225 INSTRUCTING ON A "PRESUMED FACT" THAT IS AN ELEMENT OF THE CRIME — § 903.03(3)

Evidence has been received that: (here identify the "basic facts")[1] _____.

If you are satisfied beyond a reasonable doubt that (state the basic facts) _____, you may find from this evidence alone that (identify the "presumed facts")[2] _____, but you are not required to do so. You are the sole judges of the facts, and you must not find that the defendant (state the presumed fact) unless you are so satisfied beyond a reasonable doubt from all the evidence in the case.[3]

COMMENT

Wis JI-Criminal 225 was originally published in 1987. The list of statutes beginning on page 3 was amended in February 1989 and January 1990. The instruction was republished without substantive change in 2000.

This instruction is intended to provide a framework for instructing the jury on "presumptions" in criminal cases as required by § 903.03. Most of the commonly used "presumptions" and "prima facie cases" are covered by either separate instructions on the specific evidentiary device (see, for example, JI-230 relating to a blood alcohol test) or parts of the uniform instruction for the crime to which the evidentiary device relates (see, for example, Wis JI-Criminal 1468, **ISSUE OF WORTHLESS CHECK**). The text of § 903.03 appears after note 3.

The need for an instruction arises when the legislature or the courts recognize that a certain fact or set of facts should be accorded "prima facie" or "presumptive" effect in proving the existence of other facts. For example, § 943.24(3)(a) provides that "proof that, at the time of issuance, the person did not have an account with the drawee" is "prima facie evidence that the person at the time he or she issued the check or other order for the payment of money, intended it should not be paid." The statutes refer to these evidentiary devices in a variety of ways, but the Committee has concluded that they should all be treated in the same way — as permissive inferences. An attempt to list all statutes in the Criminal Code that recognize "presumptions" or "prima facie" cases follows at the end of this comment.

Discussions of "presumptions" can become exceedingly complex. But understanding their impact in jury instructions in Wisconsin criminal cases can be simplified if one remembers that they only point out certain inferences that jurors are free to make but which jurors are not required to make. "Presumptions" cannot be employed to undercut the basic requirements that all facts necessary to constitute the crime (the "elements") be established beyond a reasonable doubt. Given that the effect of the "presumption" and the "prima facie case" is to create a "permissive inference," the Committee concluded that the words "presumption," "prima facie," or "inference," or their variations, should not be used in instructing the jury.

Two limitations on presenting these evidentiary devices to the jury should be noted. First, where the presumed fact is an element of the crime, the "presumption" cannot be submitted to the jury unless the evidence, as a whole, would allow the jury to be satisfied beyond a reasonable doubt that the presumed fact exists. See § 903.03(2). The presumption alone cannot justify submitting the case to the jury if the evidence as a whole is not sufficient.

Second, no inference or presumption may be submitted in a particular case unless, based on the facts of that case, the presumed fact is "more likely than not" to follow from the basic fact. This is the test set forth by the United States Supreme Court in County Court of Ulster County v. Allen, 442 U.S. 140 (1979). The Court held that if a statutory "presumption" creates a permissive inference (which is what "presumptions" and "prima facie cases" do in Wisconsin – see § 903.03(1)), defendants cannot challenge its constitutionality "on its face" by referring to hypothetical situations. Its validity may, however, be challenged as applied to the facts of a particular case. The test is whether ". . . there is a 'rational connection' between the basic facts that the prosecution proved and the ultimate fact presumed, and the latter is 'more likely than not to flow from' the former." 442 U.S. 140, 165, citing Tot v. United States, 319 U.S. 463, 467 (1943), and Leary v. United States, 395 U.S. 6, 36 (1969). Ulster County involved a statutory "presumption" that anyone present in a car was in possession of weapons found in the car. Under the circumstances of that case (three adult males with a 16-year-old girl and guns in her purse), the Court found the "presumption" was validly submitted to the jury. If the facts had been different, involving a defendant who was a hitchhiker, for example, it would have been error to submit the "presumption" to the jury – under those facts, it could not be said that the presumed fact (possession of the gun) was "more likely than not to flow from" the basic fact (presence in the automobile).

1. The "basic facts" are those which give rise to the "presumption" or "prima facie case." In the issue of worthless check example, evidence that the defendant did not have an account with the bank on which the check is drawn is evidence of the "basic facts" which give rise to the "presumption" that the defendant intended the check not be paid.

2. The "presumed fact" is the fact that results from the application of the "presumption" or "prima facie case." In the issue of worthless checks example, "intent that the check not be paid" is the "presumed fact" which may be found from the proof of the basic fact: no account with the bank on which the check is drawn.

3. Applying the suggested instruction to the worthless check example would result in the following:

Evidence has been received that the defendant did not have an account with the bank on which the check was drawn.

If you are satisfied beyond a reasonable doubt that the defendant did not have an account with the bank on which the check was drawn, you may find from this evidence alone that the defendant intended the check not be paid, but you are not required to do so. You are the sole judges of the facts, and you must not find the defendant intended the check not be paid unless you are so satisfied beyond a reasonable doubt from all the evidence in the case.

Section 903.03 of the Wisconsin Rules of Evidence sets forth rules relating to presumptions in criminal cases.

903.03 Presumptions in criminal cases. (1) Scope. Except as otherwise provided by statute, in criminal cases, presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule.

(2) Submission to jury. The judge is not authorized to direct the jury to find a presumed fact against the accused. When the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge may submit the question of guilt or of the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt. When the presumed fact has a lesser effect, its existence may be submitted to the jury if the basic facts are supported by substantial evidence, or are otherwise established, unless the evidence as a whole negatives the existence of the presumed fact.

(3) Instructing the jury. Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt.

Criminal Code Statutes Using
"Presumptions" or "Prima Facie" Cases

Statute	Title	Evidentiary Device
940.19(6)*	Battery	"A rebuttable presumption..."[a]
940.225(6)**	Sexual Assault	"...shall not be presumed..."[b]
941.36(2)	Fraudulent Tapping of Electric Wires or Gas or Water Meters or Pipes	"...is presumptive evidence ..."
943.20(1)(b)	Theft by Employee or Bailee	"...is prima facie evidence of..."

943.21(2), (2m)	Fraud on Hotel or Restaurant Keeper	"...prima facie evidence...is shown by..."; A...constitutes prima facie evidence of...@
943.24(3)	Issue of Worthless Checks	"...is prima facie evidence that..."
943.25(3)	Transfer of Encumbered Property	"It is prima facie evidence..."
943.37(3)***	Alteration of Property Identification Marks	"...is prima facie evidence of..."[c]
943.41(3)(a), (b) & (e), (4)(a) & (b)	Financial Transaction Card Crimes	"...is prima facie evidence..."
(5)(a), (6)(d)	" "	"...shall be presumed..."
943.455(2)	Theft of Commercial Mobile Service	"The intent required ... may be inferred ..."
943.46(2) (a), (d)-(g)	Theft of Cable Television Service	"The intent required ... may be inferred ..."
943.50(2)	Retail Theft	"...is evidence of..."
943.61(3)	Theft of Library Material	"...is evidence of..."
945.05(2)	Dealing in Gambling Devices	"...is prima facie evidence of..."
946.42(3)(e)	Escape	"...is prima facie evidence of ..."
948.02(6)****	Sexual Assault of a Child	"...shall not be presumed incapable of ..."
948.13(3)	Child Sex Offender Working with Children	"...is prima facie evidence that ..."
948.22(4)	Failure to Support	"...is prima facie evidence of..."
948.62(2)	Receiving Stolen Property From a Child	"...is prima facie evidence that..."

* The implementation of this presumption was discussed in State v. Crowley, 143 Wis.2d 324, 422 N.W.2d 847 (1988).

** This section does not actually create the same sort of evidentiary device as found in the other statutes. Rather, it is intended to state a rule of substantive law: that a person may be prosecuted for the sexual assault of his or her spouse.

*** In State v. Hamilton, 146 Wis.2d 426, 432 N.W.2d 108 (1988), the court found that the word "similar" in subsec. (3) "can be understood in different ways by reasonable people and that the statute is therefore ambiguous." The court then went on to define it: ". . . within the context of sec. 943.37(3), items must be comparable, substantially alike or capable of standing in the place of the other before they are similar."

**** This section does not actually create the same sort of evidentiary device as found in the other statutes. Rather, it is intended to state a rule of substantive law: that a person may be prosecuted for the sexual assault of his or her spouse.