

220B LAW NOTE: STATEMENT OF ACCOMPLICE ADMITTED FOR NONHEARSAY PURPOSE

COMMENT

Wis JI-Criminal 220B was originally published in 1985 and revised in 1987. This version was republished without change in Release No. 28—12/91.

This note discusses the use of an accomplice's confession in the trial of a single defendant, where evidence of that confession is admitted for a nonhearsay purpose. In Tennessee v. Street, 471 U.S. 409 (1985), the U.S. Supreme Court held that the mandatory severance rule of Bruton v. United States, 391 U.S. 123 (1968), was not implicated where the confession of an accomplice was admitted for a nonhearsay purpose. See the discussion of Bruton in Wis JI-Criminal 220, Withdrawal Note.

In Street, the confession of an accomplice was introduced to rebut the defendant's testimony that his own statement was coercively derived from the accomplice's statement. The Court held that since the statement was not introduced to prove what happened at the murder scene (that would have been a "hearsay purpose" — to prove the truth of the statement), admission raises no confrontation clause concerns.

The Court said the only similarity to Bruton is that the statement could have been misused by the jury. This danger can be effectively addressed by a limiting instruction directing the jury to consider the statement for the nonhearsay purpose only.

The Wisconsin appellate courts have not yet adopted the Tennessee v. Street rule. Although the situation comes close to implicating the constitutional concerns of Bruton, the basis for the decision was the distinction between hearsay and nonhearsay purpose. Whether such a distinction will be adopted in Wisconsin is not known at the time this Note was prepared. On one hand, the Wisconsin courts have tended to follow the United States Supreme Court's lead on issues like this. See, for example, State v. Smith, 117 Wis.2d 399, 344 N.W.2d 711 (1983), adopting the plurality decision in Parker v. Randolph, 442 U.S. 62 (1969), on the interlocking confessions issue. Parker v. Randolph's exception for interlocking confessions has been repudiated. See Cruz v. New York, 481 U.S. 186 (1987), discussed at Wis JI-Criminal 220A, Withdrawn. On the other hand, it is difficult to admit evidence for a limited purpose and, more importantly, difficult to assure that a juror will use the evidence only for the limited purpose. (See sample instruction below.) This may lead Wisconsin trial and appellate courts to use considerable caution in the Tennessee v. Street situation by making a careful evaluation of the probative value of the evidence compared to its unfairly prejudicial effect. See § 904.03, Wis. Rules of Evidence.

Limiting instructions are inherently difficult. One for this situation is especially difficult to evaluate in a general form. An instruction adapted for the facts of Tennessee v. Street might read as follows:

Evidence has been received of a statement made out-of-court by Clifford Peele.

This evidence is to be considered only for the purpose of rebutting the defendant's testimony that his own confession was a coerced copy of Peele's statements.

It must not be considered as proof of the facts contained in the statement.