

405 FALSUS IN UNO

If you are satisfied from the evidence that a witness has willfully testified falsely to a material fact, you may, in your discretion, disregard all the testimony of the witness which is not supported by other credible evidence in the case.

COMMENT

This instruction was approved by the Committee in 1972 and revised in 2010 and 2018.

Use of this instruction is not favored. It should not be given routinely although the Committee believes its discretionary use is appropriate in some circumstances. See, however, the caveat in Ollman v. Wisconsin Health Care Liab. Ins. Plan, 178 Wis.2d 648, 505 N.W.2d 399 (Ct. App. 1993). To warrant giving this instruction, the trial court must be satisfied that there is sufficient evidentiary basis to show there was willful false swearing to a material fact. Pumorlo v. Merrill, 125 Wis. 102, 103 N.W. 64 (1905); 50 Marq. L. Rev. 507 (1967). See also State v. Robinson, 145 Wis.2d 273, 281, 426 N.W.2d 606 (Ct. App. 1988).

Omission of "credible" is error. Blankavag v. Badger Box & Lumber Co., 136 Wis. 380, 386, 117 N.W. 852, 854 (1908).

To warrant giving this instruction, there must be some basis in evidence to show false swearing. Pumorlo, *supra* at 110-12. In Estate of Neumann v. Neumann, 2001 WI 61, 242 Wis.2d 205, 626 N.W.2d 821, the court noted that the numerous inconsistencies and contradictions in the defendant's deposition and trial testimony provided an evidentiary basis to show there was willful false swearing by the defendant to material facts. The court noted the instruction is not proper where there are mere discrepancies in the testimony that are most likely attributed to defects of memory or mistake. It also agreed with the language in the instruction suggesting that even if the falsus in uno instruction is given, the jury is not required to find the witness willfully testified falsely.

In State v. Williamson, 84 Wis.2d 370, 267 N.W.2d 337 (1978), the refusal to give the falsus in uno instruction in a criminal case was upheld where the witness maintained that her prior testimony was inconsistent because she was confused. The court noted that "[t]he falsus in uno instruction is not favored in the law," citing: Annot., 4 A.L.R.2d 1077 (1949), and emphasized the evidentiary basis required for giving the instruction:

In order for the falsus in uno instruction to be appropriate, the false testimony must be on a material point and must be willful and intentional. Mere discrepancies in the testimony that are most likely attributed to defects of memory or mistake are not basis for rejecting a witness's testimony entirely. 84 Wis.2d 370, 394.