

412 PARTY TO CRIME: WITHDRAWAL FROM A CONSPIRACY

WHERE THERE IS EVIDENCE OF WITHDRAWAL, ADD THE FOLLOWING

You must also consider whether the defendant withdrew from the conspiracy before the crime was committed.

A person withdraws if (he) (she) voluntarily changes (his) (her) mind, no longer desires that the crime be committed, and notifies the other parties concerned of the withdrawal within a reasonable period of time before the commission of the crime so as to allow the others also to withdraw.

A person who withdraws from a conspiracy is not held accountable for the acts of the others and cannot be convicted of any crime committed by the others after timely notice of withdrawal.

COMMENT

Wis JI-Criminal 412 was originally published in 1994 and revised in 2005. This revision involved an addition to the Comment. It was approved by the Committee in October 2007.

The substance of this instruction is based on § 939.05(2)(c), which applies where a person is charged as a party to a completed crime committed by a member of a conspiracy of which the defendant is also a member. Subsection (2)(c) provides in part:

This paragraph does not apply to a person who voluntarily changes his or her mind and no longer desires that the crime be committed and notifies the other parties concerned of his or her withdrawal within a reasonable time before the commission of the crime so as to allow the others also to withdraw.

This withdrawal rule applies only to cases under § 939.05. Withdrawal is not a defense to the inchoate crime of conspiracy as defined in § 939.31. See Wis JI-Criminal 570, Comment.

The instruction on withdrawal should be added to the appropriate instruction at the point indicated in the text of that instruction. It is also recommended that there be an addition to the concluding paragraph summarizing the findings required for a guilty verdict to the effect that the defendant did not withdraw. The latter is also provided in the text of the appropriate instructions.

The Committee concluded that withdrawal should be handled in the same manner as other affirmative defenses under Wisconsin law. The burden of production is on the defendant to introduce or point to "some evidence" tending to show withdrawal. If that showing is made, the burden of persuasion is on the State to prove beyond a reasonable doubt that withdrawal did not occur. As to the general rules in Wisconsin relating to "affirmative defenses," see Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979) and State v. Felton, 110 Wis.2d 485, 329 N.W.2d 161 (1983).