

TESTIMONY OF ACCOMPLICE

A.

You have heard testimony from _____ who was an accomplice. An accomplice is one who knowingly and voluntarily cooperated with, aided, advised or encouraged another person in the commission of a crime.

You must first decide whether the testimony of _____ was corroborated before you may consider it. The defendant cannot be convicted solely on the uncorroborated testimony of an accomplice. However, only slight corroboration is required. This means there must be some evidence in addition to the testimony of _____ tending to show either (1) that the defendant committed the crime charged or (2) that the defendant was with others who committed the crime, at the time and place the crime was committed.

If you find that the testimony of _____ has been corroborated, it should be considered with caution and given such weight as you believe it deserves. If you find that the testimony of _____ has not been corroborated, you must disregard it and may not consider it as evidence against the defendant. Remember, the defendant cannot be convicted solely on the uncorroborated testimony of an accomplice.

Young v. State, 68 Md. App. 121, 136-37, 510 A.2d 599, 607, *cert. denied*, 307 Md. 599, 516 A.2d 569 (1986) (no specific instruction required as to weighing the testimony of police officers).

"[If] the trial court chooses to sum up the evidence, he or she must be careful to do so fairly and impartially, without suggesting what weight should be given to particular evidence." *McLain*, *supra* § 104.1, at 66; *see Gore v. State*, 309 Md. 203, 209-14, 522 A.2d 1338, 1341-43 (1987) (comment on legal sufficiency of the evidence was improper as an "indirect comment on the general weight of evidence"); *Hardaway v. State*, 72 Md. App. 592, 602-04, 531 A.2d 1305, 1310 (1987), *rev'd on other grounds*, 317 Md. 160, 562 A.2d 1234 (1989) (no improper comment made in statement by judge in response to questions by jurors when viewed in context); *see also* *Murphy*, *supra* § 1301, at 637 (citing with approval MPJI-Cr 3:10).

An instruction raising a presumption either way as to witness credibility invades the province of the jury. *Laster v. State*, 70 Md. App. 592, 521 A.2d 1289 (1987), *aff'd*, 313 Md. 548, 546 A.2d 427 (1988). Therefore, "a presumption of truthfulness instruction is improper and ought not be given, especially when . . . the only witnesses testifying are state witnesses. [However,] the error in instructing that there is a presumption of truthfulness does not rise to the level of plain error." *Id.* at 598-99, 521 A.2d at 1292; *cf. Brown v. State*, 80 Md. App. 187, 191, 560 A.2d 605, 606 (1989) (when neither side can vouch for the veracity of an individual appearing to possess material evidence, it is within the sound discretion of the trial judge to call that person as a court's witness).

Comment

An accomplice is one who, knowingly and with common criminal intent, participated, cooperated, aided, or abetted the principal offender and thus also can be convicted, either as a principal or an accessory before the fact. *Rivenbark v. State*, 58 Md. App. 626, 634, 473 A.2d 1329, 1333, cert. denied, 300 Md. 795, 481 A.2d 1240 (1984). If there is no factual dispute as to the participation or role of the witness in the commission of the offense, the witness's status as an accomplice is a question of law for the court. However, if the witness's status as an accomplice is at issue, it is a jury question, with the defendant having the burden of persuasion, by a preponderance of the evidence, to establish that the witness was an accomplice. *Bennett v. State*, 283 Md. 619, 623, 392 A.2d 76, 78 (1978). See generally Lynn McLain, *Maryland Evidence* § 300.6, at 169 n.5 (1987 & Supp. 1994); *Burroughs v. State*, 88 Md. App. 229, 235-42, 594 A.2d 625, 627-32 (1991).

An accomplice is a competent witness to testify against the defendant. *Veney v. State*, 251 Md. 159, 168, 246 A.2d 608, 614 (1968). However, such testimony must be corroborated. *Faulkner v. State*, 314 Md. 630, 642, 552 A.2d 896, 902 (1989); *Turner v. State*, 294 Md. 640, 641-42, 452 A.2d 416, 417 (1982). Corroboration is required because a person who admits guilt may be testifying solely to better his or her own position with the State. Thus, accomplice testimony should be regarded with caution. *Brown v. State*, 281 Md. 241, 378 A.2d 1104 (1977); *Watson v. State*, 208 Md. 210, 217, 117 A.2d 549, 552 (1955); *Samuels v. State*, 54 Md. App. 486, 492, 459 A.2d 213, 217 (1983).

The degree of corroboration necessary is slight and need not be sufficient by itself to convict. See, e.g., *Collins v. State*, 318 Md. 269, 280, 568 A.2d 1, 6-7, cert. denied, 110 S. Ct. 3296 (1990); *Govostis v. State*, 74 Md. App. 457, 467-70, 538 A.2d 338, 343-44, cert. denied, 313 Md. 7, 542 A.2d 844 (1988); *Grant v. State*, 65 Md. App. 547, 550-53, 501 A.2d 475, 476-78 (1985), cert. denied, 306 Md. 70, 507 A.2d 184 (1986); *Boone v. State*, 3 Md. App. 11, 20 n.4, 237 A.2d 787, 794 n.4, cert. denied, 393 U.S. 872 (1968). Corroborating evidence must relate to the material facts tending either (1) to identify the accused with the perpetrators of the crime, or (2) to show the participation of the accused in the crime itself. *Collins*, 318 Md. at 280, 568 A.2d at 6-7; *Brown*, 281 Md. at 244, 378 A.2d at 1107; see *Woods v. State*, 315 Md. 591, 616-20, 556 A.2d 236, 248-50 (1989) (accomplice's testimony corroborated by defendant's confession); *Wiggins v. State*, 76 Md. App. 188, 200, 544

A.2d 6, 14 (1987) (State corroborated testimony of accomplice through the introduction of victim's property seized under search warrant). Whether the testimony is sufficiently corroborated, and, if so, what weight to give it, are for the jury to decide. *Wright v. State*, 219 Md. 643, 650, 150 A.2d 733, 737 (1959).

material facts tending either (1) to identify the accused with the perpetrators of the crime or (2) to show the participation of the accused in the crime itself. See Wright v. State, 219 Md. 643, 150 A.2d 733 (1959). If with some degree of cogency the corroborative evidence tends to establish either of these matters, the trier of fact may credit the accomplice's testimony even with respect to matters as to which no corroboration was adduced. McDowell v. State, 231 Md. 205, 189 A.2d 611 (1963). That corroboration need not extend to every detail and indeed may even be circumstantial is also settled by our cases.

Id. at 244. Additionally, the evidence offered as corroboration must be independent of the accomplice's testimony. Turner v. State, 294 Md. 640, 452 A.2d 416 (1982) (Court held that in order to satisfy the rule of independent corroboration of accomplice testimony, the proffered evidence must consist of some thing more substantial than the extrajudicial comments of the accomplice himself.) While it may be obvious, corroboration is necessary only when criminal agency has not been established. Regarding the first alternative, i.e., identifying the defendant with the perpetrators of the crime, "it would be sufficient by way of corroboration for the State to show, by way of non-accomplice evidence, that the appellant was in the general vicinity of the crime scene and at about the time when the crime occurred." Jeandell v. State, 34 Md.App. 108, 110, 336 A.2d 79 (1976).

The issue of whether an accomplice's testimony has been sufficiently corroborated usually comes up on appeal wherein the appellant challenges the sufficiency of the evidence. If the appellant's conviction is based solely upon the uncorroborated testimony of an accomplice then it will not be sustained...an accused cannot be convicted upon the uncorroborated testimony of an accomplice.

For the sake of completeness, an accomplice is defined as "one who knowingly, voluntarily, and with common criminal intent with the principal offender unites with him in the commission of the crime, either as principal or as an accessory before the fact." Watson v. State, 208 Md. 210, 117 A.2d 549 (1955). The generally accepted test to determine if a witness is an accomplice is whether he himself could be convicted for the offense either as a principal or as accessory before the fact. Sutton v. State, 10 Md.App. 353, 270 A.2d 417 (1970). If there is no factual dispute as to the participation or role of the witness in the commission of the offense, the witness's status as an accomplice is a question of law for the court. However, if the witness's status as an accomplice is at issue, it is a jury question, with the defendant having the burden of proving by a preponderance of the evidence his assertion that a witness offered against him is an accomplice. Bennett v. State, 283 Md. 619, 392 A.2d 76 (1978). An accomplice does not include an accessory after the fact. Gardner v. State, 6 Md.App. 483, 251 A.2d 901 (1969).