§ 300.40 Court's charge; submission of indictment to jury; counts to be submitted.

The court may submit to the jury only those counts of an indictment remaining therein at the time of its charge which are supported by legally sufficient trial evidence, and every count not so supported should be dismissed by a trial order of dismissal. The court's determination as to which of the sufficient counts are to be submitted must be in accordance with the following rules:

1. If the indictment contains but one count, the court must submit such count.

2. If a multiple count indictment contains consecutive counts only, the court must submit every count thereof.

3. If a multiple count indictment contains concurrent counts of murder in the first degree, the court must submit every such count. In any other case, if a multiple count indictment contains concurrent counts only, the court must submit at least one such count, and may submit more than one as follows:

(a) With respect to non-inclusory concurrent counts, the court may in its discretion submit one or more or all thereof;

(b) With respect to inclusory concurrent counts, the court must submit the greatest or inclusive count and may or must, under circumstances prescribed in section 300.50, also submit, but in the alternative only, one or more of the lesser included counts. A verdict of guilty upon the greatest count submitted is deemed a dismissal of every lesser count submitted, but not an acquittal thereon. A verdict of guilty upon a lesser count is deemed an acquittal upon every greater count submitted.

4. If a multiple count indictment contains two or more groups of counts, with the counts within each group being concurrent as to each other but consecutive as to those of the other group or groups, the court must submit at least one count of each group, in the manner prescribed in subdivision three. If an indictment contains one or more

of such groups of concurrent counts, and also one or more other counts each of which is consecutive as to every other count of the indictment, the court must submit each individual consecutive count and at least one count of each group of concurrent counts.

5. If an indictment contains two inconsistent counts, the court must submit at least one thereof. If a verdict of guilty upon either would be supported by legally sufficient trial evidence, the court may submit both counts in the alternative and authorize the jury to convict upon one or the other depending upon its findings of fact. In such case, the court must direct the jury that if it renders a verdict of guilty upon one such count it must render a verdict of not guilty upon the other. If the court is satisfied that a conviction upon one such count, though supported by legally sufficient trial evidence, would be against the weight of the evidence while a conviction upon the other would not, it may in its discretion submit the latter count only.

6. Notwithstanding any other provision of this section, the court is not required to submit any particular count to the jury when:

(a) The people consent that it not be submitted; except that nothing contained in this paragraph limits the right accorded a defendant by section 300.50 to the submission, in certain situations, of counts charging lesser included offenses; or

(b) The number of counts or the complexity of the indictment requires selectivity of counts by the court in order to avoid placing an unduly heavy burden upon the jury in its consideration of the case. In such case, the court may submit to the jury a portion of the counts which are representative of the people's case.

7. Every count not submitted to the jury is deemed to have been dismissed by the court. Where the court, over objection of the people, refuses to submit a count which is consecutive as to every count actually submitted, such count is deemed to have been dismissed by a trial order of dismissal even though no such order was expressly made by the court.