Chapter 7.00

SPECIAL EVIDENTIARY MATTERS

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7.01 INTRODUCTION

That concludes the part of my instructions explaining the elements of the crime [and the defendant's position]. Next I will explain some rules that you must use in considering some of the testimony and evidence.

Use Note

The bracketed language in the first sentence should be used when a defense has been explained or a defense theory instruction has been given.

Committee Commentary 7.01

(current as of July 1, 2019)

This instruction is a transitional one to be used as a lead-in to the instructions explaining the rules for evaluating evidence.

7.02A DEFENDANT'S ELECTION NOT TO TESTIFY OR PRESENT EVIDENCE

(1) A defendant has an absolute right not to testify [or present evidence]. The fact that he did not testify [or present any evidence] cannot be considered by you in any way. Do not even discuss it in your deliberations.

(2) Remember that it is up to the government to prove the defendant guilty beyond a reasonable doubt. It is not up to the defendant to prove that he is innocent.

Use Note

The bracketed language in paragraph (1) should be included when the defense has not presented any evidence.

If there is more than one non-testifying defendant, and some, but not all, the defendants request this instruction, it should be given in general terms without using the defendants' names.

Committee Commentary 7.02A

(current as of July 1, 2019)

The need for such an instruction in federal criminal cases was first noted in Bruno v. United States, 308 U.S. 287 (1939), in which a unanimous court held that 18 U.S.C. § 3481 required such an instruction where the defendant requested it. In Carter v. Kentucky, 450 U.S. 288 (1981), the Court firmly based the right on the Fifth Amendment and extended the requirement to state criminal prosecutions. The instruction is patterned after Federal Judicial Center Instruction 22.

In Lakeside v. Oregon, 435 U.S. 333 (1978), the Supreme Court upheld the practice of a state trial judge giving such an instruction over the defendant's objection that the instruction would call attention to his failure to testify. The *Lakeside* Court reasoned that the Fifth and Fourteenth Amendments bar only adverse comment on a defendant's failure to testify, and that "a judge's instruction that the jury must draw no adverse inferences of any kind from the defendant's exercise of this privilege not to testify is 'comment' of an entirely different order." *Id.* at 339. While it may be permissible to give this instruction over the defendant's objection, the better practice is not to give it unless it is requested by the defendant.

The Committee found no Sixth Circuit opinions where, in a case involving multiple defendants, one defendant requested such an instruction while another objected to it. However, following the reasoning in *Carter* and *Lakeside*, it is clear that any such instruction is not harmful to a co-defendant. The Commentary to Federal Judicial Center Instruction 22 recommends that if there is more than one non-testifying defendant and an instruction is requested by some but not all such defendants, it should be given in general terms without the use of the defendants' names.

7.02B DEFENDANT'S TESTIMONY

(1) You have heard the defendant testify. Earlier, I talked to you about the "credibility" or the "believability" of the witnesses. And I suggested some things for you to consider in evaluating each witness's testimony.

(2) You should consider those same things in evaluating the defendant's testimony.

Use Note

This instruction should be used when the defendant chooses to testify.

Committee Commentary 7.02B

(current as of July 1, 2019)

This instruction refers back to Instruction 1.07 Credibility of Witnesses.

7.02C WITNESS OTHER THAN THE DEFENDANT INVOKING THE FIFTH AMENDMENT

(1) You have heard _____ [*insert witness's name*] exercise his right under the Fifth Amendment to the United States Constitution to refuse to answer questions because the testimony might tend to incriminate him.

(2) You must not infer anything at all, for or against either the government or the defendant, because the witness did not answer.

Use Note

This instruction should be used when a witness other than the defendant declines to answer questions because of the Fifth Amendment.

Committee Commentary 7.02C

(current as of July 1, 2019)

This instruction is a cautionary instruction to help offset any prejudice that may arise when a witness declines to testify based on the Fifth Amendment.

The Sixth Circuit has quoted limiting instructions which helped avoid error when witnesses asserted the Fifth Amendment. *See* United States v. Mack, 159 F.3d 208, 217 (6th Cir. 1998); United States v. Okeezie, 1993 WL 20997, 10, 1993 U.S. App. LEXIS 1968, 4 (6th Cir. 1993) (unpublished). The language of Instruction 7.02C is based on these quoted instructions.

The Fifth Amendment to the United States Constitution states that "No person shall be . . . compelled in any criminal case to be a witness against himself . . . ." This privilege applies to a witness at a trial as well as to the defendant. *See, e.g., Mack, supra*; United States v. Gaitan-Acevedo, 148 F.3d 577, 588 (6th Cir. 1998). Thus, the parties' right to compel witnesses to testify must yield to the witness's assertion of the Fifth Amendment, assuming it is properly invoked. *Mack, supra*; *Gaitan-Acevedo,* 148 F.3d at 588, *citing* United States v. Damiano, 579 F.2d 1001, 1003 (6th Cir. 1978).

To assert the privilege, the witness must have a reasonable fear of danger of prosecution. *Mack*, *supra*; *Gaitan-Acevedo, supra* at 588, *citing Damiano, supra*. *See also* In re Morganroth, 718 F.2d 161, 167 (6th Cir. 1983) ("reasonable cause to apprehend a real danger of incrimination"), *citing* Hoffman v. United States, 341 U.S. 479 (1951). The privilege can be asserted to cover answers which would themselves support a criminal conviction, and also to cover answers which would furnish a link in the chain of evidence needed to prosecute. *In re* Morganroth, *supra* at 164, *citing Hoffman*, 341 U.S. at 486.

Although a witness has a right to assert the Fifth Amendment when called to testify, there is some danger in allowing the witness to assert it in front of a jury. In United States v. Vandetti, 623 F.2d 1144 (6th Cir. 1980), the court explained:

> There are two constitutional problems which may arise when a witness is presented who refuses to testify relying upon the fifth amendment privilege. The first problem is that such a witness permits the party calling the witness to build its case out of inferences arising from the use of the testimonial privilege, a violation of due process. "Neither side has the right to benefit from any inferences the jury may draw from the witness' assertion of the privilege alone or in conjunction with questions that have been put to him." Nevertheless, although guilt is not properly inferable from the exercise of the privilege, it is feared that its assertion in the presence of the jury may have a disproportionate effect on its deliberations.
>
> Second, calling such a witness encroaches upon the right to confrontation. . . . The probative value of this sort of testimony is almost entirely undercut by the impossibility of testing it through cross-examination.

Vandetti, supra (citations omitted). In addition, the American Bar Association Standards for Criminal Justice provide that the prosecution and defense should not call a witness in the presence of the jury who the party knows will claim a valid privilege not to testify. See American Bar Association Standards for Criminal Justice, the Prosecution Function, Standard 3-5.7(c) and *id.*, the Defense Function, Standard 4-7.6(c).

Notwithstanding these dangers, parties may still seek to call a witness, subject to the court's discretion, knowing the witness will refuse to answer under the Fifth Amendment. United States v. Vandetti, *supra* at 1147, *citing* United States v. Kilpatrick, 477 F.2d 357, 360 (6th Cir. 1973) and United States v. Compton, 365 F.2d 1, 5 (6th Cir. 1966). *See, e.g.,* United States v. Mack, *supra* at 217. *See also* Lindsey v. United States, 484 U.S. 934 (1987) (White and Brennan, JJ., dissenting from denial of cert., acknowledging Sixth Circuit law that party may seek to call witness whom party knows will assert the Fifth Amendment and noting circuit split on this issue).

Because of the competing interests involved, *i.e.*, the constitutional concerns versus the factfinders' need to operate with as much relevant information as possible, the judge should "closely scrutinize" requests to call a witness who has indicated he will assert the Fifth Amendment. *Vandetti*, 623 F.2d at 1147, *citing* United States v. Maffei, 450 F.2d 928, 929 (6th Cir. 1971). The judge should "weigh a number of factors in striking a balance between the competing interests." *Vandetti,* 623 F.2d at 1149, *citing* Eichel v. New York Central R. Co, 375 U.S. 253, 255 (1963). "The judge must determine whether the probative value of the proffered evidence is substantially outweighed by the danger of unfair prejudice." *Vandetti,* 623 F.2d at 1149, *citing* F. R. Evid. 403. Factors to balance include: (1) the extent of the questioning following the witness's assertion of the Fifth Amendment, *see Vandetti*, 623 F.2d at 1149; (2) the value of the testimony sought, *id.*; (3) the phrasing of the questions to minimize prejudice, *id.* at 1150; and (4) the effect of a limiting instruction, United States v. Epley, 52 F.3d 571, 577 (6th Cir. 1995) and *Vandetti*, 623 F.2d at 1149.

The Sixth Circuit has elaborated on the role of cautionary instructions, stating:

> Even though a cautionary instruction may be useful, it may not be sufficiently ameliorative in all cases. . . . Some courts have suggested that any prejudice to the government arising from the absence of a witness, who, if called, would assert his fifth amendment privilege, can be dissipated by an instruction that the witness is not available to either side and that no inferences about his testimony may be drawn by the jury.

Vandetti, 623 F.2d at 1148 & 1150 (citations omitted).

7.03 OPINION TESTIMONY

(1) You have heard the testimony of _____, who testified as an opinion witness.

(2) You do not have to accept _____'s opinion. In deciding how much weight to give it, you should consider the witness's qualifications and how he reached his conclusions. Also consider the other factors discussed in these instructions for weighing the credibility of witnesses.

(3) Remember that you alone decide how much of a witness's testimony to believe, and how much weight it deserves.

Use Note

If the witness testifies to both opinions and facts, a cautionary instruction such as Instruction 7.03A on the dual role should be given in addition to Instruction 7.03. This situation usually arises when law enforcement witnesses testify. See the discussion in the commentary below.

Committee Commentary 7.03

(current as of July 1, 2019)

In United States v. Johnson, 488 F.3d 690 (6th Cir. 2007), the court said that district judges should use the term "opinion" rather than "expert" in the presence of the jury. *Id.* at 698. Although the court found no plain error on the facts in *Johnson*, the court explained that, "'Except in ruling on an objection, the court should not, in the presence of the jury, declare that a witness is qualified as an expert or to render an expert opinion . . . .'" *Johnson, supra* at 697, *quoting* ABA Civil Trial Practice Standard 17 (Feb. 1998). Based on *Johnson*, Instruction 7.03 uses the term "opinion" in lieu of the term "expert."

In *Johnson*, the court also counseled district judges not to certify before the jury that a witness is qualified as an expert. The court explained, "Instead, the proponent of the witness should pose qualifying and foundational questions and proceed to elicit opinion testimony. If the opponent objects, the court should rule on the objection, allowing the objector to pose voir dire questions to the witness's qualifications if necessary and requested." *Johnson, supra* at 698.

The *Johnson* court's disapproval of certifying a witness as an expert is consistent with previous cases. In Berry v. City of Detroit, 25 F.3d 1342 (6th Cir. 1994), the court pointed out that the Federal Rules of Evidence do not call for a proffer and stated that in a previous case, United States v. Kozminski, 821 F.2d 1186, 1219 (6th Cir. 1987) (en banc) (dissent), the Sixth Circuit "counseled against putting some general seal of approval on an expert after he has been qualified but before any questions have been posed to him." Berry v. City of Detroit, *supra* at 1351.

In paragraph (2), the final sentence mentioning other instructions on the credibility of witnesses refers to Instruction 1.07 Credibility of Witnesses, which identifies the general bases for evaluating witness credibility.

The admissibility of expert testimony is governed by Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993) and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). These decisions do not affect the instruction.

"Expert testimony, even if uncontradicted, may be believed in its entirety, in part, or not at all." Dawahare v. Spencer, 210 F.3d 666, 671 (6th Cir. 2000). In holding that the arbitration panel was not compelled to accept the expert's damages evidence, the Sixth Circuit cited authority from other circuits, including Quinones-Pacheco v. American Airlines, Inc., 979 F.2d 1, 5 (1st Cir. 1992) (holding that fact finder is not ordinarily bound by uncontradicted expert opinion testimony, particularly where testimony "lacks great convictive force" in context of evidence as a whole); Gregg v. U.S. Indus., Inc., 887 F.2d 1462, 1469-70 (11th Cir. 1989) (holding that expert testimony is not conclusive and need not be accepted).

Caution is required when a law enforcement officer testifies both as a fact witness and as an opinion witness. See Instruction 7.03A.

Under the Federal Rules of Evidence, an expert may testify in order to assist the trier of fact to understand the evidence or determine a fact in issue. Such testimony may be in the form of an opinion. Fed. R. of Evid. 702. The basic approach to opinion testimony in the Federal Rules of Evidence is to allow it when it is helpful to the trier of fact. This includes opinions as to an ultimate issue to be decided by the trier of fact. Fed. R. of Evid. 704. However, opinion testimony as to ultimate issues with respect to a defendant's mental state or condition may not be introduced. Fed. R. of Evid. 704(b); United States v. Pickett, 604 F.Supp. 407 (S.D. Ohio 1985).

7.03A WITNESS TESTIFYING TO BOTH FACTS AND OPINIONS

(1) You have heard the testimony of _____, who testified to both facts and opinions. Each of these types of testimony should be given the proper weight.

(2) As to the testimony on facts, consider the factors discussed earlier in these instructions for weighing the credibility of witnesses.

(3) As to the testimony on opinions, you do not have to accept _____'s opinion. In deciding how much weight to give it, you should consider the witness's qualifications and how he reached his conclusions along with the other factors discussed in these instructions for weighing the credibility of witnesses.

(4) Remember that you alone decide how much of a witness's testimony to believe, and how much weight it deserves.

Use Note

If this instruction is given at the time the witness testifies, the language in paragraphs (2) and (3) referring to other instructions should be modified.

Committee Commentary 7.03A

(current as of July 1, 2019)

Caution is required when a witness testifies both as a fact witness and as an opinion witness. In this situation, the court should give a cautionary instruction so that the jury can give proper weight to each type of testimony and the court can guard against the inherent risk of confusion when a witness testifies in both roles. This situation usually arises when law enforcement witnesses testify.

It is clear that omitting a cautionary instruction like 7.03A is error. *See* United States v. Smith, 601 F.3d 530, 540 (6th Cir. 2010); United States v. Vasquez, 560 F.3d 461, 470 (6th Cir. 2009). Whether that error requires that the conviction be reversed is a distinct question. In United States v. Lopez-Medina, 461 F.3d 724 (6th Cir. 2006), the court vacated the conviction, holding it was plain error to allow a government agent to give dual testimony as both a fact witness and an opinion witness when no cautionary instruction was given and there was no clear demarcation between the officer's fact testimony and opinion testimony. *Id.* at 744-45. In such cases, the court " 'should take care to assure that the jury is informed of the dual roles of a law enforcement officer as a fact witness and an expert witness, so that the jury can give proper weight to each type of testimony.' " *Id.* at 743, *quoting* United States v. Thomas, 74 F.3d 676, 683 (6th Cir. 1996), *abrogated on other grounds by* General Elec. Co. v. Joiner, 522 U.S. 136, 143 (1997). For example, the Sixth Circuit found no abuse of discretion in allowing such dual testimony "where the court 'instructed the jury, both before [an agent] gave his opinion and again in the jury charge, that it should consider [the agent's] dual roles in determining what

weight . . . to give [his] expert testimony.' " *Lopez-Medina, supra* at 743, *quoting* United States v. Tocco, 200 F.3d 401, 419 (6th Cir. 2000).

In several cases handed down after *Lopez-Medina*, the court has distinguished that case and concluded that omission of a cautionary instruction like 7.03A was not plain error and did not require that the conviction be reversed. *See* United States v. Ham, 628 F.3d 801, 806 (6th Cir. 2011); United States v. Smith, 601 F.3d 530, 540-41 (6th Cir. 2010); United States v. Vasquez, 560 F.3d 461, 470-71 (6th Cir. 2009). In United States v. Martin, 520 F.3d 656 (6th Cir. 2008), the court distinguished *Lopez-Medina, supra* and found that failure to give a cautionary instruction on dual role testimony did not constitute plain error based on the particular facts in *Martin*. The court stated that the fact and opinion testimony were not so thoroughly intertwined in *Martin* as they were in *Lopez-Medina*, and that *Lopez-Medina* involved other evidentiary errors whereas *Martin* did not. *Id.* at 659. *See also* United States v. Cobbs, 2007 U.S. App. LEXIS 12826, 2007 WL 1544207 (6th Cir. 2007) (unpublished) (stating that a cautionary instruction on the witness's dual role should have been given but finding no plain error on the facts).

Paragraph (1) is based on the phrase from *Lopez-Medina* quoted above that the jury should be informed of the dual roles so it can give "proper weight to each type of testimony."

Paragraph (2) refers to the factors mentioned in Instruction 1.07 Credibility of Witnesses.

Paragraphs (3) and (4) are based on Instruction 7.03 Opinion Testimony.

7.04 IMPEACHMENT BY PRIOR INCONSISTENT STATEMENT NOT UNDER OATH

(1) You have heard the testimony of _____. You have also heard that before this trial he made a statement that may be different from his testimony here in court.

(2) This earlier statement was brought to your attention only to help you decide how believable his testimony was. You cannot use it as proof of anything else. You can only use it as one way of evaluating his testimony here in court.

Use Note

This instruction must be given when a prior inconsistent statement which does not fall within Fed.R.Evid. 801(d)(1)(A) has been admitted.

If several prior inconsistent statements were admitted, some for impeachment purposes and others as substantive evidence, this instruction should identify which statements were offered for impeachment purposes.

Committee Commentary 7.04

(current as of July 1, 2019)

A panel of the Sixth Circuit has stated that this instruction is "clearly a correct statement of the law . . . ." United States v. Johnson, 1995 WL 517229, 3, 1995 U.S. App. LEXIS 32896, 6 (6th Cir. 1995) (unpublished).

Often the question is not the content of the instruction but whether it should be given. In two cases, the Sixth Circuit did not resolve whether omitting the instruction was error because it found the omission harmless. In United States v. Aguwa, 123 F.3d 418, 422 (6th Cir. 1997), the trial court refused to instruct that prior inconsistent statements not under oath are evidence of credibility only and not substantive evidence. The Sixth Circuit affirmed the conviction, stating that the defendant was not prejudiced and might have actually benefitted from the absence of such an instruction. *Id.*

In the second case the Sixth Circuit concluded it was error to give the instruction but found the error harmless. *See* United States v. Toney, 161 F.3d 404 (6th Cir. 1998) (holding it was error for district court to give Instruction 7.04 because no evidence of a prior inconsistent statement was admitted but error harmless).

This instruction deals only with prior inconsistent statements *not* under oath. The Committee considered drafting an instruction on prior statements under oath and discarded the idea. As the First Circuit explains in commentary, the instruction on prior inconsistent statements not under oath is:

> for use where a witness's prior statement is admitted only for impeachment purposes. Where a prior statement is admitted substantively under Fed.R. Evid. 801(d)(1), this instruction is not appropriate. Once a prior statement is admitted substantively as non-

> hearsay under Rule 801(d)(1), it is actual evidence and may be used for whatever purpose the jury wishes. No instruction seems necessary in that event, but one may refer to Federal Judicial Center Instructions 33 and 34.

Pattern Jury Instructions: First Circuit, Criminal Cases, Instruction 2.02 Comment.

The traditional view had been that a prior statement of a witness is hearsay if offered to prove the matters asserted therein. This did not preclude the use of the prior statement to impeach the witness if the statement was inconsistent with his testimony. Fed. R. Evid. 801(d)(1)(A) carved out an exception where the prior statement was under oath in a judicial hearing or in a deposition. Where a prior statement does not fall within Fed. R. Evid. 801(d)(1)(A), the jury must be instructed that the statement is offered solely to impeach the credibility of the witness. United States v. Harris, 523 F.2d 172, 175 (6th Cir.1975).

If during the course of the trial, several prior inconsistent statements were admitted, some for impeachment purposes and others as substantive evidence, then this instruction should be given with the court identifying the impeaching statement or statements.

7.05A IMPEACHMENT OF DEFENDANT BY PRIOR CONVICTION

(1) You have heard that before this trial the defendant was convicted of a crime.

(2) This earlier conviction was brought to your attention only as one way of helping you decide how believable his testimony was. You cannot use it for any other purpose. It is not evidence that he is guilty of the crime that he is on trial for now.

Use Note

This instruction should not be given if evidence of other crimes has been admitted for one of the approved purposes under Fed. R. Evid. 404(b). Instead, the jury should be specifically instructed on the purpose for which the evidence was admitted. See Instruction 7.13.

Committee Commentary 7.05A

(current as of July 1, 2019)

Generally, evidence of a defendant's prior conviction is only admissible to attack his credibility as a witness. See Fed. R. Evid. 609; United States v. Sims, 588 F.2d 1145, 1149 (6th Cir.1978). The defendant is entitled, upon request, to an instruction limiting the jury's consideration of the conviction to the purpose for which it was admitted.

The defendant's commission of other crimes may also be admissible for other purposes under Fed. R. Evid. 404(b). In such cases, this instruction should not be given. Instead the jury should be specifically instructed on the purpose for which the evidence may be considered. See Instruction 7.13.

7.05B IMPEACHMENT OF A WITNESS OTHER THAN DEFENDANT BY PRIOR CONVICTION

(1) You have heard the testimony of _____. You have also heard that before this trial he was convicted of a crime.

(2) This earlier conviction was brought to your attention only as one way of helping you decide how believable his testimony was. Do not use it for any other purpose. It is not evidence of anything else.

Committee Commentary 7.05B
(current as of July 1, 2019)

This instruction should be used when a witness other than the defendant is impeached by a prior conviction.

7.06A TESTIMONY OF A PAID INFORMANT

(1) You have heard the testimony of _____. You have also heard that he received money [or _____] from the government in exchange for providing information.

(2) The use of paid informants is common and permissible. But you should consider _____'s testimony with more caution than the testimony of other witnesses. Consider whether his testimony may have been influenced by what the government gave him.

(3) Do not convict the defendant based on the unsupported testimony of such a witness, standing alone, unless you believe his testimony beyond a reasonable doubt.

Use Note

The bracketed language in paragraph (1) should be used when some consideration other than money has been given.

This instruction may not be necessary if the informant's testimony has been materially corroborated, or if an accomplice cautionary instruction has been given.

Committee Commentary 7.06A

(current as of July 1, 2019)

In United States v. Wheaton, 517 F.3d 350 (6th Cir. 2008), the court rejected a challenge to an instruction similar to Instruction 7.06A for two reasons. The first reason was that the instruction given provided ample notice that the testimony should be viewed with suspicion; the second reason was that the instruction given was "almost identical to . . . Sixth Circuit Pattern Criminal Jury Instruction 7.06A . . . ." *Id.* at 363.

In On Lee v. United States, 343 U.S. 747, 757 (1952), the Supreme Court said that to the extent an informant's testimony raises serious questions of credibility, the defendant is entitled to have the issue submitted to the jury "with careful instructions."

No cautionary instruction is required when there is no evidence that the witness was an informant. See United States v. Vinson, 606 F.2d 149, 154 (6th Cir. 1979). Less clear is whether an instruction is required if the witness's testimony has been materially corroborated. In United States v. Griffin, 382 F.2d 823, 827-28 (6th Cir. 1967), the Sixth Circuit indicated in dictum that even if corroborated, the better practice would be to give a cautionary instruction. But subsequently, in United States v. Vinson, *supra*, the Sixth Circuit rejected the argument that a cautionary instruction should have been given, in part on the ground that the witness's testimony had been materially corroborated. *Vinson* also indicated that no instruction was required because the district court had instructed the jury to treat the witness's testimony with care because of evidence that he was an accomplice, and that this "had the same cautionary effect" as if the court had given an informant instruction. *Id.*

Instruction 7.06A does not use the term "informer" in order to avoid pejorative labeling. *See* United States v. Turner, 490 F.Supp. 583 (E.D.Mich.1979), *aff'd*, 633 F.2d 219 (6th Cir.1980). It is based on Federal Judicial Center Instruction 24.

7.06B TESTIMONY OF AN ADDICT-INFORMANT UNDER GRANT OF IMMUNITY OR REDUCED CRIMINAL LIABILITY

(1) You have heard the testimony of _____. You have also heard that he was using _____ during the time that he testified about, and that the government has promised him that he will not be prosecuted for _____ [or will _____] in exchange for his testimony.

(2) It is permissible for the government to make such a promise. But you should consider _____'s testimony with more caution than the testimony of other witnesses. An addict may have a constant need for drugs, and for money to buy drugs, and may also have a greater fear of imprisonment because his supply of drugs may be cut off. Think about these things and consider whether his testimony may have been influenced by the government's promise.

(3) Do not convict the defendant based on the unsupported testimony of such a witness, standing alone, unless you believe his testimony beyond a reasonable doubt.

Use Note

The bracketed language in paragraph (1) should be used when some consideration other than an agreement not to prosecute has been given by the government.

Whether this instruction must be given may depend on the particular circumstances of the case.

Committee Commentary 7.06B

(current as of July 1, 2019)

In United States v. Anderson, 1998 WL 833701, 1998 U.S. App. LEXIS 30121 (6th Cir. 1998) (unpublished), the defendant requested an "addict-witness instruction" and the district court refused. A panel of the Sixth Circuit noted that Pattern Instruction 7.06B, and the underlying case law, refer to addict-*informants*, and then went on to discuss the propriety of refusing the instruction. The panel stated there was no "per se rule" requiring this instruction whenever an addict-informant testifies; district courts should assess the need for such an instruction based on the circumstances of each case. *Anderson*, 1998 WL at 4, 1998 LEXIS at 12, *quoting* United States v. Brown, 946 F.2d 1191, 1195 (6th Cir. 1991). The panel concluded that, assuming that the addict-informant instruction applied in the case of an addict-witness/codefendant, the district court did not err by refusing the instruction because the jury was aware of the witness's addiction, the witness's testimony was corroborated, and a cautionary instruction was given. *Anderson*, 1998 WL at 4, 1998 LEXIS at 13, *citing* United States v. McGhee, 882 F.2d 1095, 1100 (6th Cir. 1989) (stating there is less need for an addict-informant instruction when the jury is aware of the witness's addiction and there is substantial corroboration for the witness's testimony).

In other cases, panels of the Sixth Circuit have likewise concluded that omission of an addict-informant instruction was not error. In United States v. Rich, 2000 WL 92269, 5, 2000 U.S. App. LEXIS 826, 13 (6th Cir. 2000) (unpublished), the panel reiterated that there was no

per se rule requiring an addict-informant instruction, *citing Brown, supra* at 1195, and concluded it was not error to refuse the instruction because no evidence suggested that the witness was addicted at the relevant time. In United States v. Lopez, 1999 WL 397947, 1999 U.S. App. LEXIS 11827 (6th Cir. 1999) (unpublished), a panel held that it was not error to omit an addict-informant instruction. The trial judge gave a general witness credibility instruction, cautioning the jury to weigh carefully testimony affected by a witness's own interest, and the panel stated that this instruction accomplished the same objective as an addict-informant instruction by warning jurors that the credibility of the witnesses might be suspect.

The instruction is a plain English version of the instruction approved in United States v. Hessling, 845 F.2d 617 (6th Cir.1988). *Hessling* approved the instruction but did not mandate its use.

7.07 TESTIMONY OF A WITNESS UNDER GRANT OF IMMUNITY OR REDUCED CRIMINAL LIABILITY

(1) You have heard the testimony of _____. You have also heard that the government has promised him that [he will not be prosecuted for _____] [he will _____] in exchange for his cooperation.

(2) It is permissible for the government to make such a promise. But you should consider _____'s testimony with more caution than the testimony of other witnesses. Consider whether his testimony may have been influenced by the government's promise.

(3) Do not convict the defendant based on the unsupported testimony of such a witness, standing alone, unless you believe his testimony beyond a reasonable doubt.

Use Note

In paragraph (1) , the first bracketed language should be used when the plea agreement is based on a government promise not to prosecute; the second bracketed language should be used when the plea agreement is based on some other consideration, such as a recommendation for a reduced sentence. It should also be used when the government and the defendant have a use immunity agreement.

This instruction may not be necessary when the witness's testimony has been materially corroborated.

Committee Commentary 7.07

(current as of July 1, 2019)

The Sixth Circuit has described this as a “proper jury instruction[]” that “correctly” and “properly” informs the jury about this issue. United States v. Hynes, 467 F.3d 951, 971 (6th Cir. 2006) (instruction given was Pattern Instruction 7.07, see Joint Appendix at 940).

The purpose of this instruction is to alert the jury to potential credibility problems with witnesses who have entered into plea bargains in exchange for their testimony.

The instruction avoids using the terms plea bargain and plea agreement.

Since the rationale for this instruction is similar to that for Instruction 7.06A on the testimony of an informant, the limitations from United States v. Vinson, 606 F.2d 149 (6th Cir.1979) should apply. Where ample corroboration of the testimony exists, the instruction may not be necessary.

7.07A TESTIMONY OF A WITNESS UNDER COMPULSION

(1) You have heard that the court compelled the testimony of _____. You have also heard that his testimony cannot be used against him by the government except in a prosecution for perjury.

(2) You should consider _____'s testimony with more caution than the testimony of other witnesses. Consider whether his testimony may have been influenced by this grant of immunity.

(3) Do not convict any of the defendants based on the unsupported testimony of such a witness, standing alone, unless you believe that testimony beyond a reasonable doubt.

Use Note

This instruction may not be necessary when the witness's testimony has been materially corroborated.

Committee Commentary 7.07A

(current as of July 1, 2019)

The purpose of this instruction is to alert the jury to potential credibility problems with witnesses who testified under compulsion. *See* 18 U.S.C. § 6001 *et seq.*

7.08 TESTIMONY OF AN ACCOMPLICE

(1) You have heard the testimony of _____. You have also heard that he was involved in the same crime that the defendant is charged with committing. You should consider _____'s testimony with more caution than the testimony of other witnesses.

(2) Do not convict the defendant based on the unsupported testimony of such a witness, standing alone, unless you believe his testimony beyond a reasonable doubt.

[(3) The fact that _____ has pleaded guilty to a crime is not evidence that the defendant is guilty, and you cannot consider this against the defendant in any way.]

Use Note

This instruction is not necessary if the jury has been instructed to treat the witness's testimony with caution for other reasons.

Bracketed paragraph (3) should be included when the fact that an accomplice has pleaded guilty has been brought to the jury's attention.

Committee Commentary 7.08

(current as of July 1, 2019)

The Sixth Circuit has described this as a "proper jury instruction[]" that "correctly" and "properly" informs the jury about this issue. United States v. Hynes, 467 F.3d 951, 971 (6th Cir. 2006) (instruction given was Pattern Instruction 7.08, see Joint Appendix at 941). In addition, a panel has cited Instruction 7.08(1) and (2) with approval. United States v. Savoca, 2006 WL 126737, 2006 U.S. App. LEXIS 1465 (6th Cir. 2006) (unpublished) (stating that the instruction "was not erroneous. Indeed, the charge is taken from Sixth Circuit Pattern Instruction 7.08.").

In United States v. Wheaton, 517 F.3d 350 (6th Cir. 2008), the court held that omitting Instruction 7.08 was not error because "an accomplice instruction 'is not necessary if the jury has been instructed to treat the witness's testimony with caution for other reasons.' " *Id.* at 363 (*quoting* the Use Note to Instruction 7.08). Because the district court had given an instruction on treating the witness's testimony with caution that was almost identical to Instruction 7.06A, it was not error to omit Instruction 7.08. *Id.* *Accord*, United States v. Carr, 5 F.3d 986, 992 (6th Cir. 1993) (finding no reversible error in omitting an explicit accomplice testimony instruction because the court substantially covered the same considerations in the general witness credibility instructions; those instructions were adequate because they cautioned the jury to consider "any relation that a witness may bear to either side of the case and his or her reasons for testifying" and stated that "the testimony of a witness may be discredited or impeached by showing that the witness has been convicted of a crime.").

In United States v. Ailstock, 546 F.2d 1285, 1288 (6th Cir. 1976), the Sixth Circuit held that an accomplice instruction alone adequately cautioned the jury about the weight to be given an accomplice's testimony, even though the accomplice had a plea bargain with the government and no plea bargain instruction had been given.

If the court thoroughly instructs the jury about evaluating the witness's credibility, and cautions the jury to use care in considering accomplice testimony, it is not an abuse of discretion to refuse any additional instruction on perjured testimony. United States v. Frost, 914 F.2d 756, 766 (6th Cir. 1990).

7.09 CHARACTER AND REPUTATION OF DEFENDANT

You have heard testimony about the defendant's good character. You should consider this testimony, along with all the other evidence, in deciding if the government has proved beyond a reasonable doubt that he committed the crime charged.

Committee Commentary 7.09
(current as of July 1, 2019)

Some instruction on the defendant's good character is required if supported by the evidence. *See* Edgington v. United States, 164 U.S. 361, 365-67 (1896); *accord* United States v. Huddleston, 811 F.2d 974, 977 (6th Cir. 1987). But there is disagreement about whether the instruction must say that good character evidence "standing alone" may create a reasonable doubt of guilt. *See* Spangler v. United States, 487 U.S. 1224 (1988) (White, J., dissenting from denial of certiorari) (noting disagreement).

Old Supreme Court cases provide some support for the position that "standing alone" language may be appropriate, at least in some circumstances. *See Edgington, supra*, 164 U.S. at 366 ("The circumstances may be such that . . . good character . . . would alone create a reasonable doubt."); Michelson v. United States, 335 U.S. 469, 476 (1948) ("[T]his Court has held that such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed.").

In Poliafico v. United States, 237 F.2d 97, 114 (6th Cir.1956), the court, without extensive analysis, rejected the argument that "standing alone" language should have been included in the district court's instructions. The Sixth Circuit characterized the instructions given, which told the jury to consider the good character evidence along with all the other evidence in the case, as "proper," citing *Edgington* in support. In *Huddleston, supra,* the Sixth Circuit, again without extensive analysis, held that the district court adequately met its responsibility to instruct on good character evidence by instructing the jury to consider such evidence along with all the other evidence in determining whether the government had sustained its burden of proving guilt beyond a reasonable doubt. Based on these cases, the Committee has omitted the "standing alone" language. *See also* United States v. Kirkland, 1994 WL 454864 at 9 n.8, 1994 U.S. App. LEXIS 22925 at 27 n.8 (6th Cir. 1994) (unpublished) (describing "standing alone" language as "not warranted under the law") (*citing* Poliafico v. United States, 237 F.2d 97, 114 (6th Cir. 1956)).

7.10 AGE OF WITNESS

You have heard the testimony of _____, a young witness. No witness is disqualified just because of age. There is no precise age that determines whether a witness may testify. With any witness, young or old, you should consider not only age, but also the witness's intelligence and experience, and whether the witness understands the duty to tell the truth and the difference between truth and falsehood.

Committee Commentary 7.10
(current as of July 1, 2019)

A panel of the Sixth Circuit described this instruction as "a general admonition to the jury to weigh the maturity and experience of a young witness when the jury considers the substance of the testimony presented by that witness." United States v. Bourne, 1994 WL 84742 at 1, 1994 U.S. App. LEXIS 4562 at 2-3 (6th Cir. 1994) (unpublished).

Under Fed. R. Evid. 601 there is no specific age requirement for the competency of witnesses.

In 1990, Congress enacted The Child Victims' and Child Witnesses' Rights Act, 18 U.S.C. § 3509. This Act defines children as persons under eighteen who are or allegedly are victims of physical abuse, sexual abuse or exploitation, or are witnesses to a crime committed against another. *Id.* § 3509(a)(2). The Act provides, "A child is presumed to be competent." *Id.* § 3509(c)(2). In *Bourne*, *supra*, a panel of the Sixth Circuit noted that this provision lends itself to the interpretation that a child witness is presumed competent to testify in the absence of an express determination to the contrary, but the issue was not preserved and the panel did not rule on it. *Bourne*, 1994 WL at 1, 1994 U.S. App. LEXIS at 3.

In United States v. Allen J., 127 F.3d 1292, 1295 (10th Cir. 1997), the court stated: "Upon enactment of § 3509, the rules changed. Now children are presumed competent and the party seeking to prevent a child from testifying has the burden of providing a compelling reason for questioning the child's competence." Similarly, the Seventh Circuit has concluded that § 3509(c)(2) means that "Children are presumed to be competent to testify." United States v. Snyder, 189 F.3d 640, 645 (7th Cir. 1999).

The statutory presumption of competency is a procedural rule to use in determining the competency of a child witness and does not affect the applicability of the instruction after the child witness is found competent.

7.11 IDENTIFICATION TESTIMONY

(1) You have heard the testimony of _____, who has identified the defendant as the person who _____. You should carefully consider whether this identification was accurate and reliable.

(2) In deciding this, you should especially consider if the witness had a good opportunity to see the person at that time. For example, consider the visibility, the distance, whether the witness had known or seen the person before, and how long the witness had to see the person.

[(3) You should also consider the circumstances of the earlier identification that occurred outside of court. For example, consider how that earlier identification was conducted, and how much time passed after the alleged crime before the identification was made.]

[(4) You may take into account any occasion in which the witness failed to make an identification of defendant, or made an identification that was inconsistent with his identification at trial.]

(5) Consider all these things carefully in determining whether the identification was accurate and reliable.

(6) Remember that the government has the burden of proving beyond a reasonable doubt that the defendant was the person who committed the crime charged.

Use Note

This instruction should be given when the identification has become an issue because of lack of corroboration, or limited opportunity for observation, or when the witness's memory has faded by the time of trial.

Bracketed paragraph (3) should be included when evidence of an out-of-court identification has been admitted.

Bracketed paragraph (4) should be included when evidence of an earlier failure to make identification or evidence of an inconsistent identification is admitted.

Committee Commentary 7.11

(current as of July 1, 2019)

The testimony of a single eyewitness is sufficient to take a criminal case to the jury. However, courts have recognized that there is a serious possibility of mistake inherent in uncorroborated identification testimony. United States v. O'Neal, 496 F.2d 368 (6th Cir. 1974). In cases where identification is a key issue, courts have required an instruction that emphasizes the need for finding that the circumstances of the identification are convincing beyond a reasonable doubt.

The leading case is United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972). *Telfaire* set out a model instruction in an appendix which emphasized: (1) the capacity and opportunity of the witness to observe reliably the offender; (2) the question whether the identification was the product of the witness's own recollection; (3) the inconsistent identification made by the same witness; and (4) the credibility of the witness. *Id.* at 558-59. The *Telfaire*-type instruction was adopted by the Sixth Circuit in United States v. Scott, 578 F.2d 1186, 1191 (6th Cir. 1978). The language in the instruction is drawn directly from *Telfaire, supra*.

The instruction should be given when the identification has become an issue because of lack of corroboration or limited opportunity for observation, or where the witness's memory has faded by the time of trial. *Scott, supra.*

This instruction omits any mention of the credibility of the identification witnesses because that topic is adequately covered in the general credibility instruction, Instruction 1.07. If the credibility of identification witnesses is a particularly significant issue in a case, the *Scott* decision gives district courts the leeway to mention the credibility factor in this instruction as well as in the general credibility instruction. *See Scott, supra* (listing as a factor the jury should consider "(4) the credibility of the witness.").

7.12 SUMMARIES AND OTHER MATERIALS NOT ADMITTED IN EVIDENCE

During the trial you have seen counsel use [summaries, charts, drawings, calculations, or similar material] which were offered to assist in the presentation and understanding of the evidence. This material is not itself evidence and must not be considered as proof of any facts.

Use Note

This instruction should be used when pedagogical-device summaries or similar material are not admitted into evidence.

If the summaries or similar material are admitted into evidence as secondary-evidence summaries, see Instruction 7.12A.

If the summaries or similar material are admitted into evidence as primary-evidence summaries, no instruction is necessary.

Committee Commentary 7.12

(current as of July 1, 2019)

This instruction is based on United States v. Bray, 139 F.3d 1104, 1112 (6th Cir. 1998), in which the Sixth Circuit noted some confusion in past cases and provided a comprehensive discussion on the treatment of summary evidence. The court explained:

> To recapitulate, there are three kinds of summaries:
> (1) Primary-evidence summaries, ... which summarize "voluminous writings, recordings, or photographs" that, because they are so voluminous, "cannot conveniently be examined in court." Fed.R.Evid. 1006. In this instance, the summary, and not the underlying documents, is the evidence to be considered by the factfinder.
> (2) Pedagogical-device summaries, or illustrations, such as chalkboard drawings, graphs, calculations, or listings of data taken from the testimony of witnesses or documents in evidence, which are intended to summarize, clarify or simplify testimonial or other evidence that has been admitted in the case, but which are not themselves admitted, instead being used only as an aid to the presentation and understanding of the evidence. For these the jury should be instructed that the summaries are not evidence and were used only as an illustrative aid.
> (3) Secondary-evidence summaries that are a combination of (1) and (2), in that they are not prepared entirely in compliance with Rule 1006 and yet are more than mere pedagogical devices designed to simplify and clarify other evidence in the case. These secondary-evidence summaries are admitted in evidence not in lieu of the evidence they summarize but in addition thereto, because in the judgment of the trial court such summaries so accurately and reliably summarize complex or difficult evidence that is received in the case as to materially assist the jurors in better understanding the evidence. In the unusual instance in which this third form of secondary evidence summary is admitted, the jury should be instructed that the summary is not independent evidence of

> its subject matter, and is only as valid and reliable as the underlying evidence it summarizes.

Id. (citations omitted).

As the Sixth Circuit explained, when summaries are used as (2) pedagogical-device summaries or (3) secondary-evidence summaries, the trial court should give a limiting instruction. Pattern Instruction 7.12 is the limiting instruction designed to cover the type of material described in category (2) as pedagogical-device summaries. This instruction should be given only when the material is not admitted into evidence. If the summary or other material falls into category (3) as secondary-evidence summaries and is admitted into evidence, Pattern Instruction 7.12A should be given. Finally, if the summary or other material falls into category (1) as primary-evidence summaries and is admitted into evidence, no limiting instruction is necessary since Rule 1006 authorizes the admission into evidence of the summary itself. *Bray,* 139 F.3d at 1111-12.

In United States v. Paulino, 935 F.2d 739 (6th Cir. 1991), the court stated that summaries other than those directly admissible under Rule 1006 should generally be accompanied by a limiting instruction, but held that omission of a limiting instruction was not reversible error because the defendants did not request a limiting instruction, the trial judge did give a limiting instruction at the close of the proof, the defendants had a full opportunity to cross-examine the witness on the summaries, and the summaries were not substantially inconsistent with the evidence. *Id.* at 753-54. The Sixth Circuit later relied again on the opportunity to cross-examine, explaining "we have not held a court's failure to issue such [limiting] instructions fatal where the defendants had a full opportunity to cross-examine the witness and thereby 'alleviat[e] any danger or inaccuracy or unfair characterization.'" United States v. Gaitan-Acevedo, 148 F.3d 577, 587-88 (6th Cir. 1998), *quoting Paulino*, 935 F.2d at 753.

7.12A SECONDARY- EVIDENCE SUMMARIES ADMITTED IN EVIDENCE

(1) During the trial you have seen or heard summary evidence in the form of [a chart, drawing, calculation, testimony, or similar material]. This summary was admitted in evidence, in addition to the material it summarizes, because it may assist you in understanding the evidence that has been presented.

(2) But the summary itself is not evidence of the material it summarizes, and is only as valid and reliable as the underlying material it summarizes.

Use Note

Giving Instruction 7.03 Opinion Testimony does not obviate the need for this instruction when summary evidence is admitted.

This instruction should be used when summaries or similar material are admitted into evidence as secondary-evidence summaries.

The bracketed items in the first sentence should be tailored to fit the facts of the case.

If the summaries or similar material are admitted as primary-evidence summaries, no instruction is necessary.

If the summaries or other material are not admitted into evidence, see Instruction 7.12.

Committee Commentary 7.12A

(current through July 1, 2019)

This instruction is based on United States v. Bray, 139 F.3d 1104, 1112 (6th Cir. 1998), which is discussed in the Commentary to Instruction 7.12.

In United States v. Smith, 601 F.3d 530, 541-42 (6th Cir. 2010), the court stated it was error to omit a cautionary instruction regarding summary testimony but concluded it was not plain error and so did not warrant reversal of the conviction. In United States v. Vasilakos, 508 F.3d 401, 412 (6th Cir. 2007), the court held that omission of a limiting instruction on the summary testimony of an IRS agent was plain error. This holding is reflected in the words in paragraph (1) that refer to hearing summary evidence in the form of testimony.

7.13 OTHER ACTS OF DEFENDANT

(1) You have heard testimony that the defendant committed [crimes, acts, wrongs] other than the ones charged in the indictment. If you find the defendant did those [crimes, acts, wrongs], you can consider the evidence only as it relates to the government's claim on the defendant's [intent] [motive] [opportunity] [preparation] [plan] [knowledge] [identity] [absence of mistake] [absence of accident]. You must not consider it for any other purpose.

(2) Remember that the defendant is on trial here only for _____, not for the other acts. Do not return a guilty verdict unless the government proves the crime charged in the indictment beyond a reasonable doubt.

Use Note

This instruction should be used when evidence of other acts has been admitted for an appropriate purpose under Fed.R.Evid. 404(b). In identifying the purposes for which the evidence may be used, the instruction should name only the purpose or purposes actually in issue. The instruction facilitates this by bracketing each of the purposes separately.

This instruction should be given when the evidence is introduced and at the end of the case as well.

Committee Commentary 7.13

(current through July 1, 2019)

Once evidence of other crimes, acts or wrongs has been admitted under Rule 404(b), the trial court should give a cautionary instruction identifying the specific, limited purpose for which the evidence was admitted. The district court "must 'clearly, simply, and correctly' instruct the jury as to the specific purpose for which they may consider the evidence." United States v. Merriweather, 78 F.3d 1070, 1077 (6th Cir. 1996) (*quoting* United States v. Johnson, 27 F.3d 1186, 1193 (6th Cir. 1994)). In the limiting instruction, the court should be careful to identify only purposes for using the other acts evidence that are actually in issue. In *Merriweather*, the Sixth Circuit reversed a conviction because the limiting instructions allowed the jury to consider the other acts evidence for seven of the nine purposes listed in Rule 404(b) when only two purposes were arguably presented on the facts. 78 F.3d at 1077. Similarly, in United States v. Ward, 190 F.3d 483 (6th Cir. 1999), the court held the limiting instruction to be error because it recited the list of all the purposes for which other acts evidence was admissible as set out in Rule 404(b). The Sixth Circuit cautioned district courts as follows:

> Rule 404(b) evidence, even when properly admitted, under a properly limiting instruction, asks jurors to engage in mental gymnastics that may well be beyond their ability or even their willingness. Such evidence has great potential for unfair prejudice, and ordinarily it is only the trial court's carefully and clearly articulated limiting instruction as to the specific purpose for which the evidence may be considered by the jurors, that avoids substantial unfairness to the accused. Here, the court's instruction was certainly error, but [not plain error]. We do, however, caution district courts, when

> admitting rule 404(b) evidence, to instruct the jury that the "other act" evidence may be considered only with respect to the specific factor named in the rule–usually only one–which is in issue in the case.

Id. at 489-90. *See also* United States v. Davis, 547 F.3d 520, 526-27 (6th Cir. 2008) (limiting instruction erroneous for listing purposes not in issue; error not harmless); United States v. Bell, 516 F.3d 432, 446-47 (6th Cir. 2008) (limiting instruction erroneous for listing purposes not in issue and for listing prior convictions not probative of intent; error not harmless); United States v. Fraser, 448 F.3d 833, 842 (6th Cir. 2006) (limiting instruction erroneous for listing three purposes not in issue but error did not affect defendant's substantial rights); United States v. Everett, 270 F.3d 986, 992 (6th Cir. 2001) (limiting instructions erroneous but error harmless); United States v. Spikes, 158 F.3d 913, 929-30 (6th Cir. 1998) (same).

The instruction responds to these concerns by listing the appropriate purposes for which the evidence may be admitted under Rule 404(b) rather than just leaving a blank for the district court to fill in. Rule 404(b) states that the evidence may be admitted "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." Each purpose is separately bracketed so district courts can readily identify the appropriate purpose or purposes involved and include only those actually raised in the case. Rule 404(b) is reprinted in full below.

District courts are urged to instruct the jury on the specific use or uses for the evidence that are actually implicated in the case even if defense attorneys do not object to an instruction listing purposes not implicated in the case. In United States v. Davis, 547 F.3d 520 (6th Cir. 2008), the defendant objected to the admission of the Rule 404(b) evidence but did not separately object to the limiting instruction. The court held it was not limited to plain error review of the instruction because the defendant had already objected to admission of the evidence for the purposes identified in the limiting instruction. The *Davis* court distinguished United States v. Fraser, 448 F.3d 833 (6th Cir. 2006), in which the court reversed for plain error because no such objection to admission of the evidence had been made. The *Davis* court stated, "It is proper for us to look at the limiting instruction when we review the admission of such evidence." *Davis, supra* at 526. *See also* United States v. Newsom, 452 F.3d 593, 607 (6th Cir. 2006) (*citing* United States v. Johnson, 27 F.3d 1186, 1194 (6th Cir. 1994) and commenting on "the tension between existing Sixth Circuit opinions regarding Rule 404(b) jury instructions"); United States v. Yopp, 577 F.2d 362 (6th Cir. 1978) (stating that if no limiting instruction is requested by the defendant, the failure to give an instruction will not necessarily result in reversible error but noting that it would have been better practice for the court to give the instruction sua sponte).

The Use Note indicates that the instruction should be given when the evidence is admitted as well as at the close of the case. However, a delayed instruction alone has been held not to be reversible error. *See* United States v. Fraser, *supra* at 843 n.4 (6th Cir. 2006) ("A delayed limiting instruction is no basis for reversal.") (*citing* United States v. Miller, 115 F.3d 361, 366 (6th Cir. 1997)); United States v. Cook, 2008 WL 3983925 at 9, 2008 U.S. App. LEXIS 18788 at 25 (6th Cir. 2008) (unpublished) (mentioning with approval that the court gave limiting instructions twice).

Federal Rule of Evidence 404(b) states:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

The threshold inquiry the trial court must make before admitting evidence under Rule 404(b) is whether such evidence is "probative of a material issue other than character." Huddleston v. United States, 485 U.S. 681, 686 (1988). In so doing, the court necessarily assesses whether the evidence is relevant and, if so, whether the probative value is substantially outweighed by its potential for unfair prejudice under Fed. R. Evid. 403.

7.14 FLIGHT, CONCEALMENT OF EVIDENCE, FALSE EXCULPATORY STATEMENTS

(1) You have heard testimony that after the crime was supposed to have been committed, the defendant _____.

(2) If you believe that the defendant _____, then you may consider this conduct, along with all the other evidence, in deciding whether the government has proved beyond a reasonable doubt that he committed the crime charged. This conduct may indicate that he thought he was guilty and was trying to avoid punishment. On the other hand, sometimes an innocent person may _____ for some other reason. The defendant has no obligation to prove that he had an innocent reason for his conduct.

Use Note

The language in paragraphs (1) and (2) should be tailored to the specific kinds of evidence in the particular case.

Committee Commentary 7.14

(current through July 1, 2019)

The Sixth Circuit recognizes defendants' flight, concealment of evidence and implausible stories as evidence which allows an inference of guilty knowledge. *See* United States v. Jackson, 55 F.3d 1219, 1226 (6th Cir. 1995).

Flight has been deemed relevant to show guilt through consciousness of guilt. United States v. Touchstone, 726 F.2d 1116, 1119 (6th Cir. 1984); United States v. Rowan, 518 F.2d 685, 691 (6th Cir. 1975). The relevance of such evidence depends on a series of inferences. For example, the relevance of evidence of flight depends on being able to draw three inferences: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; and (3) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.

In United States v. Carter, 236 F.3d 777 (6th Cir. 2001), the trial court gave an instruction on flight substantially similar to Pattern Instruction 7.14. The Sixth Circuit concluded that giving the instruction was not an abuse of discretion and did not unconstitutionally require the defendant to testify or explain prior incidents of flight. The instruction did not appear to suggest guilt on the defendant's part, but rather stated that "evidence of flight *may or may not* indicate a defendant's guilty conscience or intent to avoid punishment." *Id*. at 792 n.11 (italics in original), *citing* Illinois v. Wardlow, 528 U.S. 119, 123-27 (2000). *See also* United States v. Swain, 2007 U.S. App. LEXIS 16825 at 7-9, 2007 WL 2031447 (6th Cir. 2007) (unpublished) (giving Instruction 7.14 on flight was not error because adequate evidence existed; Instruction 7.14 accurately reflects the law, *citing* United States v. Carter, *supra* and United States v. Diakite, 5 Fed. Appx. 365, 370-71 (6th Cir. 2001) (unpublished)). The final sentence in paragraph (2) is based on United States v. Peterson, 569 F. App'x 353, 356 n.4 (6th Cir. 2014) (unpublished).

The Sixth Circuit has held that evidence of flight is admissible even though the flight was not immediately after the commission of the crime or after the defendant is accused of the crime. *Touchstone, supra* at 1119-20. In that case the court explicitly approved the following instruction:

> The intentional flight or concealment of a defendant is not of course sufficient in itself to establish his guilt; but is a fact which, if proved, may be considered by the jury in the light of all other evidence in the case, in determining guilt or innocence.

Id. at 1118 and 1120 n.6.

In Illinois v. Wardlow, *supra*, the Supreme Court recognized flight as a factor the police could use in determining whether they had reasonable suspicion to justify a stop under the Fourth Amendment. The Court stated, "Headlong flight–wherever it occurs–is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." *Wardlow, supra* at 124.

The Sixth Circuit has approved implausible stories as evidence allowing an inference of guilt in several cases. *See Jackson, supra, quoting* United States v. Diaz-Carreon, 915 F.2d 951, 955 (5th Cir. 1990) *and citing* United States v. Mari, 47 F.3d 782, 785 & n.2 (6th Cir. 1995) and United States v. Chu, 988 F.2d 981, 984 (9th Cir. 1993).

False exculpatory statements are also recognized as evidence from which the jury may infer consciousness of guilt. Stanley v. United States, 245 F.2d 427 (6th Cir. 1957). *See, e.g.,* United States v. Tedesco, 1996 WL 690152 at 2, 1996 U.S. App. LEXIS 31285 at 7 (6th Cir. 1996) (unpublished). *Cf.* United States v. McDougald, 990 F.2d 259, 262-63 (6th Cir. 1993) (describing defendant's false exculpatory statements as "of little value" in establishing guilty knowledge at relevant time because statements were made eight months after the crime when he was questioned by police; conviction reversed for insufficient evidence).

Spoliation of evidence is admissible to show consciousness of guilt. The fact that a defendant attempts to fabricate or conceal evidence indicates a consciousness that his case is weak and from that the defendant's guilt may be inferred. United States v. Mendez-Ortiz, 810 F.2d 76, 79 (6th Cir. 1986); United States v. Franks, 511 F.2d 25, 36 (6th Cir. 1975). It has been held to be reversible error for the court to instruct that such evidence might be considered evidence of guilt rather than evidence of "consciousness of guilt." As with all consciousness of guilt evidence, there is some dispute as to its admissibility.

The Federal Judicial Center includes a general instruction on "Defendant's Incriminating Actions After the Crime." See Federal Judicial Center Instruction 43. But the Committee Commentary recommends that it should not be given in most cases, and that generally these matters should be left to argument by counsel.

Based on Sixth Circuit authority, the Committee recommends one generic instruction for all consciousness of guilt situations which can be modified as circumstances dictate.

7.15 SILENCE IN THE FACE OF ACCUSATION

(No Instruction Recommended.)

Committee Commentary 7.15

(current through July 1, 2019)

The Committee withdrew this instruction in view of Combs v. Coyle, 205 F.3d 269, 283 (6th Cir. 2000) (use of prearrest silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination). However, evidence of the defendant's prearrest, pre-*Miranda* silence is still admissible to impeach the defendant if he testifies at trial. *See* Fletcher v. Weir, 455 U.S. 603, 607 (1982); Jenkins v. Anderson, 447 U.S. 231, 238-39 (1980); Combs v. Coyle, 205 F.3d at 280.

7.16 POSSESSION OF RECENTLY STOLEN PROPERTY

(1) You have heard testimony that the defendant had possession of some property that was recently stolen.

(2) If you believe that the defendant had possession of this property, you may consider this, along with all the other evidence, in deciding whether the defendant knew that the property was stolen [or stole the property]. But the longer the period of time between the theft and his possession, the less weight you should give this evidence.

(3) You do not have to draw any conclusion from the defendant's possession of the property. You may still have a reasonable doubt based on all the other evidence. Remember that the burden is always on the government to prove beyond a reasonable doubt that the defendant committed the crime charged.

Use Note

The bracketed language in paragraph (2) should be used when the government is attempting to prove in the alternative that the defendant either possessed the property knowing that it was stolen, or stole the property.

Committee Commentary 7.16

(current through July 1, 2019)

In Barnes v. United States, 412 U.S. 837, 843 (1973), the Supreme Court noted that "For centuries courts have instructed juries that an inference of guilty knowledge may be drawn from the fact of unexplained possession of stolen goods."

The bracketed language in paragraph (2) is based on United States v. Jennewein, 590 F.2d 191, 192 (6th Cir. 1978) (citing United States v. Nalley, 455 F.2d 259 (6th Cir. 1972); United States v. Lipscomb, 425 F.2d 226 (6th Cir. 1970); and Prince v. United States, 217 F.2d 838 (6th Cir. 1954)).

7.17 TRANSCRIPTIONS OF RECORDINGS

(1) You have heard some recorded conversations that were received in evidence, and you were given some written transcripts of the recordings.

(2) Keep in mind that the transcripts are not evidence. They were given to you only as a guide to help you follow what was being said. The recordings themselves are the evidence. If you noticed any differences between what you heard on the recordings and what you read in the transcripts, you must rely on what you heard, not what you read. And if you could not hear or understand certain parts of the recordings, you must ignore the transcripts as far as those parts are concerned.

Committee Commentary 7.17
(current through July 1, 2019)

Recordings are generally admissible unless the incomprehensible portions of the recordings are so substantial as to render the recordings as a whole untrustworthy. United States v. Terry, 729 F.2d 1063, 1068 (6th Cir. 1984). The decision to admit recordings into evidence rests with the trial court. United States v. Vinson, 606 F.2d 149 (6th Cir. 1979). Such recordings must be authentic, accurate, trustworthy and sufficiently audible and comprehensible for the jury to consider the contents. *See* United States v. Robinson, 707 F.2d 872, 876 (6th Cir. 1983). *See also* United States v. Elder, 90 F.3d 1110, 1129-30 (6th Cir. 1996); United States v. Scarborough, 43 F.3d 1021, 1024 (6th Cir. 1994); United States v. Segines, 17 F.3d 847, 854 (6th Cir. 1994).

When a recording is admissible, an accurate transcript of the recording may be provided, in the trial court's discretion, for the jury to use while the recording is played, so that the jury may follow the recording more easily. *See Robinson, supra* at 876. But the Sixth Circuit has expressed a clear preference that a transcript not be submitted to the jury unless the parties stipulate to its accuracy. *Id.; see also Vinson, supra* at 155.

In the absence of a stipulation, the transcriber should verify that he or she has listened to the recording and accurately transcribed its content, and the court should make an independent determination of accuracy by comparing the transcript against the recording and directing the deletion of the unreliable portion of the transcript. *Robinson, supra* at 879.

Another option, but the least preferred, is to submit two transcripts to the jury, one from the government and one from the defense. *See* United States v. Martin, 920 F.2d 393, 396 (6th Cir. 1990). But this has been held to be prejudicial error requiring reversal if the recording is significantly inaudible, even if a cautionary instruction is given. *Robinson, supra* at 879.

In *Segines,* the Sixth Circuit elaborated on the procedural alternatives when a transcript is used:

> The preferred method is stipulation to its accuracy by all parties. The next best alternative is for the transcriber to attest to its accuracy and for the court to test that

> accuracy, outside of the jury's presence, "by reading the transcripts while listening to the tapes." (citation omitted.) When tapes are unintelligible, however, a transcript intended as an aid to the jury inevitably becomes, in the minds of the jurors, the evidence itself (citation omitted). As is required whenever a transcript is used and there is no stipulation as to its accuracy, the trial court here gave a cautionary instruction to the jury regarding the limited use to be made of the transcript. Such an instruction does not suffice, however, to erase the prejudice created by "shepherding hearsay to the jury via the transcripts . . . ."

Segines, supra at 854.

One point made clear in *Segines* is that cautionary instructions on the limited role of the transcript alone are not sufficient to justify its use. The *Segines* court concluded that use of transcripts was error, despite repeated use of a cautionary instruction on the limited role of the transcript, because the judge found much of the recording unintelligible. The Sixth Circuit stated that at retrial, a transcript should not be given to the jury. *Id.* at 855.

See also Scarborough, supra at 1024-25 (no error to use government's transcript where district court reviewed it and found it accurate and gave limiting instruction); United States v. Wilkinson, 53 F.3d 757 (6th Cir. 1995) (any potential prejudice from use of government's transcript was remedied, *inter alia*, by a cautionary jury instruction), *citing* United States v. Hughes, 895 F.2d 1135, 1147 (6th Cir. 1990). In United States v. Elder, 90 F.3d 1110, 1129-30 (6th Cir. 1996), the Sixth Circuit held that it was not error to allow transcripts as an aid to the jury when the trial judge followed the *Robinson* guidelines to review the recordings and gave a limiting instruction substantially the same as Pattern Instruction 7.17.

On whether transcripts can be used by the jury during deliberations, the Sixth Circuit has allowed such use. *See Scarborough, supra* at 1024-25 (transcripts can be used in deliberations, even if transcripts not admitted into evidence, as long as court instructs that the recordings and not the transcripts are evidence) (*citing* United States v. Puerta Restrepo, 814 F.2d 1236, 1242 (7th Cir. 1987)). While the Committee takes no position on whether transcripts should go to the jury room, if they do, the court should instruct the jury again that the recordings are the evidence rather than the transcripts.

If the case involves recordings in a foreign language and English transcripts are provided to the jury, see United States v. Garcia, 20 F.3d 670, 672-73 (6th Cir. 1994), *citing* United States v. Moreno, 933 F.2d 362, 375 (6th Cir. 1991) and United States v. Cruz, 765 F.2d 1020, 1023 (11th Cir. 1985).

7.18 SEPARATE CONSIDERATION--EVIDENCE ADMITTED AGAINST CERTAIN DEFENDANTS ONLY

(1) You have heard testimony from _____ that _____.

(2) You can only consider this testimony against _____ in deciding whether the government has proved him guilty. You cannot consider it in any way against any of the other defendants.

Committee Commentary 7.18
(current through July 1, 2019)

This instruction is designed to supplement any mid-trial instructions given when evidence admissible against only one defendant is introduced. See Fed. R. Evid. 105 and United States v. Gallo, 763 F.2d 1504, 1528 (6th Cir. 1985) for when such an instruction must be given.

Recent cases indicate that limiting instructions such as Instruction 7.18 can cure a risk of prejudice when there are multiple defendants. In Zafiro v. United States, 506 U.S. 534 (1993), the Supreme Court held that mutually antagonistic defenses alone do not mandate separate trials; there must be some risk of prejudice. Even when the risk of prejudice is high, the Court explained, severance may not be necessary because "less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice." *Id*. at 539. In *Zafiro*, the Court found the risk of prejudice was cured by proper instructions, including an instruction that told the jury to "give separate consideration to each individual defendant and to each separate charge against him. Each defendant is entitled to have his or her case determined from his or her own conduct and from the evidence [that] may be applicable to him or to her." *Id*. at 541.

The Sixth Circuit relied on *Zafiro* in United States v. Pierce, 62 F.3d 818 (6th Cir. 1995) to find no error in a joint trial because the risk of prejudice was cured by several cautionary instructions, including one stating "[y]ou must decide, for each defendant, whether the United States has presented proof beyond a reasonable doubt that the particular defendant is guilty of a particular charge." *Id*. at 830-31.

This issue is also covered by Pattern Instruction 2.01B, Separate Consideration – Multiple Defendants Charged with a Single Crime.

7.19 JUDICIAL NOTICE

I have decided to accept as proved the fact that _____, even though no evidence was presented on this point. You may accept this fact as true, but you are not required to do so.

Committee Commentary 7.19
(current through July 1, 2019)

This instruction is based on Fed. R. Evid. 201(g). It should be given whenever the court has taken judicial notice of a fact.

This instruction applies only to adjudicative facts and must not be used in connection with a court's determination of law. In United States v. Dedman, 527 F.3d 577, 587-88 (6th Cir. 2008), the court held that giving Instruction 7.19 was error when the district court gave it in connection with announcing applicable state law because the last sentence of the instruction empowered the jury to disregard that law. The court quoted the official commentary to Instruction 7.19 to the effect that the instruction should be given only when the court takes judicial notice of facts and further counseled, "Accordingly, judges should take care to limit judicial notice and use of criminal Pattern Jury Instruction 7.19 to matters of fact." *Id.* at 588.

7.20 STATEMENT BY DEFENDANT

(1) You have heard evidence that the defendant, _____ , made a statement in which the government claims he admitted certain facts. It is for you to decide whether the defendant made that statement, and if so, how much weight it deserves. In making these decisions, you should consider all of the evidence about the statement, including the circumstances under which the defendant allegedly made it.

(2) You may not convict the defendant solely upon his own uncorroborated statement or admission.

Committee Commentary 7.20
(current as of July 1, 2019)

Paragraph (1) is based on Jackson v. Denno, 378 U.S. 368 (1964) and 18 U.S.C. § 3501(a), the latter of which states that "the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances." Most circuits include a similar pattern instruction, including the First, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits.

Paragraph (2) is based on United States v. Adams, 583 F.3d 457 (6th Cir. 2009) and United States v. Marshall, 863 F.2d 1285 (6th Cir. 1988). In *Adams*, the court reversed the conviction and remanded for a new trial because the district court erred in refusing to instruct the jury that it could not find defendant guilty solely on the basis of his uncorroborated confession. The court noted that based on *Marshall*, the established law in the circuit is that this instruction is required even though the record includes some evidence that tends to corroborate the statements. *Adams, supra* at 469-70, *quoting Marshall, supra* at 1288. *See also* United States v. Brown, 617 F.3d 857, 862-63 (6th Cir. 2010) (giving several examples of sufficient corroboration) and United States v. Ramirez, 635 F.3d 249 (6th Cir. 2011). The purpose of requiring corroboration is "to ensure the reliability of the confession or admission of the accused." *Brown, supra* at 862, *quoting* United State v. Trombley, 733 F.2d 35, 37 (6th Cir. 1984). *See generally* Smith v. United States, 348 U.S. 147 (1954) and Opper v. United States, 348 U.S. 84 (1954).

7.21 STIPULATIONS

The government and the defendant have agreed, or stipulated, to certain facts. Therefore, you must accept the following stipulated facts as proved: [*insert facts stipulated*].

Use Note

Each stipulation should be read to the jury right after the element it pertains to.

When the stipulated facts establish an element of the crime, the best practice is for the stipulation to be in writing and signed by the defendant and counsel.

Brackets indicate options for the court; bracketed italics are notes to the court.

Committee Commentary 7.21
(current as of July 1, 2019)

The general rule is that a defendant cannot stipulate or admit his way out of the full evidentiary force of the case as the government chooses to present it. Old Chief v. United States, 117 S. Ct. 644, 653 (1997); United States v. Luck, 852 F.3d 615, 624 (6th Cir. 2017). In *Old Chief*, the Court carved out an exception to this rule, holding that the government cannot refuse a defendant's offer to stipulate to felon status in felon-in-possession prosecutions under 18 U.S.C. § 922(g)(1). *Old Chief*, 117 S. Ct. at 654-55. The Supreme Court limited this exception to cases involving proof of felon status, see 117 S. Ct. at 651 note 7, and the Sixth Circuit has rejected attempts to expand the exception. *Luck*, 852 F.3d at 625.

In Witherspoon v. United States, 633 F.2d 1247 (6th Cir. 1980), the defendant entered a plea of not guilty and stipulated that he met all the elements for the offense of being a felon in possession of a firearm; the trial judge found the defendant guilty. When the defendant argued that the trial judge should have complied with the procedures of Rule 11 because the stipulation had the practical effect of a guilty plea, the Sixth Circuit found no reversible error and affirmed the conviction. However, the court expressed concern and suggested to District Courts that "they consider the possible applicability of the terms of Rule 11 in any instance where a stipulation as to most or all of the factual elements necessary to proof of guilt . . . is tendered." *Id.* at 1252. When the parties stipulate to any element of the crime, the Use Note suggests that the best practice is to put the stipulation in writing and have it signed by both parties.

In United States v. Griffith, 1993 WL 492299, 1993 U.S. App. LEXIS 31194 (6th Cir. 1993) (unpublished), a panel of the Sixth Circuit reversed a conviction due to erroneous jury instructions on stipulations. The trial court instructed the jury to give the stipulation "such weight as you believe it deserves . . . ." 1993 WL 492299 at 2, 1993 LEXIS 31194 at 4. The panel stated, "The law in the Sixth Circuit on the effect of a stipulation of fact is clear: 'Stipulations voluntarily entered by the parties are binding, both on the district court and on [the appeals court].'" *Griffith*, 1993 WL 492299 at 2, 1993 LEXIS 31194 at 4, *quoting* FDIC v. St. Paul Fire and Marine Ins. Co., 942 F.2d 1032, 1038 (6th Cir. 1991).

See also Instruction 1.04(2) Evidence Defined.