

CIRCUMSTANTIAL EVIDENCE AS DEFINED BY THE NEW YORK COURT OF APPEALS

"While it is not necessary that the words 'moral certainty' be used, when the evidence is circumstantial the jury should be instructed in substance that it must appear that the inference of guilt is the only one that can fairly and reasonably be drawn from the facts, and that the evidence excludes beyond a reasonable doubt every reasonable hypothesis of innocence." *People v Sanchez*, 61 NY2d 1022, 1024 (1984); *People v Ford*, 66 NY2d 428, 441-443 (1985). See also *People v Gonzalez*, 54 NY2d 729 (1981).

§ 125.25. Murder in the second degree

A person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime; or

(b) The defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the second degree or any other crime; or

2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person; or

3. Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, [fig 1] criminal sexual act in the first degree, sexual abuse in the first degree, aggravated sexual abuse, escape in the first degree, or escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision, in which the defendant was not the only participant in the underlying crime, it is an affirmative

defense that the defendant:

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury; or

4. Under circumstances evincing a depraved indifference to human life, and being eighteen years old or more the defendant recklessly engages in conduct which creates a grave risk of serious physical injury or death to another person less than eleven years old and thereby causes the death of such person [fig 1] ; or

5. Being eighteen years old or more, while in the course of committing rape in the first, second or third degree, criminal sexual act in the first, second or third degree, sexual abuse in the first degree, aggravated sexual abuse in the first, second, third or fourth degree, or incest [fig 1] in the first, second or third degree, against a person less than fourteen years old, he or she intentionally causes the death of such person.

MURDER SECOND DEGREE
(A-I Felony)
(Intentional Homicide)
PENAL LAW 125.25(1)
(Committed on or after Sept. 1, 1967)

The _____ count is Murder in the Second Degree.

Under our law, a person is guilty of Murder in the Second Degree when, with intent to cause the death of another person, he or she causes the death of such person [or of a third person].

The term "intent" used in this definition has its own special meaning in our law. I will now give you the meaning of that term.¹

¹If causation, "death," or "person" is in issue, see Additional Charges at the end of this article.

INTENT means conscious objective or purpose.² Thus, a person acts with intent to cause the death of another when that person's conscious objective or purpose is to cause the death of another.

[NOTE: In a case of "transferred intent," add the following paragraph:

Under our law, it is not required that the person who dies be the same person whose death was intended to be caused.]

In order for you to find the defendant guilty of this crime, the People are required to prove, from all the evidence in the case, beyond a reasonable doubt, both of the following two elements:

1. That on or about (date), in the county of (county), the defendant, (defendant's name), caused the death of (specify); and
2. That the defendant did so with the intent to cause the death of (specify).

Therefore, if you find that the People have proven beyond a reasonable doubt both of those elements, you must find the defendant guilty of the crime of Murder in the Second Degree as charged in the _____ count.

On the other hand, if you find that the People have not proven beyond a reasonable doubt either one or both of those elements, you must find the defendant not guilty of the crime of Murder in the Second Degree as charged in the _____ count.

[NOTE: If either of the affirmative defenses -- Extreme Emotional Disturbance (§ 125.25(1)(a)) or Aiding a Suicide (§ 125.25(1)(b)) -- applies, omit the final two paragraphs of the above charge, and substitute one of the charges at the end of this article.]

²See Penal Law § 15.05(1).