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QUANTUM OF PROOF NECESSARY TO CORROBORATE A CONFESSION

This memorandum is concerned with the quantum and kind of evidence necessary to corroborate a confession which is to be used in proof of the corpus delicti. It is elementary that a confession, standing alone, is not adequate proof of corpus delicti; but, contrary to the impression held by some, this does not mean that a confession is not competent evidence that a crime has been committed. The test is whether it is sufficiently corroborated by other evidence so as to convince the jury that the crime charged is real and not imaginary.

It was said in *Williams v. People,* 114 Colo. 207, 214, 158 P. 2d 447:

> Proof of the corpus delicti may be by circumstantial evidence. Where defendant has confessed commission of the crime, the confession may be considered in connection with other evidence to establish the corpus delicti and it is sufficient if it is corroborated by other evidence. * * * "While a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is, nevertheless, competent evidence of that fact, and may, with *slight* corroborative circumstances, establish the corpus delicti as well as the defendant's guilty participation. . . . The rule requiring corroboration of a confession is met if the additional evidence is sufficient to convince the jury that the crime charged is real and not imaginary." *Bunch v. People,* 87 Colo. 84, 285 P. 766. See, also, *Short v. People,* 27 Colo. 175, 60 P. 350; 7 Wigmore on Evidence (3d ed.) §§2070, 2071.

It should be remembered that the identity of the accused as the criminal agent is not a part of the corpus delicti. This is made clear in *Ausmus and Moon v. People,* 47 Colo. 167, 180, 107 P. 204, where it was said:

> It, therefore, follows that under either the orthodox rule as stated by Wigmore, or the broader sense in which the words are used, the existence of the criminal fact—the corpus delicti—in homicide may be completely established, before the question of the identity of the slayer is reached. Treating the agency of the accused as one element of the corpus delicti in its strict sense is certainly

> not in harmony with the proper use of that phrase. Ignorance of identity embarrasses the proof, and may cause a fatal variance; but proof of the corpus delicti may yet be complete, though ultimately the case fails for want of proof, either as to identity of the slayer or the slain. Certainly in the sense of a completed case, in which sense it is frequently used, it must include the identity of the accused as the criminal agency, and the identity of the deceased as the party alleged to have been murdered.

The same distinction between *corpus delicti* and *identity* was made in *Lowe v. People,* 76 Colo. 603, 611, 234 P. 169:

> Proof that one charged committed a felonious homicide involves three elements; first, the death. second, the criminal agency of another as the cause; third, the identity of the accused as that other. The first two constitute what is known in law as the corpus delicti. Some authorities erroneously include the third, but this makes the corpus delicti identical with the whole case of the people.

CORROBORATION OF CONFESSION MAY BE BY CIRCUMSTANTIAL EVIDENCE

The rule in Colorado is that all of the elements of the corpus delicti may be proved by circumstantial evidence. While such evidence must establish the corpus delicti to a reasonable certainty, and exclude every other possible hypothesis than that of guilt, yet it is not necessary that each particular circumstance be thus conclusively established. If the combined effect of all the circumstances produces the same degree of certainty as would be established by direct and positive proof, that is sufficient. These principles are set out in *Bruner v. People,* 113 Colo. 194, 207, 156 P. 2d 111, in this language:

> It is well settled in this jurisdiction that the corpus delicti consists of two components: death as a result, and the criminal agency of another as the means, and it is equally settled that that the corpus delicti may be established by either direct or circumstantial evidence. *Roberts v. People,* 11 Colo. 213, 17 P. 637; *Ausmus and Moon v. People,* 47 Colo. 167, 107 P. 204; *Bunch v. People,* 87 Colo. 84, 285 P. 766.
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> To convict one of crime, proof must be made that the offense was committed and also that the accused was the perpetrator or one of the perpetrators of the offense, and both may be shown by circumstantial evidence. . . .
>
> The corpus delicti, and all the elements thereof, may be proved by circumstantial evidence, from which the jury may reasonably infer that a crime has been com-

> mitted. Such evidence must exclude every reasonable hypothesis except guilt, and be convincing to a moral certainty; and such proof of corpus delicti must be the most convincing and satisfactory proof compatible with the nature of the case. . . .
>
> A large number of the more modern cases, probably constituting the weight of authority, however, have adopted the rule that all of the elements of the corpus delicti, including the fact of the death of the person alleged to have been murdered, as well as the criminal agency of the accused, and the identity of the deceased, may be proved by presumptive or circumstantial evidence, at least when direct evidence is not available. And in case of the entire destruction or disappearance of the body of the person alleged to have been killed, as in the case of drowning at sea, the corpus delicti may be proved circumstantially or inferentially. . . .
>
> It seems now pretty generally held that circumstantial evidence is admissible to establish the corpus delicti in a trial for murder, but that it must be strong and cogent. . . .
>
> In a case where circumstantial evidence is relied upon to establish the corpus delicti, it is not sufficient that the circumstances proved coincide with and account for, and therefore render probable, the hypothesis of the guilt of the accused. The evidence must be such as to establish the corpus delicti to a reasonable certainty, and exclude every other possible hypothesis except that of guilt; that is, the evidence must be such as to establish so positively the corpus delicti as to exclude from the minds of the jury all uncertainty in regard to it. But to do this it is not necessary that each particular circumstance be established thus exclusively. It is sufficient if the combined effect of all the circumstances proved in a case is such as to produce the same degree of certainty in regard to the corpus delicti as would be established by direct and positive proof.

A CONFESSION IS "DIRECT" EVIDENCE

Bruner v. People, supra, 113 Colo. 194, 156 P. 2d 111, deals with a situation where *all* of the evidence going to show the corpus delicti is "circumstantial." The subject dealt with in this memorandum, however, is concerned with the quantum and kind of evidence necessary to corroborate a confession which is offered in proof of the corpus delicti.

The confession itself is some evidence of the existence of the "criminal fact"—the corpus delicti. All that is necessary, under the Colorado decisions, to make it adequate proof is that it be corroborated by such circumstances as are "sufficient to con-

vince the jury that the crime charged is *real* and not *imaginary.*" —*Williams v. People,* 114 Colo. 207, 214, 158 P. 2d 447. And the *Williams* case, it will be remembered, says that "slight corroborative circumstances" are sufficient.

Where a confession of the crime is proved, there exists a great deal more than mere "circumstantial" evidence. The confession is "direct" evidence—sufficient, in fact, to permit infliction of the death penalty in a murder case where the only other evidence is "circumstantial." Such was the ruling in *Mitchell v. People,* 76 Colo. 346, 349, 232 P. 685, as to both written and oral confessions. It was there said:

> Here the question is this: Is a written confession, a duly signed, attested, and proven document, circumstantial evidence? We know of no authority and can conceive of no reasoning, which justifies an affirmative answer thereto. Exhibit H was established beyond the peradventure of a doubt. Save for the contention that defendant was intoxicated and was not warned, it is undisputed. By this document, the person most concerned, he against whose last earthly interest it stands, whose eye saw, whose ear heard, whose hand acted, speaks. If this evidence is not direct, no evidence can be. The strenuous argument that it is extrajudicial is beside the mark. The question is not: Where was it given? but: How was it given? Did it come from one whose senses took cognizance of the very facts in issue, or from one whose senses only took cognizance of the facts from which those in issue must be deduced? If from the former it is direct evidence, if from the latter it is circumstantial. The conclusion is inevitable; this written confession was direct evidence, and instruction No. 12 was correct.

ADOPTION OF THE COLORADO RULE

The rule as to proof of the corpus delicti by circumstantial evidence was probably first announced in Colorado in *Roberts v. People,* 11 Colo. 213, 216, 17 P. 637, involving the offense of larceny of ore from a certain mine. The evidence indicated that ore had been stolen from the mine, and other evidence indicated that the ore charged to have been stolen was in fact ore from the mine. Defendant denied stealing the ore, although he did admit receiving certain ore from other persons. In holding that the evidence was sufficient to support the conviction, the court said:

> The chief contention by counsel for the plaintiff in error is that the evidence does not show the corpus delicti. While direct evidence of the corpus delicti is always desirable, it should not be held indispensable. To so hold would, in many cases, give immunity to crime, especially in the class of cases to which this belongs. There is some

> conflict of authority, but we regard this as the better doctrine. If, however, circumstantial evidence is relied upon for this purpose, it should be such as to exclude all reasonable doubt. I Bish. Crim. Proc., §1071, and cases cited. In the case at bar we have to deal with the admission of the prisoner. The general rule is that the extrajudicial confessions of a prisoner are not sufficient to warrant a conviction without proof aliunde of the corpus delicti; or, as it is sometimes stated, the prisoner's confession of the crime must be corroborated by other and independent evidence. Id.; Whart. Crim. Ev. §632. We are of the opinion that there is sufficient evidence to show a larceny of ores from the Forest City mine.

CHARGE MUST BE "REAL," NOT "IMAGINARY"

It was stated, as has been seen, in *Williams v. People,* 114 Colo. 207, 214, 158 P. 2d 447, that the test is whether the evidence corroboratory of a confession is sufficient to convince the jury that the charged offense was real and not imaginary [ante, page 202]. The precedent cited was *Bunch v. People,* 87 Colo. 84, 86, 285 P. 766, where the charge was aggravated robbery. There, the court said: " . . . we observe that proof of the corpus delicti may be made by circumstantial evidence. . . . And that the rule requiring corroboration of a confession is met if the additional evidence is sufficient to convince the jury that the crime charged is real and not imaginary. Wigmore on Evidence (2d ed.), vol. 4, §2071; *Heard v. State,* 59 Miss. 505; *Sullivan v. State,* 58 Neb. 796, 79 N. W. 721."

The court there cites with approval section 2071 of the second edition of Wigmore on Evidence. Wigmore, in his third edition (vol. 7, §2071), in which he places Colorado among the very liberal jurisdictions in the matter of the proof of corpus delicti (citing *Bunch v. People, supra*), had this to say: "In a few jurisdictions, the rule is properly not limited to evidence concerning the 'corpus delicti'; i.e. the corroborating facts may be of *any sort whatever,* provided only that they tend to produce a confidence in the truth of the confession."

Another precedent cited in *Bunch v. People, supra,* to the effect that all that is necessary is that the jury be convinced that the crime is real and not imaginary, is *Sullivan v. State,* 58 Neb. 796, 79 N. W. 791, which contains an excellent discussion of the problem:

> The uniform doctrine of the American courts is that a conviction for felony will not be sustained when the only evidence of guilt is the extrajudicial confession of the defendant that a crime has been committed. His confession may be sufficient to prove his own connection with the alleged criminal act, but there must in all cases be proof aliunde of the essential facts constituting the

crime. But, while a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is, nevertheless, competent evidence of that fact, and may, with slight corroborative circumstances, establish the corpus delicti, as well as the defendant's guilty participation. Discussing this question, Nelson, C. J., in *People v. Badgley,* 16 Wend. 53, said: "Full proof of the body of the crime, the corpus delicti, independently of the confession, is not required by any of the cases; and in many of them slight corroborating facts were held sufficient." The doctrine of this case was distinctly approved in *People v. Jaehne,* 103 N. Y. 182, 8 N. E. 374, where it was held that equivocal circumstances offered as part of the corpus delicti might be interpreted in the light of the prisoner's confession, and the fact under investigation thus be given a criminal aspect. In *State v. Hall,* 31 W. Va. 505, 7 S. E. 422, the court, considering this question said: "We know of no decisions anywhere that hold that the admissions of the defendant are not competent evidence tending to prove the corpus delicti, but they certainly are competent evidence tending to prove that the crime charged has been committed." It has often been held in cases where there is no direct proof of the crime, as in prosecutions for adultery and trials for homicide, where the body of the deceased has not been found, that the defendant's extrajudicial confession, in connection with other incriminating circumstances, would warrant a conviction.

RULE NOT CONFINED TO HOMICIDE CASES

It is obvious that any test which can be applied to murder cases would not be any more liberal in application where a lesser offense is charged. No greater degree of proof is required. Thus, in *Woods v. People,* 111 Colo. 448, 451, 142 P. 2d 386, the defendant was charged with larceny from the person, a felony. The victim was unable to say there had ben any felonious taking of his property; all he knew was that his wallet was missing in circumstances indicating that there had been a wrongful taking. The victim's property was later found in the possession of the accused. The court held that the corroboration requirement was satisfied, saying:

> We think the above resume of the facts as disclosed by the record is ample proof of the corpus delicti. No good purpose would be served by an academic discussion as to what its component elements are. A comprehensive review of the subject will be found in *Ausmus and Moon v. People,* 47 Colo. 167, 107 P. 704. See, also, *Lowe v. People,* 76 Colo. 603, 234 P. 169. While these are homicide cases, the rule therein stated is made applicable to other

> crimes, e.g., in larceny, proof of "property missing" and "somebody's criminality as the source of the loss." *Ausmus and Moon v. People, supra.* "The first two (elements of homicide) constitute what is known in law as the corpus delicti. . . . That proof may be made by any legal evidence, the same as proof of other facts." *Lowe v. People, supra.* "The corpus delicti in larceny is constituted of two elements: (1) That the property was lost by the owner; and (2) that it was lost by a felonious taking." 32 Am. Jur. 1033, §121. In this state the corpus delicti may be proved by circumstantial evidence (*Ausmus and Moon v. People, supra; Bunch v. People,* 87 Colo. 84, 285 P. 766), provided such circumstantial evidence is sufficiently clear to exclude any reasonable hypothesis of innocence. *Beeler v. People,* 58 Colo. 451, 146 P. 762; *Conferti v. People,* 79 Colo. 666, 247 P. 1065; *Allison v. People,* 109 Colo. 295, 125 P. 2d 146. See, also, *Cobianchi v. People,* 111 Colo. 298, 141 P. 2d 688. All of these requirements were fulfilled in the instant case, as appears from the record, and a case of circumstantial evidence is presented which was properly submitted. . . . The evidence excludes any reasonable hypothesis of innocence.

EXAMPLES OF CORROBORATING CIRCUMSTANCES

Two Colorado cases appear to sustain the proposition that a confession is sufficient to sustain the "fact of crime" if it is corroborated by circumstances.

In *Bruner v. People,* 113 Colo. 194, 207, 156 P. 2d 111, where defendant was charged with the murder of his wife, the wife's body was never discovered. Yet it was held that the corpus delicti was established by the accused's admission that his wife had died within his view (although he maintained that the death was accidental). His admission together with a myriad of other circumstances, all viewed together as a whole, were implicatory.

In *Williams v. People,* 114 Colo. 207, 158 P. 2d 442, where the defendant was charged with infanticide, and where it was necessary, of course, to prove that the infant had had a living, breathing existence separate and apart from its mother, it was held that the corpus delicti was established adequately although the sole evidence that the infant had ever been living was that its umbilical cord had been severed. This was sufficient when taken with the accused's confession that she had drowned the baby after she had delivered it.

It is quite evident that in Colorado the sole evidence necessary to support a confession by the accused is such as will convince the jury that the crime is "real," and not "imaginary." The confession is "direct" evidence, and the circumstantial evidence necessary to support that evidence in proof of the corpus delicti, as evidenced by the *Bruner* and *Williams* cases, need only be "slight."