315 DEFENDANT ELECTS NOT TO TESTIFY

[TO BE GIVEN ONLY IF REQUESTED BY DEFENDANT.][1]

A defendant in a criminal case has the absolute constitutional right not to testify.

The defendant's decision not to testify must not be considered by you in any way and must not influence your verdict in any manner.

COMMENT

Wis JI-Criminal 315 and comment were originally published in 1962 and revised in 1979, 1981, and 1985. Wis JI-Criminal 315 was republished without change in 1991. The 2001 revision updated the comment.

Wis JI-Criminal 315 is to be used in cases where there have been no unusual circumstances calling attention to the accused's failure to testify. For example, where the prosecutor makes improper comments about the defendant's failure to take the witness stand, a more detailed instruction may be required which directs the jury to disregard the comment. See State v. Jackson, 219 Wis. 13, 261 N.W. 732 (1935). Wis JI-Criminal 315 is also not appropriate where reference has been made to the accused's silence at the time of arrest; such situations, to the extent they are curable by jury instructions, will require a different type of admonition.

Wis JI-Criminal 315 also does not deal with the unique issues presented in the rare case where a defendant elects not to testify but makes an opening statement or a closing argument to the jury. See State v. Johnson, 121 Wis.2d 237, 258 N.W.2d 824 (Ct. App. 1984).

An instruction like Wis JI-Criminal 315 must be given when requested by the defendant. Carter v. Kentucky, 450 U.S. 288 (1981). However, the trial court does not have the obligation to give the instruction sua sponte in the absence of a request by the defendant. The Committee recommends that the instruction not be given unless requested, see discussion in note 1, below.

Subsection 905.13(1) provides that a claim of privilege is not a proper subject for comment by judge or counsel. Subsection 905.13(3) provides that upon request, a party against whom the jury might draw an adverse inference from a claim of privilege is entitled to a jury instruction that no such inference is to be drawn. In criminal cases, these sections apply to the privilege against self-incrimination. Wis JI-Criminal 315 does not use the precise statutory language: ". . . draw no inference therefrom." The Committee concluded that the direction that the exercise of the privilege "must not be considered by you in any way and must not influence your verdict" is a more understandable equivalent of "draw no inference."

Evidence providing an explanation for a defendant=s failure to take the stand is not relevant. State v. Heuer, 212 Wis.2d 58, 61, 567 N.W.2d 638 (Ct. App. 1990).

1. The Committee recommends that Wis JI-Criminal 315 be given only when requested by the defendant. In Champlain v. State, 53 Wis.2d 751, 193 N.W.2d 868 (1972), the Wisconsin Supreme Court held

that giving the instruction in the absence of defense request or objection was not reversible error. But the court noted that the giving of such an instruction is a matter of trial strategy and that ". . . the better practice is for the trial judge to give the instruction only if it is requested by the defendant. . . . In a case where the trial court might feel because of the facts and the lack of skill of counsel for the defense such an instruction might well be given, the trial judge might properly offer such instruction for defense counsel's consideration." 53 Wis.2d 751, 758. But see Price v. State, 37 Wis.2d 117, 130, 154 N.W.2d 222 (1967), which suggests that this should be done only in the case where there is unusual disparity in the skill of counsel.

The giving of the instruction over the defendant's objection was reviewed and upheld by the U.S. Supreme Court in Lakeside v. Oregon, 435 U.S. 333 (1978). The defendant argued that giving the instruction, even though the instruction was intended to be neutral, constituted an impermissible comment on his constitutional right not to testify. The Court held that the Constitution forbids only adverse comment on the failure to testify. Correctly instructing the jury in the meaning of the privilege against self-incrimination is not an adverse comment; it is more like an instruction on basic concepts like burden of proof and reasonable doubt. The Court also rejected the defendant's claim that the giving of the instruction violated his right to counsel by interfering with the planned trial strategy. The Court noted, however:

> It may be wise for a trial judge not to give such a cautionary instruction over a defendant's objection. And each State is, of course, free to forbid its trial judges from doing so as a matter of state law. We hold only that the giving of such an instruction over the defendant's objection does not violate the privilege against compulsory self-incrimination guaranteed by the Fifth and Fourteenth Amendments.

435 U.S. 333, 340-41.

The Committee recommends that Wis JI-Criminal 315 be given only when requested by the defendant. It must be given if there is a proper request. Carter v. Kentucky, 450 U.S. 288 (1981).

