172 CIRCUMSTANTIAL EVIDENCE: FLIGHT, ESCAPE, CONCEALMENT

Evidence has been presented relating to the defendant's conduct [after the alleged crime was committed] [after the defendant was accused of the crime]. Whether the evidence shows a consciousness of guilt, and whether consciousness of guilt shows actual guilt, are matters exclusively for you to decide.

COMMENT

Wis JI-Criminal 172 was originally published in 1978 and revised in 1991. This revision was approved by the Committee in September 1999.

This instruction may be used when sufficient evidence of flight or other conduct after the alleged crime has been offered to sustain a finding of guilty knowledge. Whether to give an instruction on this topic is within the discretion of the court. If this instruction is given, it may be appropriate to include it immediately after, or as part of, Wis JI-Criminal 170, **CIRCUMSTANTIAL EVIDENCE**.

A strong argument can be made that an instruction on this topic is unnecessary, but the Committee decided to republish this revised version rather than withdraw the instruction entirely. An instruction on this topic may continue to be requested, especially where case law can be found supporting the concept addressed here. The material below summarizes the relevant legal authority and points out the potential problems that need to be avoided in attempting to craft an instruction on this topic.

As a general rule, it has been held that evidence of flight, escape, or concealment by an accused has probative value as to guilt. The most typical situation involves flight from the crime scene. See Wangerin v. State, 73 Wis.2d 427, 437, 243 N.W.2d 448 (1976). The rule extends to escapes from custody while the charges are pending. State v. Knighten, 212 Wis.2d 833, 839-40, 569 N.W.2d 770 (Ct. App. 1997); Gauthier v. State, 28 Wis.2d 412, 419-20, 137 N.W.2d 101 (1965). Evidence of flight by a codefendant can be admissible if it "was so closely connected with the commission of the crime as to be admissible as **res gestae**." State v. Winston, 120 Wis.2d 500, 504, 355 N.W.2d 553 (Ct. App. 1984).

The rule has been extended beyond "flight" to other "criminal acts of an accused which are intended to obstruct justice or avoid punishment [which] are admissible to prove a consciousness of guilt of the principal criminal charge." State v. Bettinger, 100 Wis.2d 691, 698, 303 N.W.2d 585 (1981) [evidence of bribery is admissible to show consciousness of guilt on a charge of sexual assault]; State v. Neuser, 191 Wis.2d 131, 144, 528 N.W.2d 49 (Ct. App. 1995) [evidence of a threatening phone call is admissible to show consciousness of guilt on a charge of aggravated battery]. Also see Peters v. State, 70 Wis.2d 22, 30, 233 N.W.2d 420 (1975) [evidence of a fabricated alibi is relevant to a burglary charge]. Evidence of noncriminal acts of concealment are also covered. State v. Paulson, 118 Wis. 89, 94 N.W.2d 771 (1903).

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For a recent discussion of the admissibility of flight evidence, see State v. Miller, 231 Wis.2d 447, 605 N.W.2d 567 (Ct. App. 1999). Admitting flight evidence is within the court=s discretion even if other criminal charges based on the same conduct have been severed. Miller, 231 Wis.2d 447, 461-62.

The propriety of giving correct instructions on flight evidence is also generally recognized. See Devitt and Blackmar, Federal Jury Practice and Instructions, § 15.08. However, at least one state, Missouri, has apparently determined that instructions on flight should not be given. State v. Coleman, 254 S.W.2d 27 (Mo., 1975). The Wisconsin Supreme Court has not specifically reviewed flight instructions but has recognized their propriety in an unpublished opinion. State v. Gill, per curiam, May 2, 1978.

A series of United States Supreme Court cases have discussed the limits on flight instructions. Instructions that refer to flight as a "silent admission of guilt," or which include such language as "the wicked flee, when no man pursueth, but the innocent are as bold as a lion," have been found clearly erroneous. Hickory v. United States, 160 U.S. 408, 16 S.Ct. 327, 40 L.Ed. 474 (1896); Alberty v. United States, 162 U.S. 499, 16 S.Ct. 864, 40 L.Ed. 1051 (1896); Starr v. United States, 164 U.S. 627, 17 S.Ct. 223, 41 L.Ed. 577 (1896). However, there is no error in instructing the jury in a way that is not misleading, on the well-settled law that the flight of the accused is competent evidence against him as having a tendency to establish guilt. Allen v. United States, 164 U.S. 492, 17 S.Ct. 156, 41 L.Ed. 530 (1896); and Bird v. United States, 187 U.S. 118, 23 S.Ct. 42, 47 L.Ed. 100 (1902).

There are a number of problems in developing a fair flight instruction. First, characterizing the evidence as evidence of "flight" prejudges an issue that is often for the jury to determine. In many cases the jury will first have to decide whether the defendant's actions did constitute "flight." In State v. Sullivan, 203 A.2d 179 (1964), the Supreme Court of New Jersey was concerned with the misuse of "flight" when the evidence showed only "departure." Departure alone raises no inference of guilt, and "[f]or departure to take on the legal significance of flight, there must be circumstances present and unexplained which, in conjunction with the leaving, reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid an accusation based on that guilt." Sullivan, supra, at 192. The uniform instruction tries to meet this problem by using the general term "conduct" instead of "flight."

A second problem is that even if the conduct amounts to "flight," it may be engaged in by people who are not guilty of a crime. This was recognized by the United States Supreme Court in Alberty v. United States:

> . . . it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. . . . Innocent men sometimes hesitate to confront a jury - not necessarily because they fear that the jury will not protect them, but because they do not wish their names to appear in connection with criminal acts, are humiliated at being obliged to incur the popular odium of an arrest and trial, or because they do not wish to be put to the annoyance or expense of defending themselves. Alberty v. United States, 162 U.S. 499, 511, 16 S.Ct. 864, 40 L.Ed. 1051 (1896).

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Thus flight evidence is probative of guilt only insofar as it indicates a consciousness of guilt and insofar as consciousness of guilt indicates actual guilt. United States v. Myers, 55 F.2d 1036 (5th Cir. 1977); and Miller v. United States, 320 F.2d 767 (D.C. Cir. 9163) (concurring opinion). The uniform instruction tries to state this connection in a forthright manner.

Finally, it has been held that an "antiflight" instruction need not be given where the defendant asks that the jury be instructed that his failure to flee should be considered as a circumstance in his favor. United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972).

The previous version of the instruction used the general term "conduct or whereabouts" instead of "flight," "escape," "concealment," etc. The Committee believed that using the latter to characterize the defendant's conduct answers one of the questions that the jury must consider: did the conduct of the defendant constitute flight? This revision deletes Awhereabouts@ in favor of relying on Aconduct@ as a general term allowing consideration of a broader range of conduct than the physical fleeing from the scene of a crime. However, great caution must be taken not to use this instruction when the "conduct" involves the defendant's silence at the time of arrest. It is improper for the judge or the prosecutor to comment on that type of conduct. See Reichhoff v. State, 76 Wis.2d 375, 251 N.W.2d 470 (1977), and cases cited therein.

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