STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1907

State of Minnesota,
Respondent,

vs.

James Lewis Nelson,
Appellant.

Filed September 17, 2012
Affirmed
Bjorkman, Judge
Concurring specially, Rodenberg, Judge

Cass County District Court
File No. 11-CR-10-707

Lori Swanson, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Christopher J. Strandlie, Cass County Attorney, Walker, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Stoneburner, Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

BJORKMAN, Judge

Appellant challenges (1) the issuance of a warrant to search his residence; (2) the sufficiency of the evidence to support his convictions of burglary, theft, and receiving stolen property; and (3) the admission of *Spreigl* evidence. We affirm.

FACTS

Appellant James Nelson was charged with numerous counts of second- and third-degree burglary, theft, receiving stolen property, and unlawful possession of a firearm. At trial, the state presented the testimony of mail carrier C.G.P. who saw Nelson climb through a window into R.R.P.'s barn while R.R.P. was out of town. When C.G.P. asked Nelson if he was supposed to be there, he at first said "no," but then lied and said that the owner knew he was there. R.R.P. testified that when he returned, he discovered that $30,000 worth of property had been stolen from his barn, shed, and trailer. Much of this property was found at Nelson's residence, including a $10,000 stereo system, construction equipment, and farm equipment. The state also submitted five of Nelson's 16 prior theft and burglary convictions as *Spreigl* evidence.

Nelson disputed almost none of these facts yet maintained that he did not steal R.R.P.'s property. He testified that he entered R.R.P.'s barn to find out if anyone was home because he wanted to buy R.R.P.'s truck. According to Nelson, a few days later, a man with a white truck named "Max Larson" drove by Nelson's home and offered to sell him a variety of items. Nelson responded that he had very limited financial resources but would exchange 12 cords of wood, each worth $120, for the items. Nelson submitted a

handwritten bill of sale as evidence of this purported exchange. Nelson's wife and roommate testified that they saw Nelson talking to a man next to a white truck, but neither stated that they witnessed any exchange of property. Police could not locate anyone named Max Larson living in the area, and the address Nelson provided for Larson does not exist.

The jury found Nelson guilty on all counts except second-degree burglary. The district court sentenced Nelson to 68 months' imprisonment. This appeal follows.

D E C I S I O N

I. The district court had a substantial basis for concluding that probable cause supported the search warrant.

The United States and Minnesota Constitutions protect individuals against unreasonable searches. U.S. Const. amend. IV; Minn. Const. art. I, § 10. A warrant to conduct a search must be supported by probable cause. U.S. Const. amend. IV; Minn. Const. art. I, § 10. In making a probable-cause determination, the district court must determine whether "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Jenkins*, 782 N.W.2d 211, 223 (Minn. 2010) (quotation omitted), *cert. denied*, 131 S. Ct. 1533 (2011). "When reviewing a district court's decision to issue a search warrant, our only consideration is whether the judge issuing the warrant had a substantial basis for concluding that probable cause existed." *Id.* at 222-23 (quotation omitted).

Nelson argues that the affidavit of the investigating police officer did not establish probable cause to issue the search warrant because "[n]o specific facts are presented

indicating that any stolen items had been seen at Nelson's home." We disagree. A supporting affidavit need not "contain any averment of firsthand information that fruits of the crime would be found at [the] defendant's residence." *Rosillo v. State*, 278 N.W.2d 747, 748 (Minn. 1979). "All that is required is that the affidavit, interpreted in a common-sense and realistic manner, contain information which would warrant a person of reasonable caution to believe that the articles sought are located at the place to be searched." *Id.* at 748-49. Consequently, probable cause to search the defendant's residence exists where "the affidavit contain[s] facts justifying the conclusion that [the] defendant had participated in the [crime]" and the defendant's residence is "the normal place that [the] defendant would be expected to keep" the articles sought. *Id.* at 749.

The affidavit meets both of these requirements. First, the affidavit presented substantial evidence that Nelson participated in the crime: C.G.P. saw Nelson climb inside R.R.P.'s barn around the time of the burglary; when she confronted Nelson about his presence in the barn, Nelson equivocated, first telling C.G.P. that he was not supposed to be there and then asserting that he had the owner's permission; C.G.P. recognized Nelson as a resident of a home located near R.R.P.'s property and identified Nelson in a photo lineup; R.R.P. did not give Nelson permission to enter the barn; and Nelson is a convicted burglar. *See State v. Carter*, 697 N.W.2d 199, 205 (Minn. 2005) (explaining that a person's criminal record is relevant to a probable-cause determination). Second, the affidavit presented evidence that Nelson's home is the normal place where he would be expected to store the stolen property: Nelson lives near R.R.P.'s home and the volume of items stolen (six to eight truckloads) and the size of certain of the items make it more

likely that the items would be stored in a home rather than in a vehicle or on Nelson's person. *See State v. Harris*, 589 N.W.2d 782, 788 (Minn. 1999) (concluding that the defendant could be expected to store stolen property in his home in part because it was near the victim's home); *Rosillo*, 278 N.W.2d at 749 (concluding that the defendant could be expected to store stolen property in his home in part because its volume was too great for him to carry on his person). On this record, we conclude that the district court had a substantial basis for finding probable cause to issue the search warrant.

II. Sufficient evidence supports Nelson's convictions of burglary, theft, and receiving stolen property.

In assessing the sufficiency of the evidence, we generally "review the evidence to determine whether the facts in the record and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted." *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010) (quotation omitted). "A conviction based on circumstantial evidence, however, warrants heightened scrutiny," requiring us "to consider whether the reasonable inferences that can be drawn from the circumstances proved support a rational hypothesis other than guilt." *Id.* (quotation omitted).

In assessing the sufficiency of circumstantial evidence of guilt, we conduct a two-step analysis. *Id.* First, we identify the circumstances proved, deferring "to the jury's acceptance of the proof of these circumstances and rejection of evidence . . . that conflict[s] with the circumstances proved by the State." *Id.* (quotation omitted). We then examine "the reasonableness of all inferences that might be drawn from the

circumstances proved," giving no deference to the jury's choice between inferences. *Id.* at 473-74 (quotation omitted). We will affirm only if no reasonable inferences are inconsistent with guilt. *Id.* at 474.

We begin by noting that the state proved many of the elements of burglary, theft, and receiving stolen property using direct evidence. One is guilty of third-degree burglary if he enters a building without consent and steals or has intent to steal while in the building. Minn. Stat. § 609.582, subd. 3 (2008). One is guilty of theft if he intentionally and without claim of right takes or retains possession of another's movable property without the owner's consent and with intent to deprive the owner permanently of possession of the property. Minn. Stat. § 609.52, subd. 2(1) (2008). And one is guilty of receiving stolen property if he possesses stolen property knowing that it was stolen. Minn. Stat. § 609.53, subd. 1 (2008). The state presented direct evidence that Nelson entered R.R.P.'s barn; R.R.P. did not give Nelson permission to enter his buildings or take his property; R.R.P.'s movable property was stolen; and this stolen property was found in Nelson's home. The jury was entitled to rely on this direct evidence.

The state relied on circumstantial evidence to establish Nelson's mental state—that he intentionally stole R.R.P.'s property and possessed the property with knowledge that it was stolen. The state presented evidence that Nelson climbed inside the upper story of R.R.P.'s barn without permission; Nelson falsely told C.G.P. that the owner knew he was in the barn; police found six to eight truckloads of the property stolen from R.R.P. at Nelson's residence; and a camera found in Nelson's home contained photos of R.R.P.'s land and property. Additionally, the state presented circumstantial evidence to

discredit Nelson's testimony that he innocently possessed the stolen property: police could not locate a Max Larson living in the area; Larson's purported address does not exist; and a handwriting expert testified that Larson's signature on the alleged bill of sale looked unnatural. We defer to the jury's acceptance of this evidence. *See Al-Naseer*, 788 N.W.2d at 473.

Having identified the circumstances proved, we consider whether these circumstances are consistent with a rational hypothesis other than guilt. On this record, we conclude that there are no reasonable inferences other than that Nelson stole property from R.R.P.'s buildings and possessed the property with no intent to return it to R.R.P. It is not reasonable to believe that Nelson climbed into the upper story of R.R.P.'s barn to see if R.R.P. was home and to offer to buy R.R.P.'s truck even though the truck did not have a for-sale sign and Nelson had very limited financial resources. Likewise, Nelson's testimony that he gave Larson only $1,440 worth of wood in exchange for $30,000 worth of property strains reason, particularly in light of the fact that neither Nelson's wife nor his roommate saw any exchange of property, let alone an exchange of six to eight truckloads of property. Nor is there any other reasonable explanation of why Nelson entered R.R.P.'s barn without permission and how the property stolen from R.R.P. ended up in Nelson's home. The evidence amply supports Nelson's convictions.

III. The district court did not abuse its discretion by admitting *Spreigl* evidence.

Evidence of a criminal defendant's prior crimes is not admissible to prove the defendant's character for purposes of showing that the defendant acted in conformity with that character. Minn. R. Evid. 404(b). But such evidence is admissible for other

purposes, including to show the defendant's intent or a common scheme or plan. *Id.; see also State v. Stewart*, 643 N.W.2d 281, 296 (Minn. 2002). Such evidence is admissible if

> (1) the prosecutor gives notice of its intent to admit the evidence consistent with the rules of criminal procedure; (2) the prosecutor clearly indicates what the evidence will be offered to prove; (3) the other crime, wrong, or act and the participation in it by a relevant person are proven by clear and convincing evidence; (4) the evidence is relevant to the prosecutor's case; and (5) the probative value of the evidence is not outweighed by its potential for unfair prejudice to the defendant.

Minn. R. Evid. 404(b). We review the admission of *Spreigl* evidence for an abuse of discretion. *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006).

The state provided notice of its intent to offer 16 of Nelson's prior convictions and accompanying complaints as evidence of intent and a common scheme or plan. The district court allowed the state to present evidence of five of the convictions on both grounds. The state submitted evidence of felony theft offenses from July 2001, March/April 2002, and November 2005, and third-degree burglary offenses from April and May 2002. Nelson argues that the evidence was not relevant and that its potential for unfair prejudice outweighed any probative value. We address each argument in turn.

A. The evidence is relevant to show a common scheme or plan.

Spreigl evidence is admissible to show a common scheme or plan, including to "establish that the conduct on which the charged offense was based actually occurred." *Id.* at 688. Spreigl evidence need not be identical to the charged offense but must be substantially similar to the charged offense in time, place, and modus operandi. *Id.* at 687-88; *see also State v. DeBaere*, 356 N.W.2d 301, 305 (Minn. 1984) (explaining

Spreigl evidence is admissible "notwithstanding a lack of closeness in time or place if the relevance of the evidence [i]s otherwise clear"). Nelson's conduct underlying his prior convictions was substantially similar to the charged offenses. Each offense involved the theft of large volumes of farm and construction equipment along with a variety of other property located in the same building. Together, the prior offenses demonstrate Nelson's pattern of identifying and ransacking places that store valuable farm and construction equipment. Accordingly, the district court did not abuse its discretion by determining that Nelson's prior convictions are relevant.

B. The potential for unfair prejudice does not outweigh the probative value of the *Spreigl* evidence.

Nelson argues that any probative value of the *Spreigl* evidence was outweighed by the danger of unfair prejudice. We disagree. In light of Nelson's defense that he purchased the property from a third party and did not know it was stolen, his pattern of cleaning out buildings containing large volumes of construction and farming equipment is highly probative. And the risk of unfair prejudice was mitigated by the district court's cautionary instructions, the absence of any inflammatory details regarding Nelson's prior offenses, and the fact that Nelson had already been convicted of the prior offenses, sparing him the prejudice of having to defend himself regarding those offenses. *See Ness*, 707 N.W.2d at 689 (noting that the danger of unfair prejudice is lessened when the defendant was convicted of a crime based on the prior offense); *State v. DeWald*, 464 N.W.2d 500, 504 (Minn. 1991) (noting that the danger of unfair prejudice was heightened

because evidence of the defendant's prior offense was detailed and compelling). We discern no abuse of discretion in the district court's admission of *Spreigl* evidence.

Affirmed.

RODENBERG, Judge, concurring specially

I concur in the opinion of the court in all respects but write separately to address how best to assure proper consideration of circumstantial evidence in criminal jury trials. Where an element or elements of the state's case rely in whole or in part on circumstantial evidence, it is my view that the interests of all would be advanced by providing an instruction to the jury that, in order to return a guilty verdict based upon circumstantial evidence, the circumstances proved must be inconsistent with any rational hypothesis other than the accused's guilt.

The state in this case relied upon circumstantial evidence in proving the charges against Nelson. At least as to Nelson's mental state, the state's evidence was necessarily circumstantial because Nelson denied intentionally stealing the property or knowing that it was stolen. Under current Minnesota law, an appellate court in such a case must identify all reasonable inferences that can be drawn from the circumstantial evidence and determine whether those inferences support any rational hypothesis other than guilt. *See State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010); *State v. Andersen*, 784 N.W.2d 320, 329–30 (Minn. 2010); *State v. Tscheu*, 758 N.W.2d 849, 857 (Minn. 2008).

Prior to 1980, Minnesota courts routinely instructed juries that, in order to convict the accused based upon circumstantial evidence, "the circumstances proved must be consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of his guilt." *See State v. Johnson*, 173 Minn. 543, 545, 217 N.W. 683, 684 (1928). The Criminal Jury Instruction Guide (CRIMJIG) prior to 1980 provided in pertinent part:

> Circumstantial evidence may be of the highest and most conclusive kind of proof, but in order to reach a conclusion beyond a reasonable doubt on circumstantial evidence alone, all circumstances proved must be consistent with that conclusion and inconsistent with any other rational conclusion.

10 *Minnesota Practice*, CRIMJIG 3.05 (1977).

Following the lead of the United States Supreme Court, the Minnesota Supreme Court in 1980 affirmed a conviction where the jury instructions had omitted the phrase "all circumstances proved must be consistent with that conclusion and inconsistent with any other rational conclusion." *State v. Turnipseed*, 297 N.W.2d 308, 312–13 (Minn. 1980) (citing *Holland v. United States*, 348 U.S. 121, 75 S. Ct. 127 (1954)). The court noted that the phrase in question had never been "held . . . to be mandatory," that other courts had determined that a proper reasonable-doubt instruction obviated the need for a specific circumstantial-evidence instruction, and that omission of the more specific instruction was the "better rule." *Id.*; *see also State v. Gassler*, 505 N.W.2d 62, 68 (Minn. 1993) ("[I]t is not always wise to read a sufficiency of evidence test to the jury."). It went on to analyze the sufficiency of the evidence "in the light most favorable to the verdict" and concluded that there was "no evidence which the jury was bound to accept that was consistent with any reasonable hypothesis of defendant's innocence or inconsistent with his guilt." *Turnipseed*, 297 N.W. 2d at 314.

In *State v. Webb*, the Minnesota Supreme Court utilized the "rational hypothesis" test for the sufficiency of circumstantial evidence where the jury presumably had not received any instruction on the use of circumstantial evidence. 440 N.W.2d 426, 430–31

(Minn. 1989). Since *Webb*, Minnesota's appellate courts have consistently applied some variant of this test in analyzing convictions based upon circumstantial evidence where the jury has received no specific instruction on the proper use of circumstantial evidence.

As a result of these developments, the current version of the pattern jury instruction regarding circumstantial evidence reads as follows:

> A fact may be proven by either direct or circumstantial evidence, or by both. The law does not prefer one form of evidence over the other.
>
> A fact is proven by direct evidence when, for example, it is proven by witnesses who testify to what they saw, heard, or experienced, or by physical evidence of the fact itself. A fact is proven by circumstantial evidence when its existence can be reasonably inferred from other facts proven in the case.

10 *Minnesota Practice*, CRIMJIG 3.05 (2006).

Owing at least in part to the absence of a jury instruction on the use of circumstantial evidence from the current pattern jury instructions, there has developed a torrent of appellate law on the subject of whether circumstantial evidence is sufficient to sustain a conviction. *See e.g.*, *Al-Naseer*, 788 N.W.2d at 473–81; *Andersen*, 784 N.W.2d at 329–33; *Tscheu*, 758 N.W.2d at 857–61; *State v. Reynua*, 807 N.W.2d 473, 482–84 (Minn. App. 2011), *review ganted, rev'd in part and remanded on other grounds* (Minn. Feb. 28, 2012); *State v. Orfi*, 511 N.W.2d 464, 471–72 (Minn. App. 1994), *review denied* (Minn. Mar. 15, 1994); *State v. McBroom*, 394 N.W.2d 806, 810–11 (Minn. App. 1986), *review denied* (Minn. Jan. 16, 1987). As in the present case, appellate courts review circumstantial evidence on a case-by-case basis to determine whether the circumstances

proven by the state at trial are consistent with a rational hypothesis other than guilt. *See Al-Naseer*, 788 N.W.2d at 473.

Former Justice Meyer has written at length in several concurring opinions regarding the history of the inclusion in jury instructions of protective restrictions upon the use of circumstantial evidence. *See Andersen*, 784 N.W.2d at 337–40; *Tscheu*, 758 N.W.2d at 868–71. In *Andersen*, Justice Meyer advocated for a "rational-hypothesis instruction [which] directs the jury's attention to the appropriate method for evaluating [circumstantial] evidence." 784 N.W.2d at 340. Noting Justice Meyer's concurrences, the absence of any appellate decisions overruling *Turnipseed* and its progeny, and the absence of any case which has "disapproved the language in [the current version of CRIMJIG 3.05]," the Minnesota District Judges Association's Committee on Criminal Jury Instruction Guides has recommended that no change be made to CRIMJIG 3.05 "at this time." CRIMJIG 3.05 cmt. (Supp. 2011).

Despite the current CRIMJIG 3.05, review of the cases convinces me that a trial judge may nevertheless properly provide a jury with a more specific instruction that, in order to return a verdict of guilty on the basis of circumstantial evidence, "all circumstances proved must be consistent with that conclusion and inconsistent with any other rational conclusion." Such an instruction would aid the jury in cases where the proof of one or more elements includes circumstantial evidence. As discussed below, this would benefit the trial judge, would be fairer to both the state and the accused, and would decrease appellate litigation regarding convictions that are based in whole or in part on circumstantial evidence.

Absent a waiver of the right to a jury trial, an accused has a constitutional right to a jury determination of all the facts necessary to find the accused guilty beyond a reasonable doubt. *See, e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466, 477, 483–84, 120 S. Ct. 2348, 2355–56, 2359 (2000). However, since *Turnipseed*, the determination of whether a set of circumstances permits a rational hypothesis inconsistent with guilt has been allocated not to the jury, but to the appellate courts (or, on motion for dismissal or directed verdict of acquittal, to the trial judge).

Holland, *Turnipseed*, and several other cases conclude that, where a jury receives a proper reasonable-doubt instruction, "an additional instruction on circumstantial evidence is confusing and incorrect." *Holland*, 348 U.S. at 139–40, 75 S. Ct. at 137; *accord Turnipseed*, 297 N.W.2d at 313. It seems to me to be almost unbelievable that jurors, generally untrained in the law, will be able to discern from the current CRIMJIG 3.03 and 3.05 that circumstantial evidence is insufficient to support a conviction unless there is no rational hypothesis which is inconsistent with guilt. The current pattern instructions do not so instruct them.

In a case such as this one, I believe that the jury would have been much better equipped to address the question of Nelson's guilt had it been specifically instructed on the proper use of circumstantial evidence. Indeed, the current instruction, that as between direct and circumstantial evidence, "[t]he law does not prefer one form of evidence over the other," is, without further explanation, at least incomplete and possibly misleading to

the jury.[1] CRIMJIG 3.05. While it is true that the law does not "prefer" direct over circumstantial evidence, the law does limit the uses to which circumstantial evidence may be put. *Tscheu*, 758 N.W.2d at 858. Telling the jury of this limitation on its reliance upon circumstantial evidence would be helpful to the jury and would be conducive to the jury's efforts to arrive at a fair and just verdict consistent with the law.

Including a specific limiting instruction on the use of circumstantial evidence in a case such as this would also benefit the trial judge. The trial judge wants, of course, the jury to be fully and accurately instructed. In the absence of a specific circumstantial-evidence instruction, the accused must necessarily turn to the trial judge for intervention should the circumstantial proof be thought insufficient. Such a motion requires the trial judge to determine whether all circumstances proved are consistent with the guilt of the accused and inconsistent with any other conclusion. But as noted above, the trial judge is not properly the finder-of-fact in a jury trial.[2]

The accused would benefit from a specific instruction on the proper use of circumstantial evidence in cases such as this because the instruction would vindicate his or her right to a jury trial on all issues. As has been noted by Justice Meyer, it is difficult,

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[1] It is beyond the scope of this concurrence to address the precise language that might be appropriate for instructions to the jury regarding the use of circumstantial evidence in a particular case. The former CRIMJIG 3.05 used the phrase discussed herein. CRIMJIG 3.05 (1977). Justice Meyer's concurrences have discussed alternatives that may be preferable, such as those formulated by the Federal Judicial Center. *See Andersen*, 784 N.W.2d at 339–40.

[2] By way of example, in *Tscheu*, the defendant argued on appeal that the trial judge should have granted his motion "for judgment of acquittal . . . at the close of the State's case-in-chief. . . .because the evidence in this case–which was purely circumstantial–was not sufficient to support the guilty verdict." 758 N.W.2d at 857.

in the absence of a specific instruction on the proper use of circumstantial evidence, for an appellate court to separate which evidence the jury found to be true from which evidence the jury found to be indicative of the accused's guilt. *See Tscheu*, 758 N.W.2d at 869–71. The current appellate formulation of the test of the sufficiency of circumstantial proof requires that the appellate court defer to the jury on "[q]uestions of which witnesses or conflicting evidence to believe." *Id.* at 858. However, after a jury has convicted the accused without a complete instruction on the proper use of circumstantial evidence, it is difficult if not impossible on appeal to discern just what evidence the jury accepted as true.

By way of example, the state's case here involved both direct and circumstantial evidence that Nelson was inside of R.R.P.'s barn. C.G.P. testified that she saw Nelson in the barn, direct evidence of that fact. There were also numerous circumstances indicating that Nelson entered the barn, including his possession of the property stolen from the barn, his possession of an apparently forged bill of sale for those items, and his possession of a camera with photographs of R.P.P.'s land and property.[3] How is an appellate court to know if the jury believed C.G.P.'s testimony that she saw Nelson in the barn (the direct evidence) or whether it rejected that testimony and relied upon the

[3] Nelson admitted in his testimony that he had entered the barn, and his testimony rendered this fact not in dispute. Nelson's case is referenced here only as an example. Had Nelson not testified, the evidence tending to prove that he was in the barn would have included both direct and circumstantial evidence. At the close of the prosecution's case, the state of the record was that it included both direct and circumstantial evidence of Nelson having been in the barn. This sort of scenario presents itself in many trials over which I presided on the district court, and the scenario presents itself regularly in cases reviewed on appeal.

circumstantial evidence as proving that Nelson was in the barn? If the jury *believed* that the direct evidence was true beyond a reasonable doubt, then it would be inappropriate for us to search the record for hypotheses inconsistent with the guilt of the accused. However, if the jury *disbelieved* the state's direct evidence, then it could convict only if there were no rational hypotheses to be drawn from the circumstantial evidence inconsistent with the guilt of the accused. Where the jury has not been instructed regarding this important limitation on the use of circumstantial evidence, the appellate courts must search the record for rational hypotheses inconsistent with guilt. While we rightly defer to the jury in its determination of the facts, it is impossible in a case such as this to know on appeal which precise facts the jury found to be true. That being so, and it being possible that a jury could convict Nelson even though it rejected the direct evidence produced by the state on one or more of the elements, a complete and accurate instruction on the use of circumstantial evidence would ensure that the conviction upon such evidence was arrived at with the proper understanding of the limitations appropriate to its use.

The state likewise has an interest in the jury being fully cognizant of the proper uses to which circumstantial evidence may be put. The state's interest goes beyond the general interest in ensuring that an accused receives the full vindication of the right to a jury trial. Again, the present case provides a helpful example: Nelson is doubtless guilty of the offenses of which he was convicted and, having proven that at trial, the current appellate-review formulation of the test for the sufficiency of circumstantial proof causes the state to have to reargue on appeal that which it has already proven to the jury's

satisfaction at trial. It seems to me that the jury should be fully instructed in the first instance, obviating the need for fact-finding to again be done at the appellate level. The state should be required to prove its case once, not twice.

Similarly, a special instruction respecting a jury's use of circumstantial evidence in appropriate cases will benefit the appellate courts. The current practice of not providing jurors with a full instruction regarding the use of circumstantial evidence results in this torrent of case-by-case appellate litigation regarding the sufficiency of circumstantial evidence after conviction. It results in fact-finding being done by appellate judges rather than by juries.

Justice Meyer's suggestions in *Tscheu* and *Andersen* warrant further consideration by the Committee on Criminal Jury Instruction Guides. I also believe that her concurring opinions in those cases should be considered by the state's trial judges as suggesting that a more complete and accurate circumstantial evidence instruction be given to the jury in cases where the state's evidence of elements of the offense(s) includes circumstantial proof. While *Turnipseed* and its progeny hold that it is not error to refuse a specific circumstantial-evidence instruction, no case prohibits the use of such an instruction when and where appropriate.