170 CIRCUMSTANTIAL EVIDENCE

It is not necessary that every fact be proved directly by a witness or an exhibit. A fact may be proved indirectly by circumstantial evidence. Circumstantial evidence is evidence from which a jury may logically find other facts according to common knowledge and experience.

Circumstantial evidence is not necessarily better or worse than direct evidence. Either type of evidence can prove a fact.

Whether evidence is direct or circumstantial, it must satisfy you beyond a reasonable doubt that the defendant committed the offense before you may find the defendant guilty.

IF EVIDENCE OF FLIGHT, ESCAPE, OR CONCEALMENT HAS BEEN ADMITTED, SEE WIS JI-CRIMINAL 172. IF EVIDENCE OF POSSESSION OF RECENTLY STOLEN PROPERTY HAS BEEN ADMITTED, SEE WIS JI-CRIMINAL 173.

COMMENT

Wis JI-Criminal 170 was originally published in 1966 and revised in 1978 and 1991. This revision was approved by the Committee in June 1999.

The 1999 revision involved a substantial rewriting of the former instruction, adapted from Wis JI-Civil 230. One change is to make it applicable to evidence submitted by either the state or the defendant. The need to change the old model to account for defense evidence was one of the issues in State v. Shah, 134 Wis.2d 246, 397 N.W.2d 492 (1986), where the jury was told that the general instruction on circumstantial evidence could apply to the defendant's evidence and that they should "interpolate how that would apply to the defendant rather than the state." The problem was that instruction referred to the "beyond a reasonable doubt" burden. While the court found that a reasonable jury would not be misled by these statements, the Committee concluded that it was advisable to rewrite Wis JI-Criminal 170 in a manner that could be applied to evidence presented by either the state or the defense.

Circumstantial evidence questions are often paired with the "reasonable hypothesis of innocence" issue. Reference to the latter issue is part of the burden of proof instruction, see Wis JI-Criminal 140, footnote 2. Also see State v. Poellinger, 153 Wis.2d 493, 451 N.W.2d 752 (1990). The following shows how the two issues are often combined:

The evidence does not have to remove every possibility before a conviction can be sustained. See State v. Eberhardt, 40 Wis.2d 175, 161 N.W.2d 287 (1968). The test stated in State v. Johnson, 11 Wis.2d 130, 136, 104 N.W.2d 379 (1960), is 'that all the facts necessary to warrant a conviction on circumstantial evidence must be consistent with each other and with the main fact sought to be proved and the circumstances taken together must be of a conclusive nature leading on the whole to a satisfactory conclusion and producing in effect a reasonable and moral certainty that the accused and no other person committed the offense charged.' The circumstantial evidence must, however, be sufficiently strong to exclude every reasonable theory of innocence, that is, the evidence must be inconsistent with any reasonable hypothesis of innocence. This is a question of probability, not possibility. State v. Shaw, 58 Wis.2d 25, 29, 205 N.W.2d 132 (1973).

For good general discussions of circumstantial evidence, see Schwantes v. State, 127 Wis. 160, 106 N.W 237 (1906); Spick v. State, 140 Wis. 104, 121 N.W. 664 (1909); State v. Johnson, 11 Wis.2d 130, 104 N.W.2d 379 (1960); and State ex rel. Hussong v. Froelich, 62 Wis.2d 577, 215 N.W.2d 390 (1974).

It has been held to error to refuse to give a requested instruction on circumstantial evidence when the state's case depends wholly or substantially upon such evidence. Kollock v. State, 88 Wis.663, 60 N.W. 817 (1894); Colbert v. State, 125 Wis. 423, 104 N.W. 61 (1905). However, it is not error to refuse to give a requested instruction when circumstantial evidence is not a substantial part of the state's case. Anderson v. State, 133 Wis. 601, 114 N.W. 112 (1907). And it has been held that the failure to instruct in the absence of a request is not error. Spick v. State, 140 Wis. 104, 121 N.W. 664 (1909).

