70 TRANSCRIPTS NOT AVAILABLE FOR DELIBERATIONS; READING BACK TESTIMONY

You will not have a written transcript of the trial testimony to use during your deliberations. [You may ask to have specific portions of the testimony read to you.] You should pay careful attention to all the testimony because you must rely on your memory of the testimony and evidence when you are deliberating.

COMMENT

Wis JI-Children 70 was approved by the Committee approved this revision in June 2022.

The purpose of this instruction is to correct any misimpressions jurors may have about the immediate availability of written transcripts of the trial testimony.

In some cases, the trial judge may want to add the following: "You may ask to have specific portions of the testimony read to you."

This is not intended to encourage jury requests for the rereading of testimony. However, "When a jury has questions regarding testimony, 'the jury has a right to have that testimony read back to it, subject to the discretion of the trial judge to limit the reading.'" See State v. Anderson, 2006 WI 77, ¶83, 291 Wis.2d 673, 717 N.W.2d 74 citing Kohlhoff v. State, 85 Wis.2d 148, 159, 270 N.W.2d 63 (1978). Anderson was abrogated in part by State v. Alexander, 2013 WI 70, 349 Wis. 2d 327, 833 N.W.2d 126 on different grounds.

[Note: Anderson, supra, was abrogated in part by State v. Alexander, 2013 WI 70, 349 Wis. 2d 327, 833 N.W.2d 126. In Alexander, the supreme court held that "Anderson changed what should have been a fact-specific due-process inquiry (did the communication between the judge and jury deny the defendant a fair and just hearing?) into an absolute Confrontation Clause right to be present whenever the trial court speaks with members of the jury. Alexander, supra, ¶28. The court in Alexander thus withdraw all language from Anderson intimating such a right."].

The judge may choose to summarize the testimony in lieu of having it read. Salladay v. Town of Dodgeville, 85 Wis. 318, 323, 55 N.W. 696 (1893). See also, Kohlhoff v. State, supra at 160. In Kohlhoff, the jury requested clarification of the defendant's testimony. Subsequent to this request, a conference was held in chambers and out of the presence of the jury between the defendant, respective counsel, and the trial judge. The record reflects that during the conference, a portion of the testimony was read, and that both counsel and the defendant participated in regard to the trial judge's summary. However, the record did not set forth in detail what was actually discussed. In its holding, the supreme court took the opportunity to make two observations. First, when a jury poses a question regarding testimony that has been presented,

"the judge may, in the exercise of his [or her] discretion, choose to present a summary of the testimony to the jury instead of having it read." Id. at 160. However, the court further provided that "the far better practice is to have the testimony read to the jury." Second, conferences such as the in chambers meeting conducted in Kohlhoff should be fully transcribed. Id. For other cases applying these standards, see State v. Tarrell, 74 Wis.2d 647, 659, 247 N.W.2d 696 (1976); and Jones v. State, 70 Wis.2d 41, 57 58, 233 N.W.2d 430 (1975).