

2.20. Presumption of Innocence / Burden of Proof - Alternative 5

It is peculiarly within the power of the State to produce evidence or witnesses who could have given material testimony on an issue in the case. The State's failure to produce such evidence or testimony may give rise to an inference that such testimony or evidence would be unfavorable to the State.

You should bear in mind that the law does not impose on the defendant in this criminal case the burden or duty of calling any witnesses or producing any evidence.

Authority: *Porter v. Irvin's Interstate Brick & Block Co.*, 691 N.E.2d 1363 (Ind. Ct. App. 1998); *Snow v. State*, 560 N.E.2d 69, 72-73 (Ind. Ct. App. 1990); and *Gossmeier v. State*, 482 N.E.2d 239, 242 (Ind. 1985).

Comments

Porter v. Irvin's Interstate Brick & Block Co., 691 N.E.2d 1363 (Ind. Ct. App. 1998)

In Indiana, the exclusive possession of facts or evidence by a party, coupled with the suppression of the facts or evidence by that party, may result in an inference that the production of the evidence would be against the interest of the party which suppresses it. *Westervelt v. National Manufacturing Co.*, 69 N.E. 169, 172 (Ind. Ct. App. 1903). "While this rule will not be carried to the extent of relieving a party of the burden of proving his case, it may be considered as a circumstance in drawing reasonable inferences from the facts established." *Great American Tea Co. v. Van Buren*, 33 N.E.2d 580, 581 (Ind. 1941). The rule not only applies when a party actively endeavors to prevent disclosure of facts, but also when the party "merely fails to produce available evidence." *Morris v. Buchanan*, 44 N.E.2d 166, 169 (Ind. 1942). These cases are directed to a party which has suppressed evidence believed to be in its control at the time of the law suit; however, we see no reason why they should not be applied where the party spoliates evidence prior to the commencement of a law suit that the party knew or should have known was imminent.

Gossmeier v. State, 482 N.E.2d 239, 242 (Ind. 1985)

Appellant tendered his instruction 5 proposing to have the jury instructed that since the State had failed to produce Dennis Paz at trial, the jury should infer that Paz's testimony would have been unfavorable to the State. The trial court refused the tendered "missing witness" instruction which is not generally favored in Indiana. *Hedrick v. State*, 430 N.E.2d 1150 (Ind. 1982); *Bruce v. State*, 375 N.E.2d 1042 (Ind. 1978). An instruction calling for an adverse inference to be drawn from the failure to produce certain evidence is appropriate only where the evidence withheld is material to the trial issues and not cumulative. *Hedrick, supra*; *Bruce, supra*. There is no such showing here.