CONSCIOUSNESS OF GUILT OR JUST A GUILTY CONSCIENCE?
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September 7th, 2021

INTRODUCTION:

In criminal trials, prosecutors love to bolster their case with any evidence (e.g., defendant's flight, false statements or secretion/destruction of evidence) that tends to demonstrate the accused's awareness of his/her culpability for the crime charged.

Sometimes, being able to point out a defendant's lie about an important fact (e.g., "I was out-of-town when the murder occurred"), when the evidence unequivocally shows otherwise (e.g., a video tape of the defendant leaving the victim's apartment), can be more compelling than testimony from a witness (who may have his/her own motive to lie), that the defendant admitted his/her involvement in the crime.

In such cases, jurors can rely on their own powers of deduction (assuming there is other evidence of guilt), to reach their own conclusions from the proof presented rather than just determine whether certain witnesses were sufficiently credible to support a verdict of guilty.

Proof of seemingly guilty behavior (e.g., flight, false alibi, misdirection) has long been considered to be relevant evidence of consciousness of guilt and therefore, of guilt of the crime charged itself, but courts have always been wary of the persuasive weight that it should be afforded in light of the complexities and ambiguities of human motivations and behavior.

As noted in People v Reddy, 26 NY 479 (1933), "it is well settled that evidence of flight, concealment or analogous conduct is always admissible. From of old (see Proverbs XXVIII,1), when unexplained, it has been indicative of a consciousness of guilt and hence of guilt itself. (Citing People v Ogle, 104 NY 511 [1887]…But ordinarily it is of slight value…unless there are facts pointing to the motive that prompted it" (citing People v Fiorentino, 197 NY 560 [1910]).

Other innocent explanations for seemingly guilty behavior can include things like: fear of false accusation or arrest for a crime that one has not committed, concern about being disbelieved, prior bad experiences with law enforcement, a desire to avoid any involvement in or public embarrassment/humiliation from a criminal investigation, a need to cover for someone else or for one's own involvement in some unrelated crime (see Andrew Palmer, "Guilt and the Consciousness of Guilt: The Use of Lies, Flight and Other Guilty Behavior in the Investigation and Prosecution of Crime," Melbourne University Law Review Vol 21, [1997]).

For example, a suspect accused of raping his sister-in-law might first falsely deny having had sex with the alleged victim so as not to upset his brother on account of the betrayal. Then, when confronted with DNA evidence implicating him in the act, he might claim that the sex was consensual.

For her part, the victim might allege that she was raped either because that's exactly what happened or to avoid her husband's ire for her own act of infidelity. The point is that conduct

that betrays a guilty conscience might not always constitute evidence of criminality. (Although adultery is a Class B Misdemeanor offense in New York State [PL 255.17], however seldom charged).

THE WHITE BRONCO: 🚐🚗🚗🚗🚗🚗🚗🚗

Perhaps the most notorious example of "flight" as possible evidence of consciousness of guilt was OJ Simpson's 45-minute trek down the Los Angeles (LA) freeway with a caravan of cop cars following closely behind, on the day he was supposed to turn himself in to the LAPD.

Interestingly, while television rubberneckers and some legal pundits concluded that this act of slow-motion evasion manifested a consciousness of guilt, prosecutors (who were hamstrung by other obstacles not the least of which included a sloppy forensic investigation and a glove that "didn't fit"), decided not to offer it as evidence in the criminal trial. It could well be that alternative explanations (e.g., a sense of hopelessness; fear of public judgment) could have neutralized the inculpatory inferences to render such evidence a needless distraction.

LIZZIE BORDEN: 💧👭🔨

In this infamous case of bloody parricide, the prosecution presented evidence of the fact that the defendant had been observed burning a dress shortly after being informed that she was a suspect in the hatchet murder of her parents. The People's ostensible purpose was to suggest that the accused burned the dress that she wore during the killings, but there was no evidence of blood observed on the garment or that she wore it at or near the time of the murders.

Nevertheless, the sheer strangeness of the act and it's timing arguably suggested a consciousness of guilt, notwithstanding the defense's unsuccessful attempt to admit evidence that burning old dresses was a family tradition in the Borden household (see: The Borden Case, 27 American Law Review 819, 842 [1893]).

Now it is considered reversible error to prevent the defendant from offering an otherwise innocent explanation for conduct that the prosecution claims evinces a consciousness of guilt.

In People v Gilmore, 66 NY2d 863 (1989), for example, the Court of Appeals held that the trial court erred in refusing to allow the defendant to testify about what he had learned from his mother-in-law [to wit: that the local police had been to his sister's home looking for him and brandishing shotguns], that prompted him to leave the area for South Carolina (where he surrendered to a police officer/friend of his uncle's). The defendant attempted to establish that he fled the area not from any consciousness of guilt but because of his fear of the police.

In the Court's view, the trial court improperly impeded the defendant's ability to present evidence in his own defense, (citing People v Carter, 37 NY2d 234 [1975]), but the error, as it turned out, was considered harmless in view of the overwhelming evidence of guilt otherwise.

CRIMINAL JURY INSTRUCTION (CJI):

The CJI instructs us that the jury must first decide if they believe whether the conduct attributed to the defendant actually took place. If so, they must then decide whether or not such conduct actually demonstrates a consciousness of guilt on the part of the defendant.

In so deciding, the jury must consider whether the conduct has an INNOCENT EXPLANATION because common experience shows that even an innocent person who finds him/herself in the crosshairs of suspicion may behave in ways that give off an APPEARANCE OF GUILT.

With respect to the value of such evidence, the instruction states that if the evidence does provide a basis for inferring a consciousness of guilt on the defendant's part, the weight and importance to be accorded to such evidence is ONLY OF SLIGHT VALUE, AND STANDING ALONE, IT MAY NEVER BE THE BASIS FOR A FINDING OF GUILT.

Fortunately for defendants, the CJI diminishes the persuasive weight of consciousness of guilt (C.O.G.) evidence by reminding jurors that suspicious behavior can have an innocent explanation and that such evidence can never provide the basis for a finding of guilt on its own. In other words, while it may be the garnish  it can never be the meat  and potatoes  of the People's proof.

PEOPLE V BENNETT: ROGUE TROOPER CHARGED WITH RAPE OF MOTORIST.
EVIDENCE OF DMV SEARCH OF VICTIM ON FALSE PRETENSES
NOT EVIDENCE OF C.O.G.

In this case, the Court of Appeals (79 NY2d 464 [1972]) affirmed the AD's reversal of the defendant's conviction based on the trial court's erroneous Sandoval ruling that the People could cross examine the defendant about two pending criminal charges (Official Misconduct and False Impersonation) arising from his efforts to obtain the victim's DMV records (as a suspended trooper claiming to need records on a defendant). As a result of the court's ruling, the defendant did not testify at trial.

The defendant pulled the victim, a college professor, over as she was driving from her home in Ithaca NY to a wedding in Lake George. He accused her of driving erratically and failing to signal a lane change after which he removed her from the car and had her perform field sobriety tests including blowing in his face (whereupon he kissed and groped her).

On the threat of charging her with DWI, he had her follow him to the barracks so he could get a condom and then have his way with her. They went to a secluded location where he sexually assaulted her. Afterwards, she drove to the wedding and claimed that she had experienced car trouble. Two days later, she reported the matter to the police.

In affirming the AD, the Court held that the trial court's ruling to permit cross examination about the other charges improperly infringed on both the defendant's right to testify in his own behalf and on his privilege against self-incrimination. (Citing, *inter alia*, People v Betts, 70 NY2d 289, 295 [1987]) - cross examination of a defendant about a pending criminal charge solely to impeach credibility is VERBOTEN.

The Court also roundly rejected the People's argument that the defendant's conduct (i.e. pretending to be a trooper in good standing and lying about his purpose for the DMV record search) reflected a consciousness of guilt of the sex charges because, in the absence of proof of any intent to intimidate the victim (other than to obtain potential impeachment evidence which is a common defense pre-trial tactic), or of any false statement about his alleged crime, there was no basis to infer that his conduct manifested an awareness of guilt.

PEOPLE V REDDY: NO HONOR AMONG ROBBERS. 
EVIDENCE OF DEFENDANT'S FLIGHT NOT ENOUGH TO CORROBORATE ACCOMPLICE'S TESTIMONY

In this case, the Court reversed the defendant's robbery and murder convictions because the testimony of the accomplice (whom the defendant allegedly deserted and then took off with the loot), was insufficiently corroborated inasmuch as there was no identification evidence other than the accomplice's testimony that tended to connect the defendant with the commission of the crime. (Code of Criminal Procedure 399, now CPL 60.22). The People also failed to establish that the defendant's absence from the area (as reported by his parole officer five days after the robbery/homicide), was connected to these crimes.

At his trial (while the defendant was still in the wind), the co-defendant/shooter did not implicate the defendant as his accomplice. It was only after he was sentenced to death and about to be executed (within a year of his conviction), that he agreed to give up the defendant (whom the authorities had suspected was involved) in exchange for a life sentence in prison.

He testified that the robbery (of a beer cellar on W 49th Street in New York City) was the idea of defendant who also provided the pistol and made arrangements for the get-away taxi. Once inside the beer "stube," the defendant ran the patrons' pockets while the codefendant pointed the gun. As they took their leave, the codefendant got into a scuffle with one of the patrons who ended up being shot. (None of the patrons who testified claimed to have heard the shooter calling out to the defendant, "wait a minute, Howie. One of them has got me.")

The patrons did describe a second robber but their descriptions did not match the defendant with any degree of particularity. While the shooter was embroiled with the patron, the defendant vamoosed and before long the police arrested the stranded codefendant.

In the Court's view, there was nothing in the witness' testimony that either directly or circumstantially connected the defendant with these crimes. While the accomplice, in the court's view, clearly had a motive to get back at the person who ditched him, his was the only testimony that implicated the defendant in the crimes. (One would think that he would have implicated the defendant from the first rather than wait until prison authorities were charging up the electric chair ).

NO NEXUS SHOWN BETWEEN D'S FLIGHT AND THESE CRIMES:

The Court also held that the evidence of the defendant's disappearance from the area (in violation of his parole), absent some facts connecting his absence with these crimes, was so inconclusive as to provide no reasonable basis to believe that the accomplice was telling the truth.

BUT SEE PEOPLE V CINTRON:

People v Cintron, 95 NY2d 329 (2000): Defendant's attempt to escape from police during a high-speed chase and his continued foot flight after exiting the car permitted a reasonable inference that he knew the vehicle was stolen. (See also People v Yazum 13 NY2d 329 [1963]: evidence of flight admissible as C.O.G, but trial court must instruct jury on the limited probative value of such evidence).

FALSE ALIBI AND CONSCIOUSNESS OF GUILT:

While proof that the defendant falsely claimed to be elsewhere at the time of the crime can be relevant and admissible evidence of C.O.G., to warrant the jury instruction, there must be independent evidence of the falsity of the alibi beyond the People's proof of the defendant's commission of the crime charged. (See People v Sheirod,124 AD2d 14 [4th Dep't 1987] and People v Abdul-Malik, 61 AD2d 657 [2d Dep't 2005]).

In People v Sheirod, *supra*, the Fourth Department held that it was error (albeit harmless in light of the overwhelming evidence of guilt), for the trial court to instruct the jury that they could consider a false alibi as C.O.G. evidence in the absence of independent proof that the alibi was a fabrication.

SOME OTHER CASES:

People v Al Kanani, 26 NY2d 473 (1970): Defendant's invocation of his right to counsel (or to remain silent) cannot be construed as C.O.G. evidence.

People v McKnight, 52 NY2d 760 (1980): Error to admit evidence of attempted murder of witness as C.O.G. evidence where the proof did not connect the would-be killer to the defendant.

People v Cotton, 184 AD3d 1145 (4th Dep't 2020): In this burglary prosecution, it was NOT ERROR for the trial court to admit as evidence of C.O.G. the fact that the victim discovered that some of her electronic devices had been damaged.

In the court's view, evidence that the defendant may have damaged the victim's equipment to prevent her from preserving a record of his conduct was probative of his C.O.G. as it is not unlike evidence of tampering or witness intimidation. (Citing, inter alia, People v Bennett supra at p.469-470 and People v Larregui, 164 AD3d 1622 [4th Dep't 2018]).

People v McDonald 89 NY2d 908 (1996): Evidence of defendant's attempts to avoid giving a sufficient breath sample for alcohol-sensor testing purposes was properly admitted as evidence of C.O.G.

People v Harris, 98 NY2d 452 (2002): Admission of defendant's in-court smirk during witness testimony during murder trial as C.O.G. evidence (which the prosecutor referenced in summation) was improper (but not grounds for reversal) because a smile can convey many different states of mind including nervousness, relief, bewilderment, exasperation and happiness. (Citing People v Basora, 75 NY2d 992 [1990]).

People v Ramirez, 180 AD3d 811 (2d Dep't 2020): Evidence that D resisted arrest some six months after alleged assault (after violating an order of protection), should NOT have been admitted as evidence of C.O.G. with respect to the assault. It was too remote in time and no evidence was offered that D resisted arrest on account of this charge. Also, any probative value of such evidence was deemed to be substantially outweighed by the risk of unfair prejudice.

People v Marin, 65 NY2d 741 (1985): In this arson case, the defendant's false statements about his efforts to assist others during arson investigation were not properly admitted as C.O.G. evidence because they were not inconsistent with innocence. In the court's estimation, an innocent person in D'S position could have made such statements to satisfy a need for recognition rather than to deflect attention from his alleged criminal involvement.

EVIDENCE ADVISORY COMMITTEE RULE 4.20.3

1. EVIDENCE OF POST-CRIME CONDUCT THAT MAY, IN THE CONTEXT OF A PARTICULAR CASE, EVINCE A DEFENDANT'S CONSCIOUSNESS OF GUILT OF THE OFFENSE IS ADMISSIBLE.

A CONSCIOUSNESS OF GUILT MAY, FOR EXAMPLE, BE EVINCED BY A FALSE ALIBI, A FALSE EXPLANATION FOR ONE'S ACTIONS, INTIMIDATION OF A WITNESS, DESTRUCTION OR CONCEALMENT OF EVIDENCE OR FLIGHT.

2. THE DEFENDANT MAY INTRODUCE EVIDENCE OF AN INNOCENT EXPLANATION FOR THE CONDUCT TO REBUT THE CONSCIOUSNESS OF GUILT INFERENCE.

3. THE JURY SHOULD BE ADVISED OF THE LIMITED PROBATIVE VALUE OF CONSCIOUSNESS OF GUILT EVIDENCE AND MUST BE SO ADVISED UPON THE DEFENDANT'S REQUEST.

A FEW MORE CASES:

People v Leyra, 1 NY2d 199 (1956): The assertion of false explanations and false alibis, as well as the concealment or destruction of evidence fall within the broad scope of conduct revealing a consciousness of guilt and may be admitted as relevant evidence on the question of guilt.

People v Ruberto, 10 NY2d 428 (2010): Consciousness of Guilt evidence MAY provide the necessary corroboration of accomplice testimony. (But see People v Reddy supra).

People v Levine, 65 NY2d 845 (1985): The defendant's false statements about finding the deceased's credit card in a park after he had already used it revealed a consciousness of guilt.

People v Johnson, 61 NY2d 932 (1984): Defendant's statement revealing a pattern of false exculpatory stories properly raised an inference of C.O.G.

FINAL THOUGHT:

While the CJI cautions jurors to consider consciousness of guilt evidence carefully and cautiously, and to refrain from giving it more weight than it might otherwise deserve, defense counsel should be prepared to identify and argue in favor of other possible explanations for the seemingly suspicious conduct.

Just as prosecutors are not shy about calling expert witnesses to explain certain victim behaviors (e.g., failure to leave a DV assailant, untimely reporting of a sexual assault, child victim accommodation syndrome), defense counsel should, in appropriate cases, consider calling an expert witness to explain why some people who have had bad experiences with law enforcement may be more prone to run from police than others, why some people might lie or otherwise act guilty (e.g., shame, embarrassment, protecting someone else) even though they may not be.

In such cases, the importance of understanding the distinction between a guilty conscience and a consciousness of guilt cannot be exaggerated.