173 CIRCUMSTANTIAL EVIDENCE — POSSESSION OF RECENTLY STOLEN PROPERTY

Evidence has been presented that the defendant possessed recently stolen property. Whether the evidence shows that the defendant [knew the property had been stolen] [or] [participated in some way in the taking of the property] is exclusively for you to decide. Consider the time and circumstances of the possession in determining the weight you give to this evidence.

COMMENT

Wis JI-Criminal 173 was originally published in 1980. It was revised in 1987 and republished without change in 1991. This revision was approved by the Committee in October 1999.

This instruction may be used when sufficient evidence of unexplained possession of recently stolen property has been offered to sustain a finding of guilty knowledge or participation in the taking of the property by the defendant. 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**.

See Wis JI-Criminal 920 for a definition and discussion of "possession."

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. That case law presents potential problems, especially since the concept has often been addressed by reference to a "presumption" flowing from possession of recently stolen property. Instructing in those terms is to be avoided.

Caution should be exercised in giving an instruction on this topic because the relevance of evidence of possession of recently stolen property can vary a great deal, depending on the facts of the case. An 1880 decision of the Wisconsin Supreme Court described the issue and offered a caution about instructing the jury:

> It is evident that mere possession of stolen goods by a party accused ought not to be in every case, if in any, sufficient evidence to justify a conviction. Take the case of a reputable citizen, whose character is such that no suspicion of crime has attached to him, charged with stealing a horse, and the only proof is that the horse was found, the next morning after he was stolen, in his stable, the stable being one which could be entered without the aid of the accused. Clearly in such a case the presumption of innocence would outweigh the inference of guilt arising out of the fact of possession. So, if a purse of money had been stolen in a crowd, and soon after the theft the same had been found

> in the pocket of a man of known reputable character, the pocket being such that the purse could have been put there without his knowledge, the circumstance would hardly raise a suspicion sufficient to lean a charge of theft upon. It is not so much the mere possession of the stolen goods, as it is the nature of the possession; whether it is an open and unconcealed one, or whether the goods are such as the person found in possession thereof would probably be possessed of in a lawful way. If property of great value should be found in the possession of one known to be poor, so as to render it highly improbable that he had purchased it, an inference of guilt would arise much stronger than if such property were found in the possession of a man of wealth, who would probably purchase goods of such value. It would be impossible to enumerate the variety of circumstances attending the mere possession of stolen goods, which would lessen or increase the inference of guilty possession. In directing a jury, therefore, as to the weight they should give to the possession of stolen goods or the instruments of crime as evidence of guilt, care should be taken not to place too much importance upon the mere possession, but their attention should be called to the character of the possession and the circumstances attending it.

Ingalls v. State, 48 Wis. 647, 657-58, 4 N.W. 785 (1880).

The evidentiary rule that unexplained possession of recently stolen goods may raise an inference that the possessor is guilty of the taking of the property is generally recognized in Wisconsin. This rule was described by the Wisconsin Supreme Court in State v. Johnson, 11 Wis.2d 130, 104 N.W.2d 379 (1960):

> Mere possession of stolen property raises no inference of guilt, but Wisconsin from early times has followed the rule that unexplained possession of recently stolen goods raises an inference of greater or less weight, depending on the circumstances, that the possessor is guilty of the theft and also of burglary if they were stolen in a burglary. Such inference being in the nature of a presumption of fact calls for an explanation of how the possessor obtained the property. Such presumption is not conclusive and may be rebutted.

State v. Johnson, at 139.

Johnson has been cited with approval in State v. Bohachef, 50 Wis.2d 694, 185 N.W.2d 339 (1971); Gautreaux v. State, 52 Wis.2d 489, 190 N.W.2d 542 (1971); and Day v. State, 61 Wis.2d 236, 212 N.W.2d 489 (1973).

However, it should be noted that each of the cited cases dealt only with the sufficiency of the evidence, judged from the viewpoint of the appellate court. None dealt with the propriety of a jury instruction.

The propriety of a jury instruction dealing with the effect of unexplained possession of recently stolen property was recognized by the United States Supreme Court in Barnes v. United States, 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973). Barnes approved an instruction that advised the jury as follows: "Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen." Note that Barnes dealt with a finding of knowledge that the property had been stolen. The Wisconsin cases expanded this rule to apply to a finding of guilt on the underlying theft itself. It should also be noted that Barnes involved a case tried in federal court, where the trial judge has greater latitude in commenting on the evidence than a state trial judge has.

While the most recent Wisconsin Supreme Court cases dealt with the issue only in reviewing the sufficiency of the evidence, a series of four older decisions specifically considered jury instructions. In Ryan v. State, 83 Wis. 486, 53 N.W. 836 (1892), a jury instruction on the presumption arising from possession of recently stolen property was approved. The court held it was not error to give such an instruction because it was clearly indicated that the presumption applied only if the possession was unexplained and if guilt was supported by all the evidence.

In Ingalls v. State, 48 Wis. 647, 4 N.W. 785 (1880), a conviction was reversed because the instruction on the presumption arising from possession of stolen property was error. The same conclusion was reached in State v. Snell, 46 Wis. 524, 1 N.W. 225 (1879). In both cases, the court based its decision on the overemphasis given to the possession of the property. In the earliest case in the series, Graves v. State, 12 Wis. 659 (1860), a jury instruction on the presumption was criticized but not found to be grounds for reversal because there was a lack of proper objection and an assumption by the appellate court that the jury instructions that were not part of the appellate record probably stated the law correctly.

The Committee advises that caution be used in trying to translate the evidentiary rule discussed above into a jury instruction. For one thing, following the language from the Johnson case and instructing the jury in terms of a "presumption calling for an explanation" might shift the burden of proof to the defendant or relieve the prosecution of its burden to prove all elements of the crime beyond a reasonable doubt. A second concern is the emphasis on the possession of stolen property being "unexplained." While the probative value of possession rests on it being unexplained, including such emphasis in the jury instruction creates a danger of impermissibly commenting on the defendant's failure to testify. For that reason, the Committee has omitted "unexplained" from the instruction.

