345 MISSING WITNESS

[THE COMMITTEE RECOMMENDS THAT A MISSING WITNESS INSTRUCTION NOT BE GIVEN IN CRIMINAL CASES.]

COMMENT

Wis JI-Criminal 345 was originally published in 1979 and revised in 1985 and 1991. The 2001 revision adopted a new format without substantive change.

The previous versions of this instruction did not include a separate criminal jury instruction on the missing witness issue. Rather, the counterpart civil instruction, Wis JI-Civil 410 Witness: Absence, was incorporated by reference.

The Committee had previously concluded that such an instruction should never be given against the defendant in a criminal case and that it would rarely be appropriate for use against the state. The Committee has now concluded that the situations where the instruction is called for are so rare that it is best to recommend that it not be given. The conditions for giving the instruction, discussed below, are so strict that they could rarely be fulfilled under modern rules of discovery and disclosure.

The Wisconsin Supreme Court has said that the absent witness instruction should be "narrowly construed to be applicable only to those cases where the failure to call a witness leads to a reasonable conclusion that the party is unwilling to allow the jury to have the full truth." Ballard v. Lumbermens Mut. Casualty Co., 33 Wis.2d 601, 615, 616, 148 N.W.2d 65 (1967). The giving of the instruction is proper only if it is reasonable to infer, under the circumstances of the case, that the missing testimony would have been unfavorable to the party failing to call the witness. A party need not call every possible witness lest his failure to do so will result in an inference against him. State v. Sarinske, 91 Wis.2d 14, 280 N.W.2d 725 (1979), citing Valiga v. National Food Co., 58 Wis.2d 232, 206 N.W.2d 377 (1973). The witness must in fact have been more accessible to one side than to another, there must be no other reasonable explanation for not calling the witness (absolute physical unavailability, for example, should not weigh against either party), and the witness' testimony must be relevant and noncumulative. Further, a party may have many reasons for not calling a witness which are unrelated to that witness' testimony being unfavorable: the witness may not be convincing on the stand; he or she may have a criminal record that would be exposed on cross-examination; or the witness may be unwilling to testify and therefore not be cooperative or helpful to the party's case. Before a missing witness instruction is given, all these factors, and others, need to be explored. Given the time-consuming nature of such exploration and the risk of jury confusion on the collateral issue of what an absent witness would have said, the Committee feels it is better practice not to give the instruction unless a case presents itself where the issue is especially important.

Where the prosecution requests the instruction be given against the defendant, even greater problems are present. Great care must be taken to make it clear that the defendant need not testify and need not present evidence in his own behalf. It is very difficult to square these principles with a jury instruction telling the jury they may draw an adverse inference from the failure to call a witness. Given this difficulty, the Committee recommends that the missing witness instruction not be given against the defendant.

It should also be noted that § 971.23(8) prevents any comment on the withdrawal of an alibi defense or on the failure to call an alibi witness.

Whether or not the parties are free to raise the missing witness issue in argument is a related question. The Committee feels that such argument is proper provided that the facts support the inference that the missing testimony would be unfavorable. Extreme care is required where the prosecutor seeks to raise the argument, however.