STATE V. JENKS FAILS TO CLARIFY
APPELLATE STANDARDS OF EVIDENCE REVIEW IN OHIO

INTRODUCTION

The Supreme Court of Ohio recently overruled a longstanding jury instruction regarding circumstantial evidence.1 The instruction was referred to as the circumstantial evidence charge and was based on the circumstantial evidence rule:

In the absence of direct evidence, circumstantial evidence, by itself, will justify a finding of guilty if the circumstances are (entirely) consistent with the defendant's guilt, and are wholly inconsistent or irreconcilable with any reasonable theory of the defendant's innocence, and are so convincing as to exclude a reasonable doubt of the defendant's guilt.2

The court also changed the standard of appellate review in cases where circumstantial evidence was exclusively relied upon to prove an essential element of a crime.3 The former standard of review was based on the circumstantial evidence rule and was used by reviewing courts to determine whether a jury verdict was supported by the manifest weight of the evidence or whether the evidence was sufficient to support the conviction:

An appellate court will reverse a conviction based solely on circumstantial evidence where that evidence does not, as a matter of law, preclude all reasonable theories of innocence... once the jury has reached its decision, an appellate court, in a case where circumstantial evidence is relied upon, will reverse only where the evidence is insufficient as a matter of law to enable the jury to exclude a reasonable hypothesis of innocence.4

This standard of review originated in State v. Kulig5 and was explicitly overruled by State v. Jenks.6

The analysis that follows focuses on two points. First, many reviewing courts in Ohio have failed to discern between reversing a conviction because it was

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2 Ohio Jury Instructions 405.03.
3 Jenks, 574 N.E.2d at 503.
4 Id. at 497.
6 Jenks, 574 N.E.2d at 503.
against the manifest weight of the evidence and reversing because the evidence was not sufficient to support the conviction. The concepts and associated standards of review are separate and distinct. Jenks failed to clarify the distinction and may actually add to the confusion. Second, the elimination of the circumstantial evidence rule has implications concerning the definition of reasonable doubt in Ohio.

BACKGROUND

The Circumstantial Evidence Standard of Review

The circumstantial evidence standard of review originated in State v. Kulig, a Supreme Court of Ohio decision.\(^7\) In Kulig, an executor was charged and convicted of embezzlement.\(^8\) The executor reported to the police that a radio and television were stolen from the decedent's house.\(^9\) Upon investigation, the police found a radio and television inexplicably in the executor's possession.\(^10\) The executor claimed he was cleaning and testing the appliances in order to determine their value for resale.\(^11\) At trial, the court failed to give instructions concerning the duties of an executor.\(^12\) The executor was subsequently convicted of embezzlement.\(^13\)

On appeal, the court began its opinion by stating that its function was not to weigh evidence developed at trial, but noted that it could do so "in order to determine whether that evidence is of sufficient probative force to support a finding of guilt beyond a reasonable doubt."\(^14\) The court then noted the circumstantial evidence standard, reviewed the evidence of the case, and reversed the conviction.\(^15\) The court held that the executor's possession of the appliances could be explained by a reasonable theory of innocence as well as a theory of guilt.\(^16\)

The dissent observed that the jury may have arrived at a different conclusion had they been properly instructed on the duties of an executor.\(^17\) The dissent disagreed with the majority on the standard of review and maintained that the earlier cases stood for the proposition that "[the court] will examine the record of a criminal trial to determine whether evidence was presented, 'which, if believed,\(^7\) Id. at 496.
\(^8\) Kulig, 309 N.E.2d at 897.
\(^9\) Id.
\(^10\) Id. at 897-98.
\(^11\) Id. at 898.
\(^12\) Id.
\(^13\) Id.
\(^14\) Id. at 898.
\(^15\) Id. at 898-99.
\(^16\) Id. at 899.
\(^17\) Id.
would convince the average mind of the defendant's guilt beyond a reasonable doubt." 18 The dissent noted that weighing the evidence was not the Court's function when reviewing evidence in a criminal case. 19 "Weighing evidence is not synonymous with determining its legal sufficiency." 20 In other words, the dissent thought that the majority was making a determination of whether the verdict was supported by sufficient evidence and should not have engaged in any weighing of the evidence.

In subsequent decisions, the Ohio Supreme Court failed to distinguish between reviewing whether a verdict was against the manifest weight of the evidence and whether a verdict was supported by sufficient evidence. In State v. Graven, 21 the court affirmed a theft by deception conviction under R.C. 2913.02. 22 The appellant claimed that the trial court erred in not granting a motion of acquittal and that the verdict was against the manifest weight of the evidence. 23 The court interpreted this as a claim that the evidence was not sufficient to support the conviction. 24 The court stated that it would review the record and determine whether the evidence, if believed, would convince an average person that the defendant was guilty beyond a reasonable doubt. 25 The court also reiterated the circumstantial evidence standard of review and held that a conviction will be reversed "only where the evidence is insufficient as a matter of law to enable the jury to exclude a reasonable hypothesis of innocence." 26

In State v. Davis, 27 the appellant questioned the credibility of the prosecution's witnesses. 28 The case did not involve an application of Kulig. The Ohio Supreme Court interpreted this as a claim that the verdict was against the manifest weight of the evidence. 29 "The standard for our review is whether, after viewing the evidence in a light most favorable to the prosecution, a reasonable jury could have found the essential elements of the crime beyond a reasonable doubt." 30

Lower reviewing courts that have applied Kulig have also confused the concepts of determining whether a verdict is against the manifest weight of the evidence and whether the verdict is supported by sufficient evidence. In State v.
Walker, 31 the appellant's second assignment of error was that the verdict was not supported by the manifest weight of the evidence. 32 The Court of Appeals for Cuyahoga County interpreted this as a claim that the evidence was insufficient to support the conviction and felt it was obliged to view the evidence as if it was believed. 33 The court also cited Kulig for the proposition that the "examination involves the weighing of the evidence developed at trial." 34

In State v. Dickerson, 35 the defendant claimed the verdict was against the weight of the evidence. 36 The Court of Appeals for Cuyahoga County stated that the only possible basis for this assertion was that some of the evidence was circumstantial. 37 The court did not review the weight of the evidence but found that there was no reasonable theory of innocence under Kulig. 38

In State v. Williams, 39 the defendant was convicted of murdering a child. 40 The defendant, Williams, claimed that the verdict was not supported by sufficient evidence and that it was against the manifest weight of the evidence. 41 The victim was a three year old child that died "from compression of the brain caused by a subdural hematoma which in turn was caused by a broadly placed zone of bruising or trauma consistent with banging ones head against a sink or tub." 42 Williams claimed that the child accidently fell and hit its head on a sink. 43 There was no direct evidence that Williams "purposely caused the death of another." 44 If the jury found that Williams struck the child, the jury could also find that he purposely killed the child because a person is presumed to intend the natural and probable consequences of his actions. 45

At the conclusion of reviewing the evidence, the court stated "without regard to the weight or credibility to be given to such evidence, a reasonable hypothesis of defendant's guilt would exist, as reasonable as would be the hypothesis of his innocence." 46 In order to reach this conclusion, the court must have viewed each side's evidence as true in determining whether the respective

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32. Id. at 193.
33. Id. at 193-94.
34. Id. at 194.
36. Id. at 930.
37. Id.
38. Id.
40. Id. at 693.
41. Id.
42. Id.
43. Id. at 693-94.
44. Id. at 694.
45. Id.
46. Id. at 695.
theories of innocence and guilt were reasonable. The court then confronted the *Kulig* rule which would have required the court to acquit the defendant. However, the court seemed reluctant to overrule the jury's verdict and engaged in a difficult analysis that concluded with the following statement:

Accordingly, we also conclude in application to the instant case that since there was substantial evidence of probative value which, if believed, would support a determination of both a reasonable hypothesis of guilt and a reasonable hypothesis of innocence we cannot substitute our judgment for that of the jury when in consideration of all the evidence in the case and applying their own determination of weight and credibility they arrived at a verdict of guilty.

This holding does not distinguish between reviewing whether evidence is sufficient to support a verdict and reviewing whether a verdict is against the manifest weight of the evidence.

*The Circumstantial Evidence Rule and its Relation to the Definition of Reasonable Doubt in Ohio*

The origin of the circumstantial evidence charge in Ohio dates back at least as far as the 1861 Ohio Supreme Court case of *Fuller v. State*. The issue in that case was whether the defendant was entitled to a jury instruction that the prosecution must prove his guilt beyond a reasonable doubt. The trial court had refused the requested charge and instructed the jury that the defendant could be found guilty by a preponderance of the evidence. The defendant subsequently was convicted.

The court began its analysis by stating that a defendant was entitled to a presumption of innocence, and the burden of proof was on the prosecutor unless expressly provided otherwise by statute. The presumption of innocence could only be overcome by "full proof" of guilt. Full proof required that the evidence entirely exclude every reasonable doubt. The court continued with its analysis to address circumstantial evidence in criminal cases:

47 *Id.*
48 *Id.* at 696.
49 12 Ohio St. 433 (1861).
50 *Id.* at 433-34.
51 *Id.* at 434.
52 *Id.*
53 *Id.* at 434.
54 *Id.* at 434-35.
55 "Evidence which satisfies the minds of the jury of the truth of the fact in dispute, to the entire exclusion of every reasonable doubt, constitutes full proof of the fact; absolute mathematical or metaphysical
In criminal prosecutions, it has been observed, the circumstantial evidence should be such as to produce nearly the same degree of certainty, as that which arises from direct testimony, and to exclude a rational probability of innocence. Doubtless, the circumstances ought to be of such a nature as not to be reasonably accounted for, on the supposition of the prisoner’s innocence, but perfectly reconcilable with the supposition of his guilt.

The court concluded by stating the proposition that proof beyond a reasonable doubt was required in all criminal cases because innocent defendants should not be subjected to criminal punishment.

Language reminiscent of the Fuller opinion appeared in jury instructions for criminal cases for a number of years. The concept that a reasonable doubt existed "if the material facts without which guilt cannot be established may be fairly reconciled with innocence" remained a part of the definition of reasonable doubt even if the conviction partly rested on direct evidence.

certainty is not essential, and in the course of judicial investigations would be unattainable. Even the most direct evidence can produce nothing more than such a high degree of probability, as amounts to a moral certainty. From the highest degree, it may decline, by an infinite number of gradations, until it produces in the mind nothing more than a mere preponderance of assent, in favor of the particular fact. The distinction between full proof and mere preponderance of evidence is, in its application, very important. In all criminal cases whatsoever, it is essential to a verdict of condemnation, that the guilt of the accused should be fully proved; neither a mere preponderance of evidence, nor any weight of preponderant evidence is sufficient for the purpose, unless it generate full belief of the fact to the exclusion of all reasonable doubt.”

"However important it may be to secure the conviction of the guilty, yet a humane and just policy regards the acquittal of the innocent as still more desirable. If the rule is to be applied in cases only involving a certain grade of crime, where shall the line be drawn? And upon what principle shall the distinction be justified? If convictions be permitted upon a bare preponderance of proof, then, according to the doctrine of probabilities, we might expect to find a bare majority of such convictions, to be cases of actual guilt. The protection of the innocent demands more than this.”

"I have already stated that the presumption of the defendant's innocence is not overcome by a mere preponderance of the evidence, but that such presumption of this innocence stands until overthrown by evidence of such force that it satisfies your minds of defendant's guilt beyond all reasonable doubt. This does not mean that you must be satisfied beyond all doubt, but beyond all reasonable doubt. The law is too humane to demand a conviction while a reasonable doubt remains in the minds of the jury. You will be justified and required to consider a reasonable doubt as existing if the material facts without which guilt cannot be established may be fairly reconciled with innocence [emphasis added]. In human affairs absolute certainty is not always attainable. From the nature of things reasonable certainty is all that can be attained on many subjects. When a full and candid consideration of the evidence produces a conviction of guilt, and satisfies the mind beyond a reasonable doubt, a mere captious ingenious artificial doubt is of no avail. If you are not fully satisfied, but find only that there are strong probabilities of guilt, or strong, suspicious circumstances, your only safe course is to acquit.”


595 Ohio N.P. 232 (C.P. 1898). In State v. Morris, the corpus delicti was in issue. Proof of the corpus delicti involved showing that the victim had died by criminal agency and that the defendant was responsible. Id. at 235. The state introduced alleged confessions of the defendant which constituted direct evidence. Id. Circumstantial evidence was relied upon to prove criminal agency because the victim was badly burned in a fire and the exact cause of death probably couldn't be determined. Id. Another issue in the trial was whether Morris had sufficient mental capacity when he made the alleged confessions. Id. If the jury found
By 1898, a form of the circumstantial evidence charge existed and was used if proof of an element was supported solely by circumstantial evidence. At this time, the concept that a reasonable doubt existed "if the material facts without which guilt cannot be established may be fairly reconciled with innocence" was still a part of a commonly used definition of reasonable doubt. These two concepts are somewhat coextensive and conceptually equivalent. The circumstantial evidence charge emphasized the necessity that the defendant's guilt be proved to the exclusion of any reasonable theory of innocence.

By 1902, the definition of reasonable doubt began to change. The older definition of reasonable doubt and the concept of full proof still appeared. In that the defendant had the requisite mental capacity, the confessions could be used as direct evidence of other elements such as premeditation and intent. Id.

60 State v. Bennett, 5 Ohio N.P. 284, 285 (C.P. 1898).

The proof of a charge made in a criminal case involves two distinct propositions: First, that the act charged was done. Second, that it was done by the person charged. In order to convict, both these propositions must be established by evidence beyond a reasonable doubt. Either of them may be proven by direct testimony, or by circumstantial evidence. Direct testimony is the positive statement, under oath, of a fact, by a credible eye-witness. Circumstantial evidence is the positive proof of circumstances which necessarily or usually attend such facts. In order to convict, in a criminal case, upon circumstantial evidence, each of the several circumstances relied upon to prove any essential element of the crime must be given by direct testimony beyond a reasonable doubt: each, when all are taken together, must be consistent with all the others, and not inconsistent with any other established fact, and all taken together must point surely and unerringly to the guilt of the defendant, and must be inconsistent with any other rational supposition than that the defendant is guilty of the offense charged.

61 State v. Bennett, 5 Ohio N.P. 284 (C.P. 1898).

What is a reasonable doubt? A verdict of guilty can never be returned without convincing evidence. The law is too humane to demand a conviction while rational doubt remains in the minds of a jury. You will be justified, and are required to consider a reasonable doubt as existing, if the material facts, without which guilt can not be established may fairly be reconciled with innocence [emphasis added]. In human affairs absolute certainty is not always attainable. From the nature of things reasonable certainty is all that can be attained on many subjects. When a full and candid consideration of the evidence produces a conviction of guilt, and satisfies the mind to a reasonable certainty, a mere captious or ingenious artificial doubt is of no avail. You will look, then to all the evidence, and if that satisfies you of the defendant's guilt, you must say so. If you are not fully satisfied, but find only that there are strong probabilities of guilt, your only safe course is to acquit.

62 I now charge you what is meant by the expression reasonable doubt. By the expression reasonable doubt is meant in law actual, substantial doubt. A reasonable doubt exists in that state of the case which after a comparison and consideration of all the evidence in the case, evidence introduced by the state together with that introduced by the defendant, leaves the minds of the jurors or any of them in that condition that they cannot say they feel an abiding conviction of the guilt of the defendant, and are satisfied to a moral certainty of the truth of the charge. The proof is to be deemed to be beyond a reasonable doubt when the evidence is sufficient to impress the judgment of ordinarily prudent men with a conviction on which they would act without hesitation in their own most important affairs of life.


63 State v. Oppenheimer, 49 Ohio L. Bull. 257, 259 (C.P. 1904).
1905 the United States Supreme Court decided *Holt v. United States*. The Court approved a definition of reasonable doubt, a variation of which eventually became widely accepted in federal courts. By this time this definition had already appeared in Ohio decisions.

At some point, the circumstantial evidence charge was restricted to cases where circumstantial evidence was relied on exclusively to prove an essential element of a crime. It would not be given if the state produced some direct evidence on each element of the crime. The 1915 case of *Carter v. State* appears to be the case that established this restriction. *Carter* involved an indictment for arson, and the evidence was entirely circumstantial. "To convict in a criminal case upon circumstantial evidence, each of the several circumstances relied upon and necessary to prove any essential element of the crime must be established by the evidence beyond reasonable doubt. Each link essential to the chain must be thus proven."

The language of the opinion does not make clear exactly how this decision restricted the circumstantial evidence rule to cases where evidence of an element was wholly circumstantial. In *Carter*, all the evidence was circumstantial, and the language "relied upon and necessary to prove any essential element" does not necessarily restrict the circumstantial evidence rule to situations of exclusive reliance upon circumstantial evidence to prove an essential element of a crime.

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64 218 U.S. 245 (1905). "A reasonable doubt is an actual doubt that you are conscious of after going over in your minds the entire case, giving consideration to all the testimony and every part of it. If you then feel uncertain and not fully convinced that the defendant is guilty, and believe that you are acting in a reasonable manner, and if you believe that a reasonable man in any matter of like importance would hesitate to act because of such a doubt as you are conscious of having, that is a reasonable doubt, of which the defendant is entitled to have the benefit." Id. at 254.

65 "The most acceptable form of an instruction is that a reasonable doubt is a doubt that would cause prudent men to hesitate before acting in matters of importance to themselves, ... " Charles A. Wright, *Federal Practice and Procedure § 500* (2d ed. 1982).


Id. at 254.


70 *Carter*, 4 Ohio App. at 194.

71 Id. at 196.

72 "From the authorities cited in the brief of counsel for plaintiff in error and others the rule appears to be well established that it is the duty of the trial court to charge the jury that the particular facts and circumstances relied upon to establish guilt must be proved beyond a reasonable doubt; also, that when taken together they must be so convincing as to be irreconcilable with the innocence of the accused, or, as said by some authorities, as to admit of no other hypothesis than the guilt of the accused. "Id.

73 Id.
In 1929, the Ohio General Assembly enacted General Code Section 13442-3. This enactment created a rift between the circumstantial evidence rule and the definition of reasonable doubt because it statutorily eliminated the older definition that "a reasonable doubt... exist[s] if the material facts without which guilt cannot be established may be fairly reconciled with innocence." In spite of the enactment, courts were still permitted to add to the definition of reasonable doubt as long as the statutory definition was read to the jury. However, the Ohio Supreme Court has more recently ruled that such additions must not prejudice either party, and a court must use "extreme care" in expanding the statutory definition.

In 1954 the United States Supreme Court decided Holland v. United States. In that decision, the Court discarded the use of the circumstantial evidence rule in federal cases. The Court also addressed the definition of reasonable doubt used by the trial court. In so doing the Court reaffirmed a definition of reasonable doubt as the kind of doubt a juror would hesitate to act upon in the more serious and important affairs of the juror's life. In 1972 the Ohio General Assembly enacted the Revised Code Section 2901.05, which effectively enacted the standard of reasonable doubt approved for federal courts in Holland. This is the same standard which is in effect today. In spite of the enactment of a standard compatible with federal courts, Ohio maintained the circumstantial evidence rule. Ohio courts continued to apply the circumstantial evidence charge without complaint.

74 "A defendant in a criminal action is presumed to be innocent until he is proved guilty of the crime charged, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he shall be acquitted. But the effect of this presumption of innocence is only to place upon the state the burden of proving him guilty beyond reasonable doubt. Reasonable doubt is defined as follows: 'It is not mere possible doubt, because everything relating to human affairs or depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in the condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.' In charging a jury the court shall state the meaning of presumption of innocence, and read the foregoing definition of reasonable doubt." Act of April 1, 1929, amended Senate Bill No. 8, ch. 21, 1929 Ohio Laws 113 (renumbered as 2945.04 as enacted 1953, and repealed 1973).

75 State v. Morris, 5 Ohio N.P. at 233-34.
77 Sargent, 322 N.E.2d at 638.
78 348 U.S. 121 (1954).
79 Id. at 139-40.
80 Id. at 140.
81 Id.
82 "Reasonable doubt is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs. " Act of December 14, 1972, amended Substitute House Bill No. 511, 1971-1972 Ohio Laws 134 (amended effective 1978, the amendment did not effect section (D) (emphasis added).
STATEMENT OF THE CASE

Facts

On June 29, 1987 Robert Risberg left a Cleveland Indians baseball game and was walking along a sidewalk. He stepped on a plate set flush with the sidewalk next to a passenger shelter of the Greater Cleveland Regional Transit Authority (RTA). Apparently, the plate was energized by a short to an electrical transformer that was used to light advertising panels at the shelter. Risberg was electrocuted and died.

The incident received wide media coverage. RTA was notified that Risberg's daughter had retained legal counsel. On July 7, 1987, the RTA Board of Trustees initiated a formal investigation.

Appellees Mary Jenks and Dale Madison both worked in the planning department of RTA. Jenks was head of the department. Madison was a transportation planner and Jenks' subordinate. On July 7, 1987, Madison gave a list of documents to a group of summer interns with instructions to find the documents and throw them away. One of the interns testified that at least one large document addressed electrical work and bus shelters.

Another RTA employee, Rose Moviel, testified that on July 15, Madison requested that she retrieve any documents concerning energy or shelters from the RTA archives. Three boxes of documents were delivered to Madison's office on July 16. On July 17, Madison asked her to remove any documents relating to energy or shelters from the boxes. The boxes were half empty, and there were no documents relating to energy or shelters.

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84 Id.
85 Id.
86 Id.
87 Id.
88 Id.
89 Id.
90 Id.
91 Id.
92 Id.
93 Id. at 504.
94 Id.
95 Id. at 505.
96 Id.
97 Id.
98 Id.
Donald Yuratovac, a seventeen year employee of RTA, directed Steve Polzin to conduct a survey of the shelters in 1983.\footnote{Id.} Polzin produced many documents and memoranda in which he identified some problems with electrical wiring at some of the shelters.\footnote{Id.} On July 6, Yuratovic asked Moviel if she had retrieved the Polzin files.\footnote{Id. at 506.} There were two boxes near her desk.\footnote{Id.} The next day he returned but couldn't find the boxes of files.\footnote{Id.} The trash dumpsters were filled with documents thrown away by the interns.\footnote{Id.} Yuratovic testified that he never again saw the Polzin files.\footnote{Id. at 494.}

Procedure

On October 28, 1987, appellees were each indicted on two counts of tampering with evidence in violation of R.C. 2921.12.\footnote{Id. at 495.} The indictments alleged that Jenks and Madison destroyed documents "for the purpose of impairing the value or availability of said documents, with the knowledge that an official investigation was in progress."\footnote{Id.} The jury found Jenks and Madison guilty on both counts.\footnote{Id. at 496.}

Jenks and Madison appealed, asserting that their convictions were not supported by sufficient evidence and that the verdicts were against the manifest weight of the evidence.\footnote{Id.} In addition, Jenks also asserted that the trial court erred in not granting her Criminal Rule 29 motion for acquittal.\footnote{Id.} The appellate court consolidated the appeals and reversed the convictions.\footnote{Id.} The prosecution subsequently appealed to the Supreme Court of Ohio.\footnote{Id.} The Supreme Court reversed the appellate court decision and reinstated the convictions.\footnote{Id.}

The Ohio Court of Appeals Analysis

The court of appeals reversed the convictions based on two grounds.\footnote{Id.} First, the court observed that all of the evidence concerning intent was
The court then applied the Kulig standard of review and found the prosecution's evidence failed to eliminate the defendants' equally plausible theory of innocence.\(^{116}\) Second, the court held that evidence concerning the condition of Risberg's body was irrelevant and prejudicial and that references to "corruption" at RTA by the prosecutor during the opening statement amounted to prejudicial prosecutorial misconduct.\(^{117}\)

**The Ohio Supreme Court Analysis**

The Ohio Supreme Court addressed three issues. First, whether the circumstantial evidence rule and the Kulig standard of appellate review should be eliminated.\(^{118}\) Second, whether the prosecutor's statements concerning "corruption" at RTA were reversible error.\(^{119}\) Finally, the court examined whether the trial court committed reversible error by admitting evidence concerning the condition of Risberg's body.\(^{120}\)

In its analysis, the court seemed to be frustrated with what appeared to be two standards of reasonable doubt.\(^{121}\) The court clearly viewed the circumstantial evidence charge as being a higher standard than proof beyond a reasonable doubt.\(^{122}\) The court reviewed several federal and state decisions.\(^{123}\) The court appears to have based its decision to eliminate the circumstantial evidence charge on two premises. First, circumstantial evidence has the same probative force as direct evidence.\(^{124}\) Second, only one standard of reasonable doubt should be applied in criminal cases.\(^{125}\) The court noted that the charge was unnecessary.

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115 *Id.*
116 *Id.*
117 *Id.*
118 *Id.* at 496.
119 *Id.*
120 *Id.*
121 "In every criminal case, the jury is asked to weigh all of the admissible evidence, both circumstantial and direct, to determine if the defendant is guilty beyond a reasonable doubt. Hence, there is but one standard of proof in a criminal case, and that is proof of guilt beyond a reasonable doubt. This tenet of the criminal law remains true, whether the evidence against a defendant is circumstantial or direct. We therefore hold that where the state relies on circumstantial evidence to prove an element of the offense, and where the jury is properly instructed on the standards for reasonable doubt, an additional instruction on circumstantial evidence is not required." *Id.* at 502.
122 "We agree with those courts that have held that an additional instruction on the sufficiency of circumstantial evidence invites confusion and is unwarranted. Since circumstantial evidence and direct evidence are indistinguishable so far as the jury's fact-finding function is concerned, all that is required of the jury is that it weigh all of the evidence, direct and circumstantial, against the standard of proof beyond a reasonable doubt. Nothing more should be required of a factfinder." *Id.* at 502.
123 *Id.* at 498-502.
124 *Id.* at 502.
125 *Id.* at 502-03.
regardless of whether it introduced a higher standard of proof into jury deliberations.\textsuperscript{126}

The court was particularly influenced by \textit{Holland v. United States}.\textsuperscript{127} In \textit{Holland} the defendants were convicted of tax evasion based on the net worth burden of proof.\textsuperscript{128} This method of proof is highly circumstantial.\textsuperscript{129} Among several assignments of error, the defendants claimed that the trial court erred by refusing to give the circumstantial evidence charge.\textsuperscript{130} The Court noted that some federal courts had granted the instruction but held "the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect."\textsuperscript{131} The Court went on to hold that circumstantial evidence and direct evidence are equivalent and that, on occasion, either can point to an incorrect result.\textsuperscript{132}

In \textit{Jenks}, the court expressed dissatisfaction with the circumstantial evidence standard of review because it forced the court to engage in a two step analysis.\textsuperscript{133} A reviewing court was required to determine whether there was sufficient direct evidence to support the conviction beyond a reasonable doubt and then repeat the process to determine whether the circumstantial evidence was

\textsuperscript{126} If one accepts the theory that the circumstantial evidence rule imposes a higher burden on the prosecution, then that added burden is erroneous. The standard of proof in a criminal trial is guilt beyond a reasonable doubt, and no more. If one accepts the postulation that the circumstantial evidence rule is an alternative means for assessing whether the reasonable doubt standard has been met, then the additional jury instruction is redundant, and can only serve to confuse the jury." \textit{Id.} at 503 n.5.

\textsuperscript{127} 348 U.S. 121, 124 (1954).

\textsuperscript{128} "In a typical net worth prosecution, the Government, having concluded that the taxpayer's records are inadequate as a basis for determining income tax liability, attempts to establish an 'opening net worth' or total net value of the taxpayer's assets at the beginning of a given year. It then proves increases in the taxpayer's net worth for each succeeding year during the period under examination and calculates the difference between the adjusted net values of the taxpayer's assets at the beginning and the end of each of the years involved. The taxpayer's nondeductible expenditures, including living expenses, are added to these increases, and if the resulting figure for any year is substantially greater than the taxable income reported by the taxpayer for that year, the Government claims the excess represents unreported taxable income." \textit{Id.} at 125.

\textsuperscript{129} \textit{Id.} at 124.

\textsuperscript{130} \textit{Id.} at 139.

\textsuperscript{131} \textit{Id.} at 139-40.

\textsuperscript{132} "In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more." \textit{Id.} at 140.

\textsuperscript{133} \textit{State v. Jenks}, 574 N.E.2d 492, 497 (Ohio 1991). The \textit{Kulig} standard entails a two-step process. First, as is done in a case involving direct evidence of guilt, an appellate court must determine whether there is sufficient probative evidence to support the defendant's guilt beyond a reasonable doubt. The second step, employed only when the state relies entirely on circumstantial evidence to prove an essential element of the offense, requires an appellate court to re-examine the circumstantial evidence to determine if the defendant's theory of innocence is reasonable or plausible. In other words, the appellate court must weigh two competing theories, one pointing to guilt and the other to innocence. In order for the conviction to stand, the appellate court must be satisfied not only that the circumstantial evidence supports a finding of defendant's guilt beyond a reasonable doubt, but, in addition, that the circumstantial evidence is of sufficient force as to exclude every reasonable hypothesis of innocence put forward by the defense. \textit{Id.}
sufficient to exclude every reasonable hypothesis of innocence.\textsuperscript{134} A reviewing court was then required to weigh the two competing theories of guilt and innocence.\textsuperscript{135} The new standard eliminates the two step analysis and is stated as follows:

In other words, an appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt . . . . The verdict will not be disturbed unless the appellate court finds that reasonable minds could not reach the conclusion reached by the trier of facts.\textsuperscript{136}

On the second issue, the court held that the prosecutor's statements concerning corruption at RTA did not create "a miscarriage of justice."\textsuperscript{137} On the third issue, the court held that testimony of Risberg's daughter was relevant in determining whether the defendants had notice of the impending civil action.\textsuperscript{138} The court found testimony of the coroner concerning the condition of the body was irrelevant and inflammatory, but did not rise to the level of plain error.\textsuperscript{139} Any other improperly admitted evidence was harmless beyond a reasonable doubt.\textsuperscript{140}

\textbf{ANALYSIS}

\textit{Manifest Weight of the Evidence and Sufficiency of the Evidence are Separate and Distinct Theories of Review}

In \textit{Jenks}, both defendants asserted "that the jury's verdict was against the manifest weight of the evidence, and that the state's evidence was insufficient as a matter of law on the essential element of intent."\textsuperscript{141} This assignment of error forced the court of appeals to review and weigh the evidence based on the \textit{Kulig} standard. \textit{Jenks} also claimed that the trial court had committed error by not granting her Criminal Rule 29 motion for acquittal.\textsuperscript{142} As discussed previously, Ohio courts have not clearly distinguished between these concepts.

There are three situations in which a reviewing court may be called upon to review evidence. The first is in the setting of a Criminal Rule 29 motion for
acquittal. A court can grant a motion for acquittal on its own motion or on the motion of the defendant after the evidence of either side is closed. A court can reserve decision on a motion for acquittal until after the jury returns its verdict if the motion is made at the close of all of the evidence. A defendant can also raise the issue on appeal. Under a Criminal Rule 29 motion for acquittal, an issue is for the jury if reasonable minds could disagree whether the defendant is guilty when the evidence is “viewed in the light most favorable” to the prosecution. A reviewing court uses the same standard on appeal.

The other two situations involve claims that the verdict was against the manifest weight of the evidence, or that the verdict was not supported by sufficient evidence. A manifest weight review is not equivalent to a sufficiency review. In State v. Robinson, the Ohio Supreme Court stated:

Although there is sufficient evidence to sustain a verdict or finding of guilty of second degree murder, a Court of Appeals has the power to decide that such verdict or finding is against the weight of the evidence. The Supreme Court is not required to and ordinarily does not weigh the evidence. Therefore, it will not review the determination by a Court of Appeals that a verdict or finding is against the weight of the evidence.

Analytically, arguing that the verdict is against the manifest weight of the evidence is equivalent to admitting that the prosecution’s evidence was sufficient to support the verdict. The concept of sufficiency is based on the United States Constitution. The concept of manifest weight is supported by the Ohio Constitution. A court of appeals can weigh evidence, but when reviewing a jury verdict all three judges hearing the case must concur in order to reverse a conviction.

143 Ohio Crim. R. 29(A).
144 Ohio Crim. R. 29(C).
146 Bridgeman, 381 N.E.2d at 185–86.
147 After determining the appropriate standard of review, the court determined whether it was properly applied. Id. at 186.
148 These two concepts will hereafter be referred to as manifest weight and sufficiency.
149 State v. Robinson, 124 N.E.2d 148, 149 (Ohio 1955)
150 Id.
153 Ohio Const. art. IV, § 3(B)(3) (amended 1968).
154 Id.
In *Jenks*, the court stated that the *Kulig* standard of review required a two-step analysis.\(^\text{155}\) A reviewing Court was required to first determine whether the evidence was sufficient to support the conviction.\(^\text{156}\) In *State v. Eley* the court held "[t]his court's examination of the record at trial is limited to a determination of whether there was evidence presented, 'which, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt.'"\(^\text{157}\) In performing this review, a court could focus primarily on the prosecution's evidence because the issue was whether that evidence, if believed, was sufficient. Weighing of the evidence was not involved. *Eley* is still good law and the standard for reviewing sufficiency has not changed.

The second step was necessary because of *Kulig*. After reviewing whether the prosecution's evidence was sufficient, a court was required to review the circumstantial evidence.\(^\text{158}\) The appropriate standard of review was whether the defendant's evidence supported a reasonable theory of innocence.\(^\text{159}\) This step forced a reviewing court to examine the defendant's evidence. This examination was required only when circumstantial evidence alone was relied on to prove an essential element of the crime.\(^\text{160}\) The second step necessarily involved weighing the prosecution's theory of guilt against the defendant's theory of innocence.\(^\text{161}\)

In *Kulig*, the Court justified weighing the two theories by observing its power to weigh evidence to a limited extent.\(^\text{162}\) At that time, that proposition was true. The Supreme Court of Ohio had addressed the weight of evidence on occasion.\(^\text{163}\) However, as stated in *State v. Cooey*, the court has no authority by the Ohio Constitution to weigh evidence and now refuses to do so to any extent.\(^\text{164}\)

The Ohio Supreme Court has previously adopted the *Jackson v. Virginia* standard when reviewing the sufficiency of evidence.\(^\text{165}\) This standard is consistent with the previous Ohio standard as stated in *Eley*.\(^\text{166}\) However, in *Jackson*, the United States Supreme Court rejected the idea that a prosecutor is required to overcome "every hypothesis except that of guilt" under the federal definition of reasonable doubt.\(^\text{167}\)

\(^{156}\) *Id.*
\(^{158}\) *Jenks*, 574 N.E.2d at 497.
\(^{159}\) *Kulig*, 309 N.E.2d at 899.
\(^{160}\) *Jenks*, 574 N.E.2d at 497.
\(^{161}\) *Id.*
\(^{162}\) *Kulig*, 309 N.E.2d at 898.
\(^{163}\) See *State v. Urbaytis*, 102 N.E.2d 248 (Ohio 1951); *Atkins v. State*, 155 N.E. 189 (Ohio 1927).
\(^{164}\) 544 N.E.2d 895, 905-06 (Ohio 1989).
\(^{165}\) *State v. Tyler*, 553 N.E.2d 576, 588 (Ohio 1990).
In *York v. Tate*, a federal court held that Ohio's circumstantial evidence standard of review is inconsistent with the *Jackson* standard. The case involved a federal district court decision granting a writ of habeas corpus. The lower court had applied the *Kulig* standard when addressing the sufficiency of the evidence. The lower court thought it was obliged to apply *Kulig* because an earlier decision had held that the *Jackson* standard was to be applied in view of the state law definitions of the substantive elements of the crime. More importantly, the court held that the *Kulig* standard "is not required by the federal Constitution and should not be applied by a federal court in deciding whether the petitioner is entitled to habeas relief."

The court of appeals observed that the application of the *Kulig* standard forced the district court to view the evidence in the light most favorable to the defendant. "By applying the *Kulig* rule, the district court turned the *Jackson* standard on its head. Rather than asking whether any reasonable juror could have found petitioner guilty, the district court considered whether any reasonable juror could have found the petitioner not guilty." The court acknowledged the district court's finding that petitioner's theory of innocence was not "implausible" or "irreconcilable" with the evidence, but still reversed the grant of the writ.

*Jackson, Cooey,* and *York* isolated the circumstantial evidence standard of review. The *Kulig* standard of review became inconsistent with Ohio Supreme Court and federal court holdings.

In *Jenks*, the court did not distinguish between weight and sufficiency. As discussed previously, courts that have applied *Kulig* have not clearly distinguished between the two concepts. When circumstantial evidence was a factor, *Kulig* provided a standard by which a reviewing court could weigh the defendant's evidence against the prosecution's evidence. The sufficiency test required that the evidence be viewed in the light most favorable to the prosecution. The circumstantial evidence standard of review constituted a weight test and allowed a

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168 858 F.2d 322 (6th Cir. 1988).
169 Id. at 330.
170 Id. at 323.
171 Id.
172 Id. at 327.
173 Id. at 327-29.
174 Id. at 330.
175 Id.
176 Id.
177 Id. at 330. The court referred to the statements in *Jackson* that a prosecutor need not overcome "every hypothesis except that of guilt." Id.
178 Jenks, 574 N.E.2d at 497.
179 State v. Tyler, 553 N.E.2d 576, 588 (Ohio 1990).
reviewing court to weigh the evidence on both sides.\textsuperscript{180} The elimination of the \textit{Kulig} standard of review leaves the sufficiency test intact, but leaves some doubt as to the appropriate standard of review when a defendant asserts that the verdict was against the manifest weight of the evidence.

The Supreme Court of Ohio could eliminate any confusion by adopting the views of the United States Supreme Court in \textit{Tibbs v. Florida}.\textsuperscript{181} The holding of the case involved an analysis of the difference between reversing a conviction as against the manifest weight of the evidence and reversing based on insufficiency of the evidence.\textsuperscript{182} The part of the opinion concerning sufficiency is dicta but is supported by authority in the decision and is quite pertinent. The United States Supreme Court noted that a defendant who was acquitted because of a lack of sufficient evidence could not be subjected to another trial.\textsuperscript{183} On a finding of insufficient evidence, a court holds that the prosecution's evidence was so lacking that the state failed to meet its burden of proof.\textsuperscript{184} Permitting additional trials would allow the state to alter its strategy and perfect its evidence eventually resulting in a conviction.\textsuperscript{185} The Court stated this was a clear violation of the double jeopardy clause of the United States Constitution.\textsuperscript{186}

On the other hand, a finding that the verdict is against the manifest weight of the evidence does not preclude another trial.\textsuperscript{187}

A reversal based on the weight of the evidence, moreover, can occur only after the State both has presented sufficient evidence to support conviction and has persuaded the jury to convict. The reversal simply affords the defendant a second opportunity to seek a favorable judgment.\textsuperscript{188}

The Court noted that the function of a reviewing court when reviewing the weight of evidence is to act as a "thirteenth juror."\textsuperscript{189} The Supreme Court of Florida held that a court is allowed to address the credibility of witnesses and to weigh the evidence.\textsuperscript{190} In \textit{State v. Mattison} an Ohio court of appeals directly confronted a

\textsuperscript{180} \textit{Jenks}, 574 N.E.2d at 497.
\textsuperscript{181} 457 U.S. 31 (1982).
\textsuperscript{182} \textit{Id.} at 39-44.
\textsuperscript{183} \textit{Id.} at 39 (dicta).
\textsuperscript{184} \textit{Id.} at 37 (dicta).
\textsuperscript{185} \textit{Id.} at 41 (dicta).
\textsuperscript{186} \textit{Id.} at 39 (dicta).
\textsuperscript{187} \textit{Id.} at 44.
\textsuperscript{188} \textit{Id.} at 42-43.
\textsuperscript{189} \textit{Id.} at 42.
\textsuperscript{190} \textit{Id.} at 37.
claim that the verdict was against the manifest weight of the evidence. The court stated several guidelines to be applied when weighing evidence:

1. Knowledge that even a reviewing Court of Appeals is not required to accept as true the incredible. [Citations omitted.]

2. Whether evidence is uncontradicted. [Citations omitted.]

3. Whether a witness was impeached. [Citations omitted.]

4. Consideration of what was not proved. [Citations omitted.]

5. The certainty of the evidence. [Citations omitted.]

6. The reliability of the evidence. [Citations omitted.]

7. The extent to which any of the witnesses may have an interest to advance or protect by their testimony. [Citations omitted.]

8. The extent to which the evidence is vague, uncertain, conflicting, fragmentary, or not fitting together in a [logical] pattern. [Citations omitted.]

This approach would be compatible with Ohio law, the Ohio Constitution, and the Constitution of the United States. Under the Ohio Constitution, a court of appeals can weigh evidence. In a jury trial, concurrence of all three judges is required in order to reverse on the ground that the verdict is against the manifest weight. Under Cooey, the Supreme Court of Ohio could not review this decision. However, a reversal based on manifest weight would result only in another trial, not an acquittal. The guidelines of Mattison could be used when a reviewing court weighs evidence. The distinction between sufficiency and manifest weight is supported in Ohio law by Robinson. Under the United States Constitution, a trial court can acquit when evidence is not sufficient to be submitted to the jury. A reviewing court can acquit a defendant if it finds the trial court

192 Id. at 929-30.
193 Ohio Const. art. IV, § 3(B)(3) (amended 1968).
194 Id.
195 544 N.E.2d 895, 905-06 (Ohio 1989).
197 490 N.E.2d 926, 929-30 (Ohio 1985).
199 A conviction based on insufficient evidence violates the due process clause of the Fourteenth Amendment. Jackson v. Virginia, 443 U.S. 307, 316-18 (1979). Evidence is sufficient only if each element is proven beyond a reasonable doubt. Id. at 316 (citing In re Nnship, 397 U.S. 358 (1970)). After a finding
should not have submitted the case to the jury under Criminal Rule 29 or under a claim that the evidence was not sufficient to support the verdict.  

The Circumstantial Evidence Charge Introduced a Higher Standard of Proof

In State v. Jenks, the court ultimately rested its decision to eliminate the circumstantial evidence jury instruction on two premises. First, circumstantial evidence is just as probative as direct evidence, and there should be no distinction in how the two are handled. Second, proof beyond a reasonable doubt is the only standard required in a criminal case. As previously discussed, the Supreme Court of Ohio implied that the circumstantial evidence charge introduces a higher standard of proof than is required by proof beyond a reasonable doubt. The court appears to have adopted the federal court view that the prosecution is not required to rule out every reasonable hypothesis of innocence. The history of the circumstantial evidence rule shows its origins date back to a time when a reasonable doubt existed "if the material facts without which guilt cannot be established may be fairly reconciled with innocence." It was eventually orphaned by changes in the definition of reasonable doubt. The definition of reasonable doubt commonly used one hundred years ago is incompatible with the definition after State v. Jenks. By the current definition of reasonable doubt, the circumstantial evidence charge introduces a higher standard of proof into a criminal trial.

CONCLUSION


Jenks, 574 N.E.2d at 502-03.

Id. at 502.

Id. at 503.

Id.

Id. at 498.

Fuller v. State, 12 Ohio St. 433, 436 (Ohio 1861).
with the two-step analysis and eliminated the circumstantial evidence standard of review.\textsuperscript{207}

Ohio courts have consistently confused reviewing evidence to determine whether it is sufficient to support a verdict with reviewing whether a verdict is against the manifest weight of the evidence. Ohio appellate courts have authority by the Ohio Constitution to weigh evidence.\textsuperscript{208} The holding of \textit{Jenks} eliminated one of the tools that Ohio appellate courts used to weigh evidence. This holding may add to the confusion.

A possible solution lies in adopting the federal definitions and associated standards of review for determining whether evidence is sufficient to support a verdict and whether a verdict is against the manifest weight of the evidence. Adopting these definitions would be one more step in what appears to be a trend to conform with federal criminal law.

The origin and history of the circumstantial evidence charge was explored and compared to the history of the definition of reasonable doubt in Ohio. The analysis showed that the circumstantial evidence charge and the definition of reasonable doubt were once compatible. The definition of reasonable doubt changed over a period of 130 years and the circumstantial evidence jury charge became alienated. Under the current definition of reasonable doubt, the circumstantial evidence jury charge introduces a higher standard of proof.

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\textsuperscript{207} \textit{Jenks}, 574 N.E.2d at 502-03.
\textsuperscript{208} \textsc{Ohio Const.} art. IV, § 3(B)(3) (amended 1968).
\textsuperscript{*} I would like to acknowledge Associate Professor J. Dean Carro for providing guidance and inspiration during the preparation of this casenote. Any errors, of course, are my own.