court shall inform the defendant of the requirements and penalties under s. 941.29." Section 941.29(1) and (2) provide that it is a Class G felony for a person "found not guilty of a felony in this state by reason of mental disease or defect" to possess a firearm. Subsection (7) of that statute provides that the section does not apply if a court subsequently determines that the person is no longer insane or no longer has a mental disease, defect, or illness and is not likely to act in a manner dangerous to public safety. The recommended advice in this instruction does not include the exception described in subsection (7).

2. Section 971.17(1h) requires that "[if] the defendant . . . is found not guilty of a violent felony, as defined in s. 941.291(1)(b), by reason of mental disease or defect, the court shall inform the defendant of the requirements and penalties under s. 941.291." Section 941.291 provides that it is a Class E felony for a person to possess body armor if the person "has been found not guilty of a violent felony in this state by reason of mental disease or defect." § 941.291(2)(d) and (3).

3. Section 971.165(3)(b) provides that a judgment of not guilty by reason of mental disease or defect "is interlocutory to the commitment order under s. 971.17 and reviewable upon appeal therefrom."

4. The standards for commitment to an institution are found in § 971.17(3)(a). If there is a claim that the standards were not met, it is assumed that the claim would be raised in an appeal from the commitment order. Section 971.165(3)(b) refers to appeal from that order. See note 3, supra.

5. The standards and procedures for a petition for conditional release are set forth in § 971.17(4)(a). Conditional release replaces reexamination under the former statutes. See Wis JI-Criminal 660-662.

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