

CHAPTER D

EVIDENTIARY INSTRUCTIONS

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D:01 DIRECT AND CIRCUMSTANTIAL EVIDENCE - NO DISTINCTION

Evidence may be either direct or circumstantial. Circumstantial evidence is the proof of facts or circumstances from which the existence or nonexistence of other facts may reasonably be inferred. All other evidence is direct evidence. The law makes no distinction between the effect of direct evidence and circumstantial evidence.

SOURCE & AUTHORITY

People v. Bennett, 183 Colo. 125, 515 P.2d 466 (1973).

In Re S.G., 91 P.3d 443 (Colo. App. 2004).

COLJI-Crim. No. 3:8

COLJI-Crim. No. 4:01 (1983).

D:02 EVIDENCE LIMITED AS TO PURPOSE

The court admitted certain evidence for a limited purpose. You are again instructed that you cannot consider that evidence except for the limited purpose for which it was admitted.

NOTES ON USE

When evidence has been admitted for a limited purpose only, this instruction must be given upon request of the party against whom the evidence is offered, and may be given sua sponte.

In domestic violence and sexual assault cases the trial court shall direct the jury as to the limited purpose for which the evidence is admitted and for which the jury may consider it. §§ 16-10-301 and 18-6-801.5 C.R.S.

SOURCE & AUTHORITY

CRE 105

Johnson v. People, 174 Colo. 413, 484 P.2d 110 (1971)

Lanford v. People, 159 Colo. 36, 409 P.2d 829 (1966)

Stull v. People, 140 Colo. 278, 344 P.2d 455 (1959)

People v. Garner, 806 P.2d 366 (Colo. 1991)

People v. Reaud, 821 P.2d 870 (Colo.App. 1991)

People v. Gladney, 194 Colo. 68, 570 P.2d 231 (1977), certiorari denied 434 U.S. 1038, 98 S.Ct. 776, 54 L.Ed.2d 787.

People v. Honey, 198 Colo. 64, 596 P.2d 751 (1979)

People v. Warren, 55 P.3d 809 (Colo. App. 2002)

COLJI-Crim. No. 4:02 (1983)

D:03 EVIDENCE LIMITED TO ONE DEFENDANT

The court admitted certain evidence concerning (name of defendant), but not concerning (name of other defendant). You are again instructed that you cannot consider it against (name of other defendant).

Your verdict as to each defendant must be rendered as if [he][she] were being tried separately.

SOURCE & AUTHORITY

CRE 105

Gregory v. People, 152 Colo. 455, 382 P.2d 544 (1963)

Thompson v. People, 139 Colo. 15, 336 P.2d 93 (1959), cert. denied 361 U.S. 972, 80 S.Ct. 606, 4 L.Ed.2d 552

Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), appeal after remand 416 F.2d 310 8th Cir.) certiorari denied 397 U.S. 1014, 90 S.Ct. 1248, 25 L.Ed.2d 428

COLJI-Crim. No. 4:03 (1983)

D:04 EXPERT WITNESSES

You have heard [a] witness[es] who [has] [have] testified as expert[s]. You are not bound by the testimony of [the] expert[s]; this testimony is to be weighed as that of any other witness. It is entirely your decision to determine what weight shall be given the testimony.

SOURCE & AUTHORITY

Hampton v. People, 171 Colo. 153, 465 P.2d 394 (1970).

Palmer v. People, 162 Colo. 92, 424 P.2d 766 (1967).

People v. King, 181 Colo. 439, 510 P.2d 333 (1973).

Tevlin v. People, 715 P.2d 338 (Colo.1986).

D:05 ACCOMPLICE TESTIMONY-UNCORROBORATED

The prosecution has presented a witness who claims to have been a participant with the defendant in the crime charged. There is no evidence other than the testimony of this witness which tends to establish the participation of the defendant in the crime.

While you may convict upon this testimony alone, you should act upon it with great caution, subjecting it to careful examination in the light of other evidence in the case. You are not to convict upon this testimony alone, unless convinced beyond a reasonable doubt of its truth.

NOTES ON USE

This instruction shall be given only when the prosecution's case is based upon uncorroborated testimony of an accomplice. Accomplice testimony need not be corroborated in every part; corroboration of the identity of the defendant and his/her connection with the crime is sufficient. *People v. Petschow*, 119 P.3d 495 (Colo. App. 2004).

SOURCE & AUTHORITY

Bowland v. People, 136 Colo. 57, 314 P.2d 685 (1957), certiorari denied, 355 U.S. 934, 78 S.Ct. 418, 2 L.Ed.2d 417

Davis v. People, 176 Colo. 378, 490 P.2d 948 (1971)

Pieramico v. People, 173 Colo. 276, 478 P.2d 304 (1970)

People v. Martinez, 187 Colo. 413, 531 P.2d 964 (1975)

Mendelsohn v. People, 143 Colo. 397, 353 P.2d 587 (1960)

Ellis v. People, 114 Colo. 334, 164 P.2d 733 (1945).

COLJI-Crim. No. 4:06 (1983).

D:06 CONVICTION OF FELONY—WITNESS OR DEFENDANT

The credibility of a witness may be discredited by showing that the witness has been convicted of a felony. A previous conviction is one factor that you may consider in determining the credibility of the witness. You must determine the weight to be given to any prior conviction when considering the witness's credibility.

[The credibility of statements made by a person who did not testify in court may be discredited by showing that the person has been convicted of a felony. A previous conviction is one factor that you may consider in determining the credibility of that person. You must determine the weight to be given to any prior conviction when considering the credibility of that person's statement.]

[The defendant is entitled to be tried for the crime charged in this case, and no other. You may consider testimony of a previous conviction only in determining the credibility of the defendant as a witness, and for no other purpose. When the defendant testifies [his][her] credibility is to be determined in the same manner as any other witness.]

NOTES ON USE

This instruction must be used when evidence of a prior felony conviction has been introduced to determine the credibility of a witness, *Lee v. People*, 170 Colo. 268, 460 P.2d 796 (1969).

The first paragraph of the instruction must be used when any witness, including the defendant, has been impeached by prior felony conviction.

The second paragraph should be used when the statement of a non-testifying person has been impeached by a prior felony conviction.

The third paragraph should only be used when the defendant has been so impeached, and when the defense requests the instruction.

SOURCE & AUTHORITY

§13-90-101, C.R.S.; C.R.E. 806

COLJI-Crim. No. 4:07 (1983)

D:07 REPUTATION FOR TRUTH AND VERACITY

The credibility of a witness may be discredited or supported by testimony about his reputation for truthfulness or by the opinion of another witness. It is entirely your decision to determine what weight shall be given the testimony.

SOURCE & AUTHORITY

CRE 608(a)

COLJI-Crim. No. 4:08

D:08 JUDICIAL NOTICE

A judicially noticed fact is one which the court determines is not subject to reasonable dispute and has accepted as being true.

You may or may not accept this fact as true. It is entirely your decision to determine what weight shall be given the evidence.

NOTES ON USE

CRE 201 requires this instruction whenever the court takes judicial notice of a fact in a criminal case.

SOURCE & AUTHORITY

CRE 201.

COLJI-Crim. No. 4:10 (1983).

Kruse v. McKenna, 178 P.3d 1198, (Colo. 2008)

D:09 STIPULATION AS TO TESTIMONY

The parties have agreed that if _____ (name) were called as a witness [he][she] would testify as set forth in the stipulation. You should consider that testimony in the same way as if it had been given here in court, and you should judge this testimony in the same manner in which you would judge that of any witness who appeared and testified before you.

NOTES ON USE

Stipulations should be presented in writing, admitted as an exhibit and read to the jury, but not given to the jury with other exhibits.

SOURCE & AUTHORITY

Martin v. People, 738 P.2d 789 (Colo. 1987).

People v. Hanson, 189 Colo. 101, 537 P.2d 739 (1975).

People v. Orr, 39 Colo.App. 289, 566 P.2d 1361 (1977).

COLJI-Crim. No. 4:11 (1993)

D:10 STIPULATION AS TO FACTS

The parties have agreed as to the existence of [a certain fact] [certain facts]. You may regard [that fact] [those facts] as proven.

NOTES ON USE

Stipulations should be presented in writing, admitted as an exhibit and read to the jury, but not given to the jury with other exhibits.

SOURCE & AUTHORITY

Martin v. People, 738 P.2d 789 (Colo. 1987).

People v. Hanson, 189 Colo. 101, 537 P2d 739 (1975).

People v. Orr, 39 Colo.App. 289, 566 P.2d 1361 (1977).
COLJI-Crim. No. 4:12 (1993).

D:11 INFERENCES-GENERAL

An inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is warranted by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

The prosecution always has the burden of proving, beyond a reasonable doubt, each element of the offense[s] charged. The defendant has no burden to prove or disprove anything.

NOTES ON USE

This instruction should only be used together with an instruction setting forth an inference or presumption. Statutory presumptions should be referred to as inferences to avoid confusion with the presumption of innocence instruction.

Because mandatory presumptions in criminal cases violate due process, these presumptions are construed as permissive inferences, even where the statutory language appears to create a mandatory presumption. *Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987), *Barnes v. People*, 735 P.2d 869, 872 (Colo. 1987), *People v. Felgar*, 58 P.3d 1122 (Colo. App. 2002); *People v. Stanley*, 170 P.3d 782, 793 (Colo.App. 2007). The statutory term "prima facie proof" means proof which gives rise to a permissive inference. See, *Jolly v. People* 742 P.2d 891 (Colo. 1987), and *People in the Matter of R.M.D.*, 829 P.2d 852 (Colo. 1992).

SOURCE & AUTHORITY

COLJI-Crim. No. 4:13 (1993).

D:12 CHARACTER-PARTICULAR TRAIT

In arriving at your verdict you may consider evidence of the defendant's character in determining whether the defendant would be likely to commit the offense charged.

NOTES ON USE

This instruction is only to be used when evidence has been admitted concerning the particular trait(s) involved in the offense charged. *Lutz v. People*, 133 Colo. 229, 293 P.2d 646 (1956).

While the Supreme Court of Colorado has ruled that the failure to give this instruction is not reversible error, *Reigan v. People*, 120 Colo. 472, 210 P.2d 991 (1949), the better practice would be to use this instruction when it is appropriate.

SOURCE & AUTHORITY

CRE 404 (a) (1).

Lutz v. People, 133 Colo. 229, 293 P.2d 646 (1956).

People v. Sexton, 192 Colo. 81, 555 P.2d 1151 (1976).

COLJI-Crim. No. 4:09 (1983)

D:13 OUT OF COURT STATEMENTS—CHILD DECLARANT

In this case, you heard evidence repeating (an) out of court statement(s) of ____ (insert child's name)_, which (was) (were) admitted into evidence.

You are instructed that it is for you to determine the weight and credit to be given this (these) statement(s). In making this determination you shall consider the age and maturity of the child, the nature of the statement(s), the circumstances under which the statement(s) was (were) made, and any other evidence that has been admitted that you choose to consider for this purpose [unless the court has

instructed you that it must be considered for some other purpose.]

NOTES ON USE

This instruction assumes that the trial court has ruled on the relevancy of the evidence pertaining to the out of court statement. Delete inapplicable bracketed material.

Pursuant to §13-25-129(2), C.R.S. the court must include this special instruction in the final written instructions to the jury. Furthermore, when requested by either party, the court should give this special instruction contemporaneously with the admission of the evidence. See *People v. Burgess*, 946 P.2d 565 (Colo.App. 1997).

The admissibility of § 13-25-129, C.R.S. statements may be limited due to constitutional confrontation clause issues, at least where such statements are testimonial and the child does not testify. See *Crawford v. Washington*, 541 U.S. 46 (2007); *People v. Vigil*, 127 P.3d 916, 929-30(Colo. 2006); *People v. Moreno*, 160 P.3d 242 (Colo. 2007); *Vasquez v. People*, 173 P.3d 1099 (Colo. 2007); *Pena v. People*, 173 P.3d 1107 (Colo. 2007); *People v. Argoramirez*, 102 P.3d 1015 (Colo. 2004).

This instruction is to be used in addition to the general instruction on credibility of witnesses.

SOURCE & AUTHORITY

§13-25-129(2), C.R.S.

COLJI-Crim. No. 22:10 (1993).

This instruction is to be used in addition to the general instruction on credibility of witnesses.