

ICJI 301 EFFECT OF DEFENDANT'S ELECTION NOT TO TESTIFY

INSTRUCTION NO. _____

A defendant in a criminal trial has a constitutional right not to be compelled to testify. The decision whether to testify is left to the defendant, acting with the advice and assistance of the defendant's lawyer. You must not draw any inference of guilt from the fact that the defendant does not testify, nor should this fact be discussed by you or enter into your deliberations in any way.

ICJI 302 CREDIBILITY OF DEFENDANT AS WITNESS

Comment

If the defendant testifies, the Court should not give any instruction that specifically addresses the evaluation of the defendant's credibility or testimony. The jury should not be instructed to consider that the defendant is interested in the outcome of the case. Instructions on evaluating the credibility of witnesses should be general and apply equally to all witnesses, both those who testify for the state and those who testify for the defendant. *State v. Rogers*, 30 Idaho 259, 163 P. 912 (1917); *State v. Webb*, 6 Idaho 428, 55 P. 892 (1899).

ICJI 303 EVIDENCE OF OTHER CRIMES

INSTRUCTION NO. _____

Evidence has been introduced for the purpose of showing that the defendant committed [crimes] [wrongs] [acts] other than that for which the defendant is on trial.

Such evidence, if believed, is not to be considered by you to prove the defendant's character or that the defendant has a disposition to commit crimes.

Such evidence may be considered by you only for the limited purpose of proving the [defendant's [motive] [opportunity] [intent] [preparation] [plan] [knowledge] [identity] or [absence of mistake or accident].

Comment

State v. Eubanks, 86 Idaho 32, 383 P.2d 342 (1963); *State v. Thompson*, 107 Idaho 666, 691 P.2d 1281 (Ct. App. 1984).

This instruction is not applicable to proof of prior convictions admitted on the issue of credibility or submitted to establish the defendant's status where the defendant is charged as a persistent violator under IC s 19-2514.

ICJI 304 EVIDENCE OF DEFENDANT'S CHARACTER

Comment

The committee determined that no separate instruction should be given with respect to the introduction of evidence relating to the defendant's character (honesty, chastity, veracity, etc.). Instructing on the effect of such proof would constitute a comment on the evidence.

ICJI 305 UNION OF ACT AND INTENT

INSTRUCTION NO. _____

In every crime or public offense there must exist a union or joint operation of act and [intent] [or] [criminal negligence].

Comment

I.C. s 18-114. The word "intent" does not mean an intent to commit a crime but merely the intent to knowingly perform the interdicted act, or by criminal negligence the failure to perform the required act. *State v. Parish*, 79 Idaho 75, 310 P.2d 1082 (1957); *State v. Booton*, 85 Idaho 51, 375 P.2d 536 (1962). The term "criminal negligence", means gross negligence, such as amounts to reckless disregard of consequences and the rights of others. *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937) (construing former I.C. s 17-114 which was identical to s 18-114).

This instruction is unnecessary when the crime charged requires a specific mental element and the jury is properly instructed regarding that mental element. *State v. Hoffman*, 137 Idaho 897, 55 P.3d 890 (Ct. App. 2002).

ICJI 306 VIEW OF THE PREMISES-PRELIMINARY INSTRUCTIONS

INSTRUCTION NO. _____

It may be helpful for you to see the place involved in this case. I have appointed Mr./Mrs./Ms. _____ to take you there. While at that place, you are not to make any measurements, conduct any tests or make any demonstrations.

Your observations during this view of the place involved are not evidence in this case, and you are not to take such observations into consideration in arriving at your verdict.

This view is only for the purpose of assisting you in understanding the evidence presented in court.

Comment

A view of the premises is not "evidence." *Tyson Creek R.R. Co. v. Empire Mill Co.*, 31 Idaho 580, 174 P. 1004 (1918); *Gilbert v. City of Caldwell*, 112 Idaho 386, 732 P.2d 355 (Ct. App. 1987).

Instructing the jury that what it observes at a view does not become evidence, and it is not to be taken into consideration in arriving at verdict, except as a means to better understand and apply testimony adduced at trial, is not erroneous. *State v. McClurg*, 50 Idaho 762, 300 P. 898 (1931), overruled on other grounds, *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937).

[Instruction modified July 2005]

ICJI 307 FLIGHT

Comment

The committee recommends that no instruction be given on this subject. Evidence of flight is a proper subject of argument.

ICJI 308 EVIDENCE LIMITED AS TO PURPOSE

INSTRUCTION NO. _____

Certain evidence was admitted for a limited purpose.

At the time this evidence was admitted you were admonished that it could not be considered by you for any purpose other than the limited purpose for which it was admitted.

Do not consider such evidence for any purpose except the limited purpose for which it was admitted.

ICJI 309 DEFENDANT'S INTENT-MANIFESTED BY CIRCUMSTANCES

Comment

The committee recommends that no instruction be given stating that a defendant's intent can be inferred by the circumstances. This is a matter of argument to the jury.

Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), disapproved the presumption that a person intends the natural consequences of his/her act as improperly shifting the burden on a defendant in violation of the 14th Amendment.

ICJI 310 ACCESSORY DEFINED

INSTRUCTION NO. _____

A person who knows a felony was committed, and willfully conceals it from a [peace officer] [judge] [magistrate] [grand jury] [petit jury] [or] [harbors and protects the person charged with or convicted thereof,] is guilty as an accessory.

Comment

I.C. s 18-205. Knowledge that another person had been charged with or convicted of a felony is sufficient; actual knowledge that the other person committed a felony is not required. *State. v. Teasley*, 138 Idaho 113, 58 P. 3d 97 (Ct. App. 2002).

ICJI 311 AIDERS AND ABETTERS/PRINCIPALS DEFINED

INSTRUCTION NO. _____

The law makes no distinction between a person who directly participates in the acts constituting a crime and a person who, either before or during its commission, intentionally aids, assists, facilitates, promotes, encourages, counsels, solicits, invites, helps or hires another to commit a crime with intent to promote or assist in its commission. Both can be found guilty of the crime. Mere presence at, acquiescence in, or silent consent to, the planning or commission of a crime is not [in the absence of a duty to act] sufficient to make one an accomplice.

Comment

See I.C. s 18-204. Modify elements instruction appropriately and select the appropriate terms to describe the type of action charged (aided, assisted, facilitated, etc.).

The legislature has abolished the distinction between accessories and principals. *State v. Kleier*, 69 Idaho 278, 206 P.2d 513 (1949). Mere knowledge of a crime and assent to or acquiescence in its commission does not give rise to accomplice liability, and the failure to disclose the occurrence of a crime to authorities is not sufficient to constitute aiding and abetting. *State v. Randles*, 117 Idaho 344, 787 P.2d 1152 (1990), overruled on other grounds, *State v. Humphreys*, 134 Idaho 657, 8 p.3d 652 (2000).

A charging document alleging that the defendant committed a particular crime is sufficient to put the defendant on notice that he or she is also being charged with aiding and abetting the commission of that crime. *State v. Ayres*, 70 Idaho 18, 211 P.2d 142 (1949); *State v. Chapa*, 127 Idaho 786, 906 P.2d 636 (Ct. App. 1995). If two or more crimes were committed, a charging document alleging that the defendant committed one of the crimes is not sufficient to provide notice that he or she is alleged to have aided and abetted the commission of another crime. *State v. Chapa*, 127 Idaho 786, 906 P.2d 636 (Ct. App. 1995) (where victim testified that both the defendant and another raped her, information charging the defendant with committing a rape as a principal did not notify him of allegation that he also aided and abetted the other man in committing a rape.)

ICJI 312 AIDING AND ABETTING

INSTRUCTION NO. _____

All persons who participate in a crime either before or during its commission, by intentionally [aiding, abetting, advising, hiring, counseling, procuring] another to commit the crime with intent to promote or assist in its commission are guilty of the crime. All such participants are considered principals in the commission of the crime. The participation of each defendant in the crime must be proved beyond a reasonable doubt.

Comment

The definition should be incorporated into the instruction stating the elements of the crime and the alleged participation of the defendant must be proved beyond a reasonable doubt.

An individual who participates in or assists the commission of an offense is guilty of aiding and abetting the crime. *State v. Gonzalez*, 134 Idaho 907, 12 P.3d 382 (Ct.App. 2000). The mental state required is generally the same as that required for the underlying offense-the aider and abettor must share the criminal intent of the principal and there must a community of purpose in the unlawful undertaking. *State v. Scroggins*, 110 Idaho 380, 716 P.2d 1152 (1985).

A charging document alleging that the defendant committed a particular crime is sufficient to put the defendant on notice that he or she is also being charged with aiding and abetting the commission of that crime. *State v. Ayres*, 70 Idaho 18, 211 P.2d 142 (1949); *State v. Chapa*, 127 Idaho 786, 906 P.2d 636 (Ct. App. 1995). If two or more crimes were committed, a charging document alleging that the defendant committed one of the crimes is not sufficient to provide notice that he or she is alleged to have aided and abetted the commission of another crime. *State v. Chapa*, 127 Idaho 786, 906 P.2d 636 (Ct. App. 1995) (where victim testified that both the defendant and another raped her, information charging the defendant with committing a rape as a principal did not notify him of allegation that he also aided and abetted the other man in committing a rape.)

ICJI 313 CORROBORATION OF ACCOMPLICE

INSTRUCTION NO. ____

A person may not be found guilty based solely on the testimony of [an] accomplice[s].

1. [*Name of the witness(es)* is an/are] accomplice(s).]

2. [An accomplice is a person who intends to promote or assist in the commission of a crime and who either directly commits the acts constituting the crime or who, before or during its commission, aids, assists, facilitates, promotes, encourages, counsels, solicits, invites, helps or hires another to commit the crime. Mere presence at, acquiescence in, or silent consent to, the planning or commission of a crime is not [in the absence of a duty to act] sufficient to make one an accomplice.]

There must be evidence, other than testimony of [an] accomplice(s), that tends to connect the defendant with the commission of the crime. Such other evidence may be slight and need not be sufficient in and of itself to establish the defendant's guilt. It is not sufficient, however, if it merely shows that the crime was committed, and it must not come from the testimony of [an]other accomplice[s].

[Statements of the defendant other than as testified to by the accomplice are capable of providing corroboration.]

Comment

Alternative 1 should be used where the accomplice is established as a matter of law.

Alternative 2 should be used where there is a jury question as to whether the witness is an accomplice.

Use last bracketed paragraph where supported by the evidence.

I.C. ss 19-2117 & 19-1430.

A victim is not an accomplice. *State v. Madrid*, 74 Idaho 200, 259 P.2d 1044 (1953); *State v. Rose*, 75 Idaho 59, 267 P.2d 109 (1954). An accessory after the fact is not an accomplice because he does not become connected with the crime until after its completion. *State v. Grimmitt*, 33 Idaho 203, 193 P. 380 (1920).

A defendant's admissions may provide corroboration of the accomplice's testimony. *State v.*

Garcia, 102 Idaho 378, 630 P.2d 665 (1981).

It is not necessary that the accomplice be corroborated in every detail. The law contemplates that some weight should be given testimony of an accomplice. *State v. Smith*, 30 Idaho 337, 164 P. 519 (1917). Corroborating testimony need only connect the accused with the crime, it may be slight and need only go to one material fact, it may be entirely circumstantial, and it need not be sufficient in and of itself to convict the defendant. *State v. Aragon*, 107 Idaho 358, 690 P.2d 293 (1984); *State v. Orr*, 53 Idaho 452, 24 P.2d 679 (1933).

I.C. s 19-2117 does not prohibit an accomplice from providing the necessary foundation testimony for the admission of an item of physical evidence. *State v. Crawford*, 99 Idaho 87, 577 P.2d 1135 (1978).

ICJI 314 CORROBORATION DEFINED

INSTRUCTION NO. ____

Corroborative evidence is evidence of some act or fact related to the offense which, if believed, by itself and without any aid, interpretation or direction from the testimony of the accomplice tends to connect the defendant with the commission of the offense charged.

However, it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged, or that it corroborate every fact to which the accomplice testifies.

In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the offense.

If there is not such independent evidence which tends to connect defendant with the commission of the offense, the testimony of the accomplice is not corroborated.

If there is such independent evidence which you believe, then the testimony of the accomplice is corroborated.

ICJI 315 DEPOSITION EVIDENCE

INSTRUCTION NO. _____

Certain evidence is about to be presented to you by deposition[s]. A deposition is testimony taken under oath before the trial and preserved in writing [or upon videotape]. This evidence is entitled to neither more nor less consideration than you would give the same testimony had the witness[es] testified here from the witness stand.

Comment

If evidence by deposition is introduced in the absence of the witness, then this instruction should be read to the jury, immediately prior to the reading or viewing of the deposition.

In view of the liberal use of evidence depositions, this instruction is likely to have frequent application. This is an example of an instance in which the committee believes it is proper for the court to call attention to specific evidence because a jury might otherwise not understand the function of a deposition.

See IDJI 1.22.

I.C. ss 19-3111 & 19-3214.

ICJI 316 SELF-INCRIMINATION OF WITNESS/PRIVILEGE

INSTRUCTION NO. _____

The information being requested from this witness is privileged and may not be presented. That fact must not affect your opinion about the believability of the witness or the guilt or innocence of the defendant.

Comment

This instruction may be used when, for example, a witness refuses to answer under the Fifth Amendment privilege. It should be given at the time the privilege is established or in a modified form if given later.

ICJI 317 WORD "DEFENDANT" APPLIES TO EACH DEFENDANT

INSTRUCTION NO. _____

The word "defendant" as used in these instructions applies equally to each defendant except as you may be otherwise instructed.

ICJI 318 IMPEACHMENT-PRIOR INCONSISTENT STATEMENT WITHOUT OATH

INSTRUCTION NO. _____

You have heard the testimony of _____ concerning a statement made by _____ before this trial. The believability of a witness may be challenged by evidence that on some former occasion the witness made a statement that was not consistent with the witness' testimony in this case. Evidence of this kind may be considered by you only for the purpose of deciding [whether you believe _____ 's testimony.] [the weight to be given the testimony that you heard from the witness in this courtroom.] This evidence of an earlier statement has been admitted to help you decide if you believe _____ 's testimony. You cannot use these earlier statements as evidence in this case.

Comment

The committee recommends that this instruction be given immediately following the witness' testimony upon request made by the party opposing the impeachment. If this instruction is not requested prior to or immediately after the testimony, the trial court does not err in failing to give it. *State v. Vaughn*, 124 Idaho 576, 861 P.2d 1241 (Ct. App. 1993).

ICJI 319 IMPEACHMENT -- PRIOR INCONSISTENT STATEMENTS UNDER OATH

INSTRUCTION NO. _____

You have heard the testimony of _____. You will recall it was brought out that before this trial that this witness made statements concerning the subject matter of this trial. Even though these statements were not made in this courtroom they were made under oath at [e.g.: another trial.]. Because of this, you may consider these statements as if they were made at this trial and rely on them as much, or as little, as you think proper.

Comment

The committee recommends that this instruction be given immediately following the witness' testimony upon request made by the party opposing the impeachment. Without such a request, it may be given at the close of the evidence.

ICJI 320 USE OF WITNESS' PRIOR CONSISTENT STATEMENTS

INSTRUCTION NO. _____

testified in the (state's) (defense) case during the trial. You will recall that it was brought out that before this trial this witness made statements which were the same as, or similar to, what the witness said here in the courtroom. These earlier statements were brought to your attention to help you decide whether you believe _____ 's testimony.

Comment

The committee recommends that this instruction be given immediately following the witness' testimony upon request made by the party opposing the impeachment. Without such a request, it may be given at the close of the evidence.

ICJI 321 IMPEACHMENT OF A WITNESS BY PRIOR CONVICTION

INSTRUCTION NO. _____

Evidence that a witness has been convicted of an offense may be considered by you only as it may affect the believability of the witness.

Comment

The court must decide that the offense is a felony and relates to credibility.

ICJI 322 IMPEACHMENT -- DEFENDANT -- PRIOR OFFENSES

INSTRUCTION NO. _____

Evidence of defendant's previous conviction of an offense may be considered by you only as it may affect the defendant's believability as a witness. You must not consider it as evidence of the defendant's guilt of the offense[s] charged in this case.

Comment

The court must decide that the offense is a felony and relates to credibility.

ICJI 323 OUT-OF-COURT STATEMENTS BY THE DEFENDANT

INSTRUCTION NO. ____

You heard testimony that the defendant [name, if more than one defendant] made a statement to [e.g., the police] concerning [the] [a] crime charged in this case. You must decide what, if any, statements were made and give them the weight you believe is appropriate, just as you would any other evidence or statements in the case.

Comment

If evidence is offered regarding out-of-court statements of the defendant, the trial court must decide by a preponderance of the evidence whether they are admissible. If they are admitted, then evidence may be offered at trial regarding the circumstances surrounding the statements, including the manner in which they were obtained, and the trial court is to instruct the jury that they may give such weight and credence to them as they see fit. *State v. Dillon*, 93 Idaho 698, 471 P.2d 553 (1970).

ICJI 324 TESTIMONY OF A CHILD

Comment

The committee determined that no separate instruction should be given with regard to a child as a witness.

ICJI 325 REPRIMAND OF COUNSEL

INSTRUCTION NO. ____

During the trial I admonished counsel for the [state] [defendant]. Do not let that influence your decision. Lawyers are required to represent their clients diligently. One of my duties is to oversee the conduct of this trial. Sometimes there are good faith disagreements between the judge and the attorneys about what questions, argument, and conduct are proper. Your verdict must be based solely upon the facts shown by the evidence and the law contained in these instructions.

ICJI 340 WILFUL DEFINED

INSTRUCTION NO. _____

[An act] [or] [A failure to act] is "wilful" or done "wilfully" when done on purpose. One can act wilfully without intending to violate the law, to injure another, or to acquire any advantage.

Comment

IC s 18-101(1). The word "wilfully," when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate law, or injure another, or to acquire any advantage.

ICJI 341 NEGLIGENCE DEFINED

INSTRUCTION NO. _____

The word(s) ["neglect"] ["negligence"] ["negligent"] ["negligently"] refer(s) to a lack of that attention to the probable consequences of an act or omission which a prudent person ordinarily would apply to the person's own affairs.

[In order to be held responsible, the defendant must be guilty of "criminal negligence," which is such negligence as amounts to a wanton, flagrant or reckless disregard of consequences or wilful indifference of the safety or rights of others.]

Comment

I.C. s 18-101(2); *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937); *State v. Hintz*, 61 Idaho 411, 102 P.2d 639 (1940).

ICJI 342 CRIMINAL OR GROSS NEGLIGENCE DEFINED

INSTRUCTION NO.

[Criminal negligence] [Gross negligence] means such negligence as amounts to a wanton, flagrant or reckless disregard of consequences or willful indifference of the safety or rights of others.

Comment

State v. Taylor, 59 Idaho 724, 735, 87 P.2d 454, 459 (1939).

ICJI 343 MALICE DEFINED

INSTRUCTION NO. _____

"Malice" and "maliciously" mean the desire to annoy or injure another or the intent to do a wrongful act.

Comment

I.C. s 18-101(4). The words "malice" and "maliciously" import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law.

The definition of "malice" in I.C. s 18-101(4) leaves no room for an interpretation of the term to include negligence. *State v. Nastoff*, 124 Idaho 667, 862 P.2d 1089 (Ct. App. 1993).

The definition of "malice" in I.C. s 18-101(4) is not applicable to a charge of murder. *State v. Dillon*, 93 Idaho 698, 471 P.2d 553 (1970).

ICJI 344 STIPULATION OF FACT

INSTRUCTION NO.

Parties can agree that certain facts are true, thereby eliminating the need for any evidence to establish those facts. In this case, the state and the defense have agreed that the following is true:

[STATEMENT OF FACTS]

You are to accept the agreed-upon facts as being true, and are to consider them along with all of the other evidence admitted during the trial.

ICJI 345 EXPERT WITNESS TESTIMONY

INSTRUCTION NO.

A witness who has special knowledge in a particular matter may give an opinion on that matter. In determining the weight to be given such opinion, you should consider the qualifications and credibility of the witness and the reasons given for the opinion. You are not bound by such opinion. Give it the weight, if any, to which you deem it entitled.

Comment

This is the last paragraph of ICJI 104.