

6.8 Direct and Circumstantial Evidence

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which you can find another fact.

You are to consider both direct and circumstantial evidence. Either can be used to prove any fact. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

Comment

“[I]t is the exclusive function of the jury to weigh the credibility of witnesses, resolve evidentiary conflicts and draw reasonable inferences from proven facts. Circumstantial and testimonial evidence are indistinguishable insofar as the jury fact-finding function is concerned, and circumstantial evidence can be used to prove any fact.” *United States v. Ramirez-Rodriguez*, 552 F.2d 883, 884 (9th Cir. 1977) (per curiam) (citations omitted); see also *Payne v. Borg*, 982 F.2d 335, 339 (9th Cir. 1992).

The Committee believes that an instruction on circumstantial evidence generally eliminates the need to explain the same principle in terms of inferences. Thus, the Committee recommends against giving instructions on matters such as flight, resistance to arrest, a missing witness, failure to produce evidence, false or inconsistent exculpatory statements, failure to respond to accusatory statements, and attempts to suppress or tamper with evidence. These matters are generally better left to argument of counsel as examples of circumstantial evidence from which the jury may find another fact. See *United States v. Beltran-Garcia*, 179 F.3d 1200, 1207 (9th Cir. 1999) (in discussing jury instruction regarding inferring intent to possess for distribution from quantity of drugs, the Ninth Circuit stated that “[a]lthough the instructions in this case were not delivered in error, we do not hesitate to point out the ‘dangers and inutility of permissive inference instructions.’” (citation omitted)); see also *United States v. Rubio-Villareal*, 967 F.2d 294, 295, 300 (9th Cir. 1992) (en banc) (disapproving jury instruction that knowledge of presence of drugs in vehicle may be inferred when defendant is driver).

It may be helpful to include an illustrative example of circumstantial evidence in the instruction. If so, consider the following:

By way of example, if you wake up in the morning and see that the sidewalk is wet, you may find from that fact that it rained during the night. However, other evidence, such as a turned-on garden hose, may provide an explanation for the water on the sidewalk. Therefore, before you decide that a fact has been proved by circumstantial evidence, you must consider all the evidence in the light of reason, experience, and common sense.

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