STATE OF WISCONSIN CIRCUIT COURT DODGE COUNTY

STATE OF WISCONSIN

Plaintiff

-vs-

LARRY LINDE Case No. 16 CF 196

Defendant

**DECISION RE MOTION FOR RECONSIDERATION OF DECISION MODIFYING BURDEN OF PROOF JURY INSTRUCTION**

The State has moved the Court to reconsider its decision to modify the burden of proof jury instruction. The State offers additional arguments against modification. The Court will now reconsider its decision to address the State's arguments.

First, it is not contested that the Court has the discretion to modify the jury instruction. This discretion is not unlimited. The Court may only modify an instruction in a way that reflects the state of the law. A circuit court has no authority to make or change the law.

The State correctly argues that much legal precedent exists supporting the current jury instruction regarding the criminal burden of proof. This Court grants great deference to this precedent. However, the Court also has the responsibility to use its skills and experience to review the law, and if possible, to improve its administration while maintaining the strictest

fidelity to it. The Court can't close its eye to the fact that people have been wrongfully convicted people and then been later exonerated after serving many years in prison. The Court can't close its eye to empirical evidence that may help the criminal justice system be more accurate in discerning guilt from innocence, and be more faithful to the stricture of the Constitution of the United States requiring a criminal charge to be proven beyond a reasonable doubt.

First, the Court wants to deal with the methodological arguments against Cicchini and White, *Truth or Doubt? An Empirical Test of Criminal Jury Instructions,* Univ. Rich. L. Rev., Vol. 50:1139 (hereinafter CW). The Court believes that it has some insight here, as before becoming an attorney, the Court obtained a master of science degree in resource economics with a concentration on quantitative methods (statistics). Further, the Court believes that the result of this study raises an issue that should not be lightly dismissed.

The State argues "The first problem is that the entire premise of the article was biased from the start. The authors were not searching for the truth: they were not looking to see what effect various instructions might have in a mock trial situation. What they were searching for was evidence to back their contention that an instruction that urges jurors to search for the truth will lead to more convictions than an instruction that urges jurors to search for doubt. This initial bias likely affected both the way the study was conducted and the way the results were construed." (State's brief pp. 6 & 7.)

The State misunderstands research methodology. CW was testing two hypotheses. The first hypothesis was that truth and doubt are separate concepts and that a jury instruction that solely instructs to search for the truth will result in higher conviction rates than an instruction that instructs solely to search for doubt. The null hypothesis is that these concepts are the same and that conviction rates should be equal regardless of the instruction. Empirical proof must overcome the presumption that the null hypothesis is true before the alternative hypothesis can be accepted.

The second hypothesis is that a jury instruction that combines a truth instruction with a doubt instruction diminishes the State's burden of proof and will result in a higher conviction rate than an instruction solely addressing doubt. Again, the null hypothesis is that the combined instruction will have no effect on conviction rates and that conviction rates should be equal regardless of the instruction.

The positing of hypotheses is not bias, but is the first step in scientific investigation. The empirical results from sound methods are what inform. If the empirical difference between the hypotheses is statistically significant, the null hypothesis is rejected and the posited hypothesis is accepted. The State's statement that: "This initial bias likely affected both the way the study was conducted and the way the results were construed" is less than persuasive. The State provides no evidence nor argument of how bias affected how the study was conducted or the presentation

of the results. The study was apparently biased because the State says it was biased. The Court is generally highly skeptical of ipse dixit arguments and refuses to accept it on this topic.

The second argument of the State is that the samples used by CW were not random. The State's argument can be summarized by its statement: "This limited self-selection is the antithesis of random sampling which is the foundation of valid empirical research, as well as fair and impartial juries." This argument is conflated with an argument that the population used by CW have different qualities than a randomly selected jury. The Court will discuss the second argument later.

While the State is correct that "random sampling is the foundation of valid empirical research", it is wrong about CW not using random sampling. The researchers recruited 300 mock jurors using Amazon's Mechanical Turk. Two participants were disqualified because they were not U.S. citizens. The article states, "Before being asked to render a verdict of guilty or not guilty, the 298 mock jurors were **randomly assigned** to one of three groups, each of which received a different jury instruction." CW at 1152. The 298 mock jurors comprised the study sample of the population of potential jurors. The sample was then divided **randomly** into three treatment groups. Random assignment into the three groups of approximately 100 mock jurors was used, as it is used in any scientific study. Random assignment minimizes the chance of creating a consistent difference between the groups that might bias the treatment groups.

Random assignment also creates a probability distribution that is useful in statistical analysis. CW used random sampling. The State's argument fails.

The State also argues that the use of Amazon Mechanical Turk to select a population sample makes CW invalid because "it is not that good at recruiting a representative sample of the population as a whole."

The Wiki article also states:

> "Beginning in 2010, numerous researchers have explored the viability of Mechanical Turk to recruit subjects of social science experiments. Thousands of papers that rely on data collected from Mechanical Turk workers are published each year, including hundreds in top ranked academic journals. Researchers generally found that while samples of respondents obtained through Mechanical Turk do not perfectly match all relevant characteristics of the U.S. population, they're not wildly misrepresentative either." https://en.wikipedia.org/wiki/Amazon_Mechanical_Turk.

The question of whether or not the chosen sample is representative of the population is always a concern. It does not invalidate a study, but may call into question the application of the results of the study to a larger population. The Court agrees that additional study would be helpful in understanding this issue, but the only evidenced-based opinion of the topic is CW.

The State then argues that the sample that was used in CW should not have been random but the participants should have been screened through a voir dire process to weed-out those with "pre-conceived" ideas. If voir dire would have occurred, the sample would have been biased

based on the subjective bias of the person(s) doing the voir dire (and striking possible study participants) resulting in the study's validity being compromised by the subjectivity of those doing the voir dire.

The State then brings up a red-herring argument that the participants did not hear real witnesses to be able assess "tonal quality, volume, and speech patterns" to " give clues to whether a witness is telling the truth." This is an often repeated bromide in the law with little empirical proof to support it. In fact, the bulk of the research would say humans are very poor at ascertaining truth by observing a speaker, and the bigger error is believing that one can ascertain truth through observing a speaker. See for example, Ekman, Paul; Telling Lies: Clues to Deceit in the Marketplace, Politics, and Marriage."

But it is a red-herring because in no way does not using live witnesses undermine the validity of CW. One could have presented live witnesses, but that would have been a different study. As long as the variable of the story told in the study was consistent among groups, how the story was told makes no difference—the differences between groups would not be biased.

The Court understands that CW is only one study. It has not been replicated. It was not published in a scientific journal, but in a law review that does not have rigorous peer review of

those trained in quantitative methods. However, it is the only piece of evidence on this topic and clearly should raise consternation.

The Court now wants to discuss the current reasonable doubt instruction without reference to CW as the Court agrees with much of the State's argument. The State admits that truth and doubt are separate concepts. "Truth is what happens. … Doubt is uncertainty about what happened." State's brief page 3. (CW also states "In fact, truth and doubt are two separate concepts: truth refers to a judgment about whether something happened; doubt refers to the level of certainty in that judgment. CW at 1144) The State further argues that a trial is a search for the truth. "The instruction properly depicts reasonable doubt as a conclusion that the truth cannot be found with sufficient certainty to warrant a conviction." The Court is in agreement.

The Court will turn to the modern elucidation of the reasonable doubt requirement in criminal cases—In re Winship, 397 U.S. 358, 363–64, 90 S. Ct. 1068, 1072, 25 L. Ed. 2d 368 (1970). There, the Court held:

> "The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.' As the dissenters in the New York Court of Appeals observed, and we agree, 'a person accused of a crime would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.'

"The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. As we said in Speiser v. Randall, supra, 357 U.S., at 525—526, 78 S.Ct., at 1342: 'There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of convincing the factfinder of his guilt.' To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.' In re Winship, 397 U.S. 358, 363–64, 90 S. Ct. 1068, 1072, 25 L. Ed. 2d 368 (1970)

The search for the truth is the search for what happened. The burden of proof is the search for one's certainty about what happened. In a civil case, the burden of proof is to the greater weight of the credible evidence. The jury is instructed that if they are convinced that one side had more convincing proof of what happened, that side should win (either plaintiff or defendant). If the jury would just be guessing at the verdict (i.e. a tie), then the burden of proof was not met, and the plaintiff loses. A tie goes to the defendant.

In other cases, the burden of proof is clear satisfactory and convincing evidence. If the evidence is not clear, satisfactory, and convincing then the defendant should win even if the jury believed the plaintiff's version of what happened.

And in criminal cases, the burden of proof is beyond a reasonable doubt. Using the statistics paradigm, "what happened" is akin to the expected value or mean. The burden of proof is akin to the confidence interval around the mean.

For example, if I blindly reached in a jar of marbles and made four selections, and three of them were black and one red, I could say: "Based on a rational consideration of the evidence my best estimation is that this jar is filled with 75% black marbles and 25% red marbles." But I would also say: "I am not certain of that. I have my doubts. It may have just been chance that I selected three black marbles. I may be way off."

But, if I blindly reached in a jar of marbles and made four hundred selections, and three hundred of them were black and one hundred of them were red, I could say: "Based on a rational consideration of the evidence, my best estimation is that this jar is filled with 75% black marbles and 25% red marbles." But now I would also say: "I am quite certain of that. I do not have a reasonable doubt. I might not be perfectly correct, but I am quite certain the jar has very close to 75% black marble and 25% red marbles."

The best estimation of the contents of the jar is the simple mean. In both scenarios the simple mean was 75% black marbles and 25% red marbles. That is the search for the truth of what actually is in the jar. However, the certainty of that result is calculated by a different

statistic called the standard error. The larger the sample size, the smaller the standard error all other things remaining equal.

Without getting into the technical details of calculating standard errors, one could say in the scenario with four observations, " I am 95% sure that the jar holds between 31% and 99% black marbles. The difference between the two numbers is the confidence interval. The confidence interval is wide in this scenario—68 percentage points

In the second scenario with 400 observations, one could say: "I am 95% sure that the jar holds between 71% and 79% black marbles." In this scenario the confidence interval is eight percentage points. As you can see, "the truth" is the same under both scenarios. (The jar hold 75% black marbles.) However, the certainty of "the truth" is very different.

One cannot evaluate a situation without both evaluating the expected value (mean) and the confidence interval around that expected value. Which brings me to the problem with the current burden of proof jury instruction.

The current jury instruction reads as follows:

**"140 BURDEN OF PROOF AND PRESUMPTION OF INNOCENCE**

**In reaching your verdict, examine the evidence with care and caution. Act with judgment, reason, and prudence.**

Presumption of Innocence

**Defendants are not required to prove their innocence. The law presumes every person charged with the commission of an offense to be innocent. This presumption requires a finding of not guilty unless in your deliberations, you find it is overcome by evidence which satisfies you beyond a reasonable doubt that the defendant is guilty.**

State's Burden of Proof

**The burden of establishing every fact necessary to constitute guilt is upon the State. Before you can return a verdict of guilty, the evidence must satisfy you beyond a reasonable doubt that the defendant is guilty.**

Reasonable Hypothesis

**If you can reconcile the evidence upon any reasonable hypothesis consistent with the defendant's innocence, you should do so and return a verdict of not guilty.**

Meaning of Reasonable Doubt

**The term "reasonable doubt" means a doubt based upon reason and common sense. It is a doubt for which a reason can be given, arising from a fair and rational consideration of the evidence or lack of evidence. It means such a doubt as would cause a person of ordinary prudence to pause or hesitate when called upon to act in the most important affairs of life.**

**A reasonable doubt is not a doubt which is based on mere guesswork or speculation. A doubt which arises merely from sympathy or from fear to return a verdict of guilt is not a reasonable doubt. A reasonable doubt is not a doubt such as may be used to escape the responsibility of a decision.**

**While it is your duty to give the defendant the benefit of every reasonable doubt, you are not to search for doubt. You are to search for the truth."**

The jury instruction discusses the State's burden to prove every element of the crime beyond a reasonable doubt. The problem is with the last two sentences. Anyone who has had any

experience in the criminal justice system knows the importance of these last two sentences. (The Court has been both a defense attorney and the District Attorney.)

At closing, the defense attorney argues the burden of proof instruction, many times not mentioning the last phrase, and then the prosecutor, on rebuttal, then reads these last two lines to the jury, emphasizing that: "You are not to search for doubt. You are to search for the truth."

The Court believes that statement, "You are not to search for doubt" vitiates the beyond a reasonable doubt burden proof. The CW study confirms that it is vitiated. The Court does not believe, as CW indicates, that the mixing of the search for truth and doubt is what harms the instruction. The Court believes it is the very command from the Court not to evaluate the case for doubt that vitiates the beyond a reasonable doubt instruction.

Not searching for doubt is the same as saying don't consider that a difference exists between the 75% black marble estimate with a sample size of four marbles and the 75% black marble estimate with a sample size of four hundred marbles. One must search for the truth and one must search for doubt.

This Court believes that the following change to the last two lines of the criminal burden of proof instruction will enhance the criminal justice system's adherence to our Constitution requiring the State to prove a criminal charge beyond a reasonable doubt. The last two lines of this instruction will be deleted and change to:

"It is your duty to give the defendant the benefit of every reasonable doubt while you search for the truth."

**Dated: August 10, 2017**

**BY THE COURT:**

Steven G. Bauer
Circuit Court Judge

cc. DISTRICT ATTORNEY
DEFENSE ATTORNEY