Land & Water Law Review

Volume 12 | Issue 1 Article 7

1977

Criminal Law - Presumptions: Abrogating the Use of Presumptive Language in Jury Instructions on Specific Intent - Stuebgen v. State

Richard E. Hopper, Jr.

Follow this and additional works at: https://scholarship.law.uwyo.edu/land_water

Recommended Citation
Hopper, Jr., Richard E. (1977) "Criminal Law - Presumptions: Abrogating the Use of Presumptive Language in Jury Instructions on Specific Intent - Stuebgen v. State," *Land & Water Law Review*: Vol. 12 : Iss. 1 , pp. 301 - 317.
Available at: https://scholarship.law.uwyo.edu/land_water/vol12/iss1/7

This Note is brought to you for free and open access by Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Land & Water Law Review by an authorized editor of Law Archive of Wyoming Scholarship.

CASE NOTES

CRIMINAL LAW—Presumptions: Abrogating the Use of Presumptive Language in Jury Instructions on Specific Intent. Stuebgen v. State, 548 P.2d 870 (Wyo. 1976).

In *Stuebgen v. State,* the Wyoming Supreme Court found presumptive language in jury instructions on specific intent in criminal cases has the effect of precluding jury certainty beyond a reasonable doubt, thereby infringing upon a defendant's due process rights under the fourteenth amendment. It appears from the *Stuebgen* court's opinion that presumptive language in criminal cases may never be used in instances where the presumption is court-made.[1]

The *Stuebgen* opinion helps eliminate the confusion between the proper application of a "presumption" and an "inference." In a criminal case, an inference, which the jury may or may not draw based on evidence introduced, is allowable. A presumption is not allowable, at least in the absence of statutory sanction, because, by its very nature, a presumption demands a particular result to follow from evidence introduced.[2]

Steubgen v. State

The defendants were charged with possession of a controlled substance with intent to deliver.[3] At trial it was

Copyright© 1977 by the University of Wyoming.

1. Statutorily enacted presumptions in criminal cases continue to be recognized by the United States Supreme Court when constitutional guidelines, discussed *infra,* are complied with. Stuebgen did not approach the question of the validity of statutorily enacted presumptions.
2. For purposes of this casenote, the terms listed below are defined as follows:
   (1) *Presumption:* a process where one fact is required to be found from the existence of another fact.
   (2) *Inference:* a process where one fact may or may not be found from the existence of another fact.
   (3) *Permissive presumption:* a permissive inference that the jury may or may not draw. (Actually, the term permissive presumption, is a contradiction within itself. By definition, a presumption warrants a certain fact to be true without examination or proof. Despite this, courts continue to use the term, presumption, when they really mean permissive inference.)
   (4) *Conclusive presumption:* a presumption in which the existence of one fact is conclusive as to the existence of another fact, and which cannot be overcome by rebutting evidence.
   (5) *Mandatory presumption:* a presumption in which the existence of one fact is conclusive as to the existence of another fact, but which can be overcome by rebutting evidence.
3. WYO. STAT. § 35-347.31(a) (Supp. 1975).

shown that the defendants had 1.86 pounds of marijuana packaged in 31 "baggies" in the trunk of their automobile. They were convicted and subsequently appealed. The Supreme Court of Wyoming reversed, holding that the defendants were deprived of their right to a speedy trial and that the instruction to the jury on specific intent was erroneous.

The purpose of this note is to analyze the effect of the jury instruction on specific intent.[4] The *Stuebgen* court held that in a criminal case it is reversible error to instruct a jury that the accused is presumed to intend the natural or probable consequences of his conscious acts when specific intent is an element of the crime involved.

The principle questions raised by the court's opinion on the specific intent instruction are: (1) when sufficient circumstantial evidence is introduced in a criminal case, can an instruction on specific intent ever be couched in terms of a presumption? and (2) what constitutes a permissible instruction on specific intent in criminal cases?

SPECIFIC INTENT, PRESUMPTIONS, AND INFERENCES

In certain crimes, specific intent is a necessary element and must be proved as a fact, in addition to the unlawful act, before an accused can be found guilty. Specific intent, in contrast with general intent, cannot be inferred from the commission of the unlawful act. This is due largely to the greater degree of culpability and punishment accompanying crimes that incorporate specific intent. Specific intent can be defined as that state of mind necessary to commit the unlawful act and to accomplish some further act or additional consequence.[5] Common examples of crimes involving specific

4. The dispositive issue in the case was the constitutional question of the right to a speedy trial, decided in favor of the defendants. The issue regarding the jury instruction on specific intent was not determinative in deciding the outcome of the case, thereby giving the portion of the majority's opinion on this issue no more force than mere dictum. The concurring opinion of Justice McClintock pointed out that the court should not have considered this issue since it was not necessary in deciding the outcome. Because the opinion on the specific intent instruction is dictum, the precedence value of the opinion is diminished.

5. People v. Hood, 1 Cal.3d 444, 462 P.2d 370, 82 Cal. Rptr. 618 (1969).

intent are murder, larceny, assault with intent to rape, and, as in the instant case, possession of a controlled substance with intent to deliver it.

Proving specific intent almost always involves showing facts which circumstantially point to the accused's guilty intent. From such circumstantial facts, intent may be inferred.[6] Often, this inferential practice gets entangled with the practice of assuming one fact from another, and it is here that the presumption terminology may arise. McCormick defines a presumption as "a standardized practice, under which certain facts are held to call for uniform treatment with respect to their effect as proof of other facts."[7] Normally, a presumption is thought to require a certain fact to be found in the absence of evidence to rebut it, while an inference indicates that the jury may or may not infer a conclusion from a given set of facts.[8] In criminal cases, the use of a presumption could have the effect of shifting the burden of proof to the accused, which would defeat the assumption of innocence inherent in the criminal law.[9]

Nevertheless, presumptions have found application in the criminal law. They are not considered conclusive or mandatory upon an issue, but give rise to a permissible inference only.[10] Their basic function in the criminal law has been to add as much fairness to the trial as possible. They attempt to eliminate imbalances resulting from one party's superior access to proof.[11] In the principal case, this would apply to the factor of the defendants' intent to deliver—though the defendants know their intent, the prosecutor cannot look into their minds to determine their intent. Not only are presumptions created because of the difficulties inherent in proving intent, but they are also used by the court

---

6. *Cf.* Kennedy v. State, 422 P.2d 88 (Wyo. 1967).
7. McCORMICK, LAW OF EVIDENCE § 342 at 803 (2d ed. 1972).
8. Sewall v. United States, 406 F.2d 1289, 1294 (8th Cir. 1969).
9. McCORMICK, *supra* note 7, at 804.
10. Note, *The Unconstitutionality of Statutory Criminal Presumptions*, 22 STAN. L. REV. 341, 343 (1970).
11. McCORMICK, *supra* note 7, § 343 at 806-07.

in appraising the probabilities of the presumed fact, and directing the course of the trial accordingly.[12]

CONSTITUTIONAL LIMITATIONS ON THE USE OF PRESUMPTIONS

The United States Supreme Court has substantially defined the constitutional limits of presumptions in criminal cases. Although the effect of a presumption may not exceed that of a permissible inference, the presumption may be sufficient to take an otherwise defective prosecution case to the jury and ultimately result in a conviction that could not have occurred without it.[13] A presumption may infringe an accused's constitutional right: (1) to be convicted beyond a reasonable doubt, under the due process clause of the fourteenth amendment; (2) to have the jury be the exclusive trier of facts, under the sixth amendment; and (3) not to testify against himself, under the fifth amendment.

The Supreme Court has reviewed the creation of presumptions to test their effect on these constitutional rights. The creation of presumptions that go beyond constitutional limits gives rise to a particularly bothersome question in criminal cases. The desire to simplify the prosecutor's burden of producing evidence in certain criminal cases is counterbalanced by "the very real fear that going too far in this direction may result in substituting an inquisitorial procedure for our traditional accusatorial system."[14]

The United States Supreme Court has given some consideration to the effect of a court-made presumption of intent in criminal cases. In *Morissette v. United States*,[15] the defendant was convicted of stealing government property. The trial court had refused to submit or to allow the defendant to argue he acted without wrongful intent;[16] the jury being in-

12. *Id.* at 807.
13. *Id.* § 344 at 811.
14. *Id.*
15. 342 U.S. 246 (1952).
16. *Id.* at 248-49. The defendant had carried away and sold empty bomb casings from a government bombing range. He claimed he thought the bomb casings had been abandoned.

structed that such intent was presumed by his own act. The Supreme Court reversed, basing its decision on the rule that criminal intent was an essential prerequisite of criminal liability under the crime charged and that such intent was not to be presumed or inferred as a matter of law, but was to be found by the jury upon a consideration of all the evidence, rather than upon the isolated fact of taking.[17] The essence of the *Morissette* decision is that an inference that would permit but not require a jury to assume intent from an isolated fact effectively precludes them from reaching their own conclusion, and as a constitutional matter, would amount to a violation of due process of law.

In *Holland v. United States*,[18] the defendent was convicted of federal income tax evasion. The Court held that willful evasion of income taxes involves a specific intent which must be proved by independent evidence and which cannot be inferred from the mere understatement of income.[19] Thus, not only is it wrong to infer intent from one fact, isolated from other facts in evidence, as *Morissette* held; it is also impermissible to infer intent when the only fact in evidence is the unlawful act itself.

STATUTORY PRESUMPTIONS

A more recent line of cases has considered the use of presumptions in criminal cases in much greater detail. These cases all involve statutory presumptions, rather than court-made presumptions, but the consequences of both types are closely related.

The Supreme Court in *Tot v. United States*[20] enunciated the "rational connection" test. To meet this test there must be a rational connection between the fact proved and the ultimate fact to be presumed before a statutory criminal presumption would satisfy due process requirements. The

17. *Id.* at 276.
18. 348 U.S. 121 (1954).
19. *Id.* at 139.
20. 319 U.S. 463 (1943).

Court said that if the inference of one fact from proof of another is arbitrary because of a lack of logical connection between the two in our common experience, then the presumption offends due process.[21]

In *United States v. Gainey*,[22] not only was the constitutionality of the presumption tested, but the actual instruction stating the presumption was examined to consider its prejudicial effect, if any. The Court concluded the instruction was permissible, because the jury was specifically told that the statutory presumption was not mandatory.[23] In a footnote, however, the Court stated that the better practice is to instruct the jury in terms of a permissible inference instead of making reference to the statute creating the presumption.[24] Unfortunately, many lower courts have construed *Gainey* liberally, allowing instructions that are more likely to be prejudicial.[25] The statute involved in *Gainey* provided that presence at the site of an illegal still is sufficient to convict a defendant of the offense of "carrying on" the business of distilling without giving bond.

21. *Id.* at 467-68. *Tot* involved a provision of the Federal Firearms Act which created the presumption that a person convicted of a violent crime who possesses a firearm is presumed to have received it in interstate commerce in violation of the Act. The Court found that from possession alone, it did not rationally follow that the firearm had been secured through interstate commerce in violation of the Act.
22. 380 U.S. 63 (1965).
23. The pertinent part of the instruction read:

    And under a statute enacted by Congress a few years back, when a person is on trial for . . . carrying on the business of a distiller without giving bond as required by law, as charged in this case, and the defendant is shown to have been at the cite of the place . . . where and at the time when the business of a distiller was engaged in or carried on without bond having been given, *under the law such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant by the evidence in the case and by proven facts and circumstances explains such presence to the satisfaction of the jury.* (Emphasis supplied).

    Now this does not mean that the presence of the defendant at the site and place at the time referred to requires the jury to convict the defendant, if the defendant by the evidence in the case, facts and circumstances proved, fails to explain his presence to the satisfaction of the jury. It simply means that a jury may, if it sees fit, convict upon such evidence, as it shall be deemed in law sufficient to authorize a conviction, but does not require such a result. (Court's emphasis).

    Id. at 69-70.
24. *Id.* at 71 n.7.
25. United States v. Armone, 363 F.2d 385 (2nd Cir. 1966); United States v. Russo, 413 F.2d 432 (2nd Cir. 1969); Bayless v. United States, 381 F.2d 67 (9th Cir. 1967); Rogers v. United States, 416 F.2d 926 (10th Cir. 1969); Boyles v. State, 464 P.2d 493 (Nev. 1970).

The case of *United States v. Romano*[26] involved the same fact situation as *Gainey*, but a different criminal charge.[27] The *Romano* court invalidated the presumption of possession of an illegal still from presence at the site of the still because the presumption of possession based on presence alone fell short of the "rational connection" test of *Tot*, thereby violating the defendant's right to due process. The crime of "carrying on" an illegal still in *Gainey* was extremely broad. The Court reasoned that anyone at an illegal still could be said to be in some way involved with the operation due to the extreme secrecy with which such operations are conducted.[28] However, "possession" of an illegal still in *Romano* was a much narrower offense, thus making presence alone inconclusive as to "possession" of the still.

In the "more-likely-than-not" rule of *Leary v. United States*[29] the Court sought to clarify the "rational connection" test of *Tot*. With regard to statutory criminal presumptions, the *Leary* rule provides that if the presumed fact is more likely than not to follow, then the use of the presumption does not violate due process requirements and can be invoked. The Court, however, did not articulate how much more likely the presumed fact had to be.

The cases of *Turner v. United States*[30] and *In Re Winship*[31] further clarified when a statutory presumption would be valid. The *Turner* opinion implied that a statutory presumption would be valid only when it meets the "beyond a reasonable doubt test."[32] The *Winship* decision set the stan-

26. 382 U.S. 136 (1965).
27. The defendant in Gainey was charged with "carrying on" illegal distilling activity, in violation of 26 U.S.C. § 5601(b)(2) (1970), while Romano concerned "possession" of an illegal still, violating 26 U.S.C. § 5601(a)(1) (1970).
28. United States v. Gainey, *supra* note 22, at 67.
29. 395 U.S. 6 (1969). Leary involved the question of whether or not a person possessing marijuana knew it was illegally imported. The statutory presumption waived the necessity of proving such knowledge. The court found that knowledge of illegal importation was not a fact "more likely than not" to follow from possession of marijuana and declared the presumption unconstitutional.
30. 396 U.S. 398 (1970).
31. 397 U.S. 358 (1970).
32. The facts of Turner were similar to Leary, except the drugs involved were heroin and cocaine. The court found, with respect to the heroin, that vir-

dard that the "beyond a reasonable doubt" test must be met in all criminal cases to insure due process requirements.

The Court in *Barnes v. United States*[33] attempted to summarize the various holdings from *Tot, Gainey, Romano*, and *Turner*, coming to the conclusion that if a statutory presumption submitted to the jury as sufficient to support guilty verdicts satisfies the "beyond a reasonable doubt" standard and the "more-likely-than-not" test, then it clearly satisfies due process requirements.

The cases discussed here related to federal prosecutions, and involved instances in which the jury was instructed that it was permitted, but not required, to find the presumed fact. With regard to the first aspect, it would seem unlikely that the court would adopt a different standard for the constitutional validity of presumptions when applied to the states. Regarding the second aspect, a presumed fact in a criminal case may be submitted to the jury as long as it is worded in terms of a permissible inference. A presumption cannot have the effect of directing a jury to find one fact from the existence of another. To do so would clearly breach due process requirements. In addition, the presumed fact must rationally follow from the established fact to the degree that it is more probable than not that it exists. This standard is good from the perspective that it continues to assist the prosecutor in his duty of producing evidence not within the realm of direct proof. A prime reason for the court's unwillingness to completely prohibit presumptions in criminal cases is that "thousands of defendants" have the opportunity to rebut the inference against them.[34]

The troublesome aspect of these decisions is that they fail to draw a clear distinction between the proper use of a presumption and an inference. The terms are used so interchangeably that their distinctions have, for all practical matters, been lost.

---

tually all of it is illegally imported, which cannot be said about marijuana. Therefore, the presumption of knowledge followed beyond a reasonable doubt.

33. 412 U.S. 837 (1973).

34. Turner v. United States, *supra* note 30, at 409.

PRE-STUEBGEN TREATMENT OF PRESUMPTIONS OF INTENT

Criminal convictions in Wyoming based on circumstantial evidence have consistently been upheld when such evidence was presented to the jury to weigh.[35] When circumstantial facts are introduced, the jury may properly draw an inference of intent if it is convinced of such intent beyond a reasonable doubt.[36] This is in accord with United States Supreme Court requirements of due process in all criminal cases.[37]

An early line of cases, beginning with *Bryant v. State*,[38] established the rule that the element of intent is just as necessary to prove as the unlawful act itself, and must be found by the jury as a matter of fact before convicting the defendant.[39] Only when the evidence warranted an inference of intent could the jury draw such an inference.[40]

In *Ivey v. State*,[41] the court reversed the defendant's conviction of assault and battery with intent to commit murder. The instruction given on specific intent was held erroneous because it stated that one can be presumed to do the probable and natural consequences of his unlawful acts.[42] The *Ivey* rule is that in the absence of evidence to the contrary, there is no presumption of intent to do anything other than that which was actually done. The court in *State v. Parm-*

35. Kennedy v. State, *supra* note 6; Alcala v. Sate, 487 P.2d 448 (Wyo. 1971); Dryden v. State, 535 P.2d 483 (Wyo. 1975).

36. Blakely v. State, 542 P.2d 857 (Wyo. 1975). *See also* Note, *Evidence—Abrogating the Cautionary Instruction in Criminal Prosecutions Relying Substantially on Circumstantial Evidence,* 11 LAND & WATER L. REV. 623 (1976).

37. *In re* Winship, *supra* note 31.

38. 7 Wyo. 311, 56 P. 596 (1899).

39. *Id.* at 597.

40. *Id.*

41. 24 Wyo. 1, 154 P. 589 (1916).

42. The erroneous instruction read:

> The court instructs the jury that a man is presumed in law to intend the probable and natural consequences of his own unlawful act. If one purposely shoots another with a deadly weapon, at or near a vital part, and in such manner that death would probably ensue, all the other elements of the crime concurring, the jury would be justified in believing that the defendant intended to kill the prosecuting witness, even if death did not ensue.

Id. at 591.

ely[43] relied on the *Ivey* decision to hold a similar instruction on intent erroneous. The *Ivey* rule satisfies due process requirements by insuring that the defendant is not convicted on a presumption when the evidence, by itself, may not be sufficient.

This earlier line of rulings was departed from in *Murdock v. State.*[44] *Murdock* involved a conviction of larceny of sheep which was affirmed on appeal. The instruction on specific intent objected to in *Murdock* was found proper, not constituting error.[45] The instruction used both the word "presumption" and "inference." The court apparently equated the meaning of the two words. Enough circumstantial evidence was introduced at trial to draw properly an inference of intent, which the jury did draw. Not relying on any previous Wyoming decisions, the court stated:

> It is a general rule applicable in all criminal cases, including those in which a specific intent is an element of the crime, that the accused is presumed to intend the necessary or the natural and probable consequences of his unlawful voluntary acts.[46]

The only other Wyoming case that specifically cites *Murdock* on this rule is *Sims v. State,*[47] but it is fair to assume trial courts have relied on the *Murdock* rule.

---

43. 65 Wyo 215, 199 P.2d 112, 118 (1948). The language of the erroneous instruction in this case read:

> The law warrants the presumption, or inference, that a person intends the results or consequences to follow an act which he intentionally commits, which ordinarily do follow such acts.

44. 351 P.2d 674 (Wyo. 1960).

45. The instruction on intent in Murdock read:

> The court instructs the jury that the intent with which an act is done, is an act or emotion of the mind, seldom, if ever, capable of direct and positive proof, but it is to be arrived at by such just and reasonable deduction of inference from the acts and facts provided as the guarded judgment of a candid and cautious man would ordinarily draw therefrom.
>
> *The law warrants the presumption, or inference, that a person intends the results or consequences to follow an act which he intentionally commits, which ordinarly do follow such acts.* (Emphasis added).

Id. at 682.

46. *Id.* The only case cited for this proposition was a Wisconsin decision, State v. Vinson, 269 Wis. 305, 68 N.W.2d 712 (1955), *reh. denied* 70 N.W.2d 1 (1955).

47. 530 P.2d 1176, 1182 (Wyo. 1975).

Another line of cases relies on the rule that a deadly and dangerous weapon used in a deadly and dangerous manner raises a presumption of malice and of murder.[48] This rule was first used in *State v. Morris*.[49] It was held sufficient to draw the inference of malice for second degree murder from the use of the deadly weapon in the threatening manner alone.[50] In *State v. Bruner*[51] the court was more careful not to employ a presumption of malice from use of a deadly weapon alone. The court noted that malice may at times be inferred from such use, but only when it appears that the use was "willful or intentional, deliberate or wanton."[52] Later cases have not followed the degree of caution used in *Bruner*, quoting the *Morris* rule freely and without qualification.[53]

THE STUEBGEN COURT'S RATIONALE

The majority opinion found the instruction on intent erroneous because it allowed the jury to presume the element of specific intent, breaching the well-established rule that an essential element of a crime must be proved from evidence and cannot be imputed in law or by mere legal presumption.[54] Intent to deliver is just as necessary to prove from evidence as is the element of possession.[55] The only presumption allowable, in absence of evidence otherwise, is that one intends to do that which he has actually done. In this, the *Stuebgen* rationale is in accord with *Morissette* and *Holland*.

The court said that to presume one element of a crime from another would be valid only if the particular result must follow.[56] The court thought it was quite clear that possession will not invariably produce a delivery. Even if it frequently does, to allow such a presumption permits a con-

48. State v. Morris, 41 Wyo. 128, 283 P. 406 (1929); Ballinger v. State, 437 P.2d 305 (Wyo. 1968); Reeder v. State, 515 P.2d 969 (Wyo. 1973).
49. State v. Morris, *supra* note 48.
50. *Id.* at 411.
51. 78 Wyo. 111, 319 P.2d 863 (1958).
52. *Id.* at 870, quoting 40 C.J.S. *Homicide* § 25 (1944).
53. Ballinger v. State, *supra* note 48; Reeder v. State, *supra* note 48.
54. *See, generally,* Bryant v. State, *supra* note 38; State v. Parmely, *supra* note 43; State v. Woodward, 69 Wyo. 262, 240 P.2d 1157 (1952).
55. Steubgen v. State, 548 P.2d 870, 879 (Wyo. 1976).
56. *Id.* at 884.

viction to be based on probabilities and negates the sacrosanct burden of proving every element of the crime beyond a reasonable doubt.[57] But, mere possession was not the only circumstantial evidence on intent. The amount in possession was pertinent as well as the fact that the marijuana was divided into 31 separate baggies. This much circumstantial evidence on intent has been sufficient to affirm convictions.[58] The Court's position is that no matter how much circumstantial evidence exists such evidence does not warrant the presumption that intent to deliver existed.

The use of the presumption in the instruction prevents the jury from weighing in an unbiased manner the evidence and reaching its own conclusion. It encourages the jury to find intent. The use of the presumption assists the prosecutor by relieving him of his burden to produce evidence and tends to shift the burden of proof to the defendant to show his innocence. Based on these factors, the majority determined that it is wrong to presume intent to effect the necessary or natural and probable consequences of an accused's unlawful acts when the element of specific intent is involved, and any instruction using such language would constitute reversible error.

Relating the *Stuebgen* court's conclusions to United States Supreme Court standards, it is apparent that *Stuebgen* requires stricter criteria than the Supreme Court requires. First, the court in the instant case goes beyond the "more-likely-than-not" test of *Leary*. *Leary* only requires that the presumed fact be more probable to follow from the established fact. It does not require, as *Stuebgen* does, that the presumed fact must inevitably follow. If the likelihood of the presumed fact is great, then, under *Leary*, the use of the presumption is not violative of a defendant's due process rights. Further, *Turner* found that a statutory presumption does not necessar-

57. *Id.*

58. United States v. Kelly, 527 F.2d 961 (9th Cir. 1976). *See also,* United States v. Ramirez-Valdez, 468 F.2d 235 (9th Cir. 1972); United States v. Gutierrez-Espinosa, 516 F.2d 249 (9th Cir. 1975); State v. Rathburn, 195 Neb. 485, 239 N.W.2d 253 (1976); People v. Newman, 5 Cal.3d 47, 484 P.2d 1356, 95 Cal. Rptr. 12 (1971).

ily prevent jury certainty beyond a reasonable doubt, as the *Stuebgen* dictum implies with respect to court-made presumptions.

Certain guidelines were established in *United States v. Gainey*[59] for instructing the jury with regard to presumptions. Part (c) of Proposed Rule 303 of the Federal Rules of Evidence is framed in accordance with those guidelines.[60] The judge, in submitting the issue of a presumed fact to the jury, must tell the jury that it may infer the presumed fact but is not required to do so. The jury should further be instructed that it must acquit unless it finds the accused guilty of the presumed fact beyond a reasonable doubt based on all the evidence introduced. Based on the *Gainey* rationale, trial court references to a presumption and a defendant's failure to rebut it does not amount to reversible error as long as the guidelines mentioned above are followed. Under the *Gainey* test, the instruction in *Stuebgen* would be held reversible error. The jury was not clearly instructed that it could disregard the presumption in the instruction absent evidence to the contrary. The *Stuebgen* rationale goes beyond the *Gainey* requirements as it seems to imply that presumptive language in criminal cases should never be used.

The presumptions allowed in the United States Supreme Court's rulings, of course, are not mandatory ones, but rather presumptions that amount to an inference that the jury may draw. A semantical problem exists as to the words "presumption" and "inference." *Stuebgen* is a step in the right direction on this point. The opinion attempts to eradicate at least some of the inexorable confusion attendant when the

59. United States v. Gainey. *supra* note 22.

60. PROPOSED FEDERAL RULE OF EVIDENCE 303(c), *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 . . . the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt.

Rule 303 was deleted from the Rules in the bill passed by the House of Representatives due to bills pending before the Committee on Rules of Practice and Procedure to revise the federal criminal code.

words are used. *Stuebgen* does not present guidelines for proper use of the two words, but is more concerned with the effect of the presumptive language than with the exact word or words employed in the presumption. When the instruction on intent is couched in terms of a presumption, it interferes with the logical, deductive process the jury may use, and will be declared reversible error. Thus, *Stuebgen* takes to heart the *Gainey* Court's observance that a presumption should not be mentioned to a jury.

POST-STUEBGEN PRACTICE

The *Stuebgen* dictum will undoubtedly make Wyoming courts and practitioners more cautious in framing jury instructions on specific intent. They should attempt to insure that a specific intent instruction is worded such that it does not use the presumptive language found objectionable in *Stuebgen*. However, it is hard to define exactly how a permissible instruction should read.[61] The better practice would

61. The federal jury instruction on presumptions in criminal cases as advocated by Devitt and Blackmar provides:

> As applied to this case, the law declares that you may regard proof of (presence of the defendant at a still) as sufficient evidence that (he is engaged in the business of distilling). The law, however, does not require you to so find. You are the sole judge of facts. Since proof (that the defendant is engaged in distilling) is an essential element of the offense charged in the indictment, as defined elsewhere in these instructions, you may not find the defendant guilty unless you find beyond reasonable doubt that the defendant (is engaged in distilling without having given bond).
>
> A presumption may be overcome by evidence. Your duty is to determine the facts on the basis of all of the evidence.
>
> Unless and until outweighted by evidence in the case to the contrary, you may find and conclude that . . . the law has been obeyed.

1 DEVITT and BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 11.05 (2d ed. 1970). This instruction provides the "beyond a reasonable doubt" standard as well as telling the jury that it is not required to find the enunciated presumption. It states a safe approach under United States Supreme Court standards, allowing the jury to weigh the evidence and make their own independently derived conclusion. It does not require or strongly urge the jury to find facts in accordance with a presumption.

The proposed Wyoming jury instruction on specific intent in criminal cases is drafted in accordance with the Stuebgen court's admonition against the use of presumptive language:

> The intent with which an act was done is a condition of the mind, seldom if ever capable of direct and positive proof. Because we have no power to directly observe the condition of a man's mind, the best we can do is infer it from the evidence introduced.
>
> In *determining* whether the necessary specific intent was present, you are instructed that the only intent you are permitted to

seem to be avoidance of the word "presume" altogether. *Stuebgen* does not shed any light on the question of whether other instructions would eliminate any prejudicial effect a presumptive instruction might have, when the effect of all the charges are considered as a whole.[62] Neither did it broach the question of whether a charge to the jury, instructing that it can disregard a presumption if used, would be sufficient to overcome the prejudicial effect the presumption creates.

The *Murdock* instruction can no longer be used without running the risk of reversal. When specific intent is an element of the crime it is improper to tell the jury that the law warrants the presumption that a person intends the natural and probable consequences of his unlawful acts. Such an instruction is erroneous because it may displace the requirement of jury certainty beyond a reasonable doubt. In addition, the presumption employed in murder cases that the use of a deadly weapon in a deadly and dangerous manner creates the presumption of malice would be prohibited under *Stuebgen.*

The *Murdock* instruction is clearly erroneous under both *Gainey* and *Stuebgen.* Applying the *Gainey* rule, the trial court failed to instruct the jury that the presumption was not mandatory and could be ignored, and under *Stuebgen,* the use of the presumption alone is fatal. It seems, then, that there are two alternatives for employing presumptions in criminal cases. The first is the *Gainey* standard, which requires a cautionary instruction that the presumption cannot supersede the necessity of finding the accused guilty beyond

infer from the doing of an act is an intent to do that act. An intent to do other than what was done must be proved by or inferred from independent evidence having to do with something other than the occurence of the act.

PROPOSED WYOMING JURY INSTRUCTION § 3.04.10A *Determining Whether Specific Intent Was Present.*

This instruction is one of two alternatives awaiting adoption. *See* PROPOSED WYOMING JURY INSTRUCTION § 3.04.10B for the alternative wording.

62. Other courts have reached this question and found the instruction on specific intent by itself constituted error, but the instructions taken as a whole clearly and correctly stated the law and did not mislead the jury. *See* Legatos v. United States, 222 F.2d 678 (9th Cir. 1955); Windisch v. United States, 295 F.2d 531 (5th Cir. 1961); United States v. Berzinski, 529 F.2d 590 (8th Cir. 1976).

a reasonable doubt. The second alternative would be to eliminate the use of the presumption altogether.

Stuebgen advocates the latter approach in an attempt to bring coherency to this area of the law. Employing the *Stuebgen* rule alleviates due process concerns since the presumption would not be used at all. The complex analysis and inherent difficulties of fulfilling the "more-likely-than-not" test and the "beyond a reasonable doubt" standard are eliminated along with the presumption.

It should be noted, however, that *Stuebgen* does not deal with a legislatively created presumption. Perhaps there is a need for the United States Supreme Court tests to remain, in deference to the legislative power to incorporate presumptions into criminal statutes; thereby allowing equalization of any imbalance in evidentiary dispositions. In the absence of statutory sanction, though, there appears to be little reason for allowing presumptions in criminal cases, especially with regard to material elements of a crime, such as specific intent.

CONCLUSION

The majority opinion in *Stuebgen* seeks to return to pre-*Murdock* standards of instructing juries on specific intent in criminal cases. When specific intent is an element of the crime, it is wrong to presume that the accused intended the natural and probable consequences of his unlawful acts. Any instruction couched in terms of a presumption will be held reversible error as the presumption may have the effect of relieving the jury of their duty to find specific intent as a matter of fact.

The experience of the United States Supreme Court in this area illustrates the difficulty of balancing the fundamental rights involved when a presumption is employed in a criminal case. It is also illustrative of a reluctance to abandon the use of presumptions, at least in cases where they are

statutorily enacted. The *Stuebgen* court is not adverse to extirpating the use of judicial presumptions, but specific guidelines on proper instructions are not given. Definitional problems with regard to the precise meaning and application to be given to the words "presumption" and "inference" remain.

RICHARD E. HOPPER, JR.