245 TESTIMONY OF ACCOMPLICES

You have heard testimony from (name accomplice) who stated that (he) (she) was involved in the crime charged against the defendant. You should consider this testimony with caution and great care, giving it the weight you believe it is entitled to receive. You should not base a verdict of guilty upon it alone, unless after consideration of all the evidence you are satisfied beyond a reasonable doubt that the defendant is guilty.

COMMENT

Wis JI-Criminal 245 was originally published in 1962 and was revised in 1983 and 1992. This revision was approved by the Committee in January 2000.

The 1999 revision involved a substantial rewriting of the former instruction, based in part on instruction 3.22, Federal Criminal Jury Instructions of the Seventh Circuit (West, 1980). The revision was intended to make the instruction more understandable without changing the meaning.

When this instruction is used, it should be given immediately after the general instruction on credibility of witnesses, see Wis JI-Criminal 300.

In cases where the accomplice has been granted immunity or other concessions, see Wis JI-Criminal 246. In State v. Nerison, the court of appeals had reversed Nerison's conviction because the trial testimony of two accomplices "was so indelibly and irreparably tainted by the state's actions in securing it that its admission violated Nerison's due process rights." The court of appeals found that the state had "crossed the line" in bargaining with the accomplices for specific testimony. 130 Wis.2d 313, 387 N.W.2d 128 (Ct. App. 1986). The Wisconsin Supreme Court reversed, holding that the due process line referred to by the court of appeals was not crossed due to the presence of corroborating evidence of guilt and the fact that all the traditional due process safeguards were made available: full disclosure of the state's agreement with the accomplices, cross-examination of the witnesses, and a specific jury instruction on the credibility of the accomplices. 136 Wis.2d 37, 401 N.W.2d 1 (1987). The Nerison court did not explicitly require a cautionary instruction in all cases, but giving an instruction should be carefully considered, given the court's emphasis on an instruction as one of the three important safeguards.

Other Wisconsin cases that discuss instructions on accomplice testimony have been concerned with whether it was error to fail to give an instruction. Most cases have found there to be no error, sometimes because the witness was not actually an accomplice, see Cheney v. State, 44 Wis.2d 454, 174 N.W.2d 1 (1969), or because the testimony of the accomplice was not uncorroborated, see Cheney, supra, Bizzle v. State, 65 Wis.2d 730, 233 N.W.2d 577 (1974), and State v. Linse, 93 Wis.2d 163, 286 N.W.2d 554 (1980). But see Abaly v. State, 163 Wis. 609, 158 N.W. 308 (1916), where the court held it was prejudicial error to refuse to give an accomplice testimony instruction.

