

4.20.3. Consciousness of Guilt

(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 with which the defendant is charged is admissible. A consciousness of guilt may, for example, be evinced by a false alibi or explanation for one's actions, intimidation of a witness, destruction or concealment of evidence or flight.

(2) A defendant may introduce evidence of an innocent explanation for the conduct in order to rebut the inference of "consciousness of guilt."

(3) A jury should be advised of the limited probative value of "consciousness of guilt" evidence and must be so advised upon request of the defendant.

Note

Subdivision (1) is derived from a long line of Court of Appeals cases that have authorized the admission of relevant "consciousness of guilt" evidence. (*E.g. People v Bennett*, 79 NY2d 464, 469-470 [1992] ["Certain postcrime conduct is 'indicative of a consciousness of guilt, and hence of guilt itself.' . . . (C)onduct that has been recognized as revealing a guilty mind includes false statements or alibis; coercion or harassment of witnesses; and abandonment or concealment of evidence" (citations omitted)]; *People v Leyra*, 1 NY2d 199, 208 [1956] ["The assertion of false explanations or alibis as well as the destruction or concealment of evidence comes within the broad category of conduct evidencing a 'consciousness of guilt' and, therefore, admissible and relevant on the question of a defendant's guilt".])

Although "consciousness of guilt" evidence may meet the relevancy test for admissibility in a particular case, New York courts have struggled with the weight a jury should be permitted to attribute to such evidence, and its value in determining the validity of a judgment of conviction. (*See Leyra*, 1 NY2d at 208-209 ["(I)t is difficult to determine from the decisions the precise weight or value to be assigned to (consciousness of guilt evidence) (T)he courts have consistently acknowledged the weakness of this type of evidence . . . where it is not supported by other proof of a truly substantial character"]; *Bennett*, 79 NY2d at 470 ["Consciousness of guilt evidence has consistently been viewed as weak because the connection between the conduct and a guilty mind often is tenuous. Even

innocent persons, fearing wrongful conviction, may flee or lie to extricate themselves from situations that look damning” (citations omitted)].)

“Consciousness of guilt” evidence therefore has been described as being of “slight value” (*People v Reddy*, 261 NY 479, 486 [1933]) and of “limited probative value,” with its probative weight “highly dependent upon the facts of each particular case.” (*People v Cintron*, 95 NY2d 329, 332-333 [2000]; see CJI2d[NY] General Applicability, Consciousness of Guilt [“(T)he weight and importance you (the jury) give to th(e) evidence (offered to show consciousness of guilt) depends on the facts of the case. Sometimes such evidence is only of slight value and, standing alone, it may never be the basis for a finding of guilt”].)

“Consciousness of guilt” evidence may provide the necessary corroboration of accomplice testimony. (*People v Ruberto*, 10 NY2d 428, 430 [1962].)

Examples of decisions relating to false statements as “consciousness of guilt” evidence are:

- The defendant’s false statement about finding the deceased’s credit card in a park after he had already used the card evinced a consciousness of guilt “of some crime” (*People v Levine*, 65 NY2d 845, 847 [1985]).
- Defendant’s statements “disclosing a pattern of inconsistent, and sometimes false, exculpatory stories” raised an inference of defendant’s consciousness of guilt (*People v Johnson*, 61 NY2d 932, 934 [1984]).
- The jury was “entitled to find consciousness of guilt if they disbelieved defendant’s explanation for his conduct” (*Cintron*, 95 NY2d at 332).

Before a jury may be charged to consider a consciousness of guilt emanating from a purportedly false alibi or explanation, there must be evidence independent of that offered to prove the defendant’s guilt, that the alibi or explanation is false. (*O’Donnell v State of New York*, 26 AD3d 59, 64 [2d Dept 2005]; *People v Sheirod*, 124 AD2d 14, 18 [4th Dept 1987]; *People v Lawson*, 112 AD2d 457, 460 [3d Dept 1985]; *People v Abdul-Malik*, 61 AD2d 657, 661[1st Dept 1978].)

Examples of decisions relating to conduct as “consciousness of guilt” evidence are:

- A defendant’s attempt to flee from the police during a high-speed chase and his continued flight on foot after crashing his car allowed for a “reasonable inference that defendant knew that the vehicle was stolen and that he did not have the owner’s consent to operate it.” (*People v Cintron*, 95 NY2d 329, 333 [2000]; see *People v Yazum*, 13 NY2d 302, 304 [1963] [evidence of flight is admissible as “consciousness of guilt”

even though a defendant has reason to be in flight from the charged crime and some other crime].)

- “[T]estimony regarding defendant’s attempts to avoid giving an adequate breath sample for alco-sensor testing was properly admitted as evidence of consciousness of guilt” (*People v MacDonald*, 89 NY2d 908, 910 [1996]).
- “Evidence that defendant may have damaged the victim’s electronic devices to prevent her from preserving a record of defendant’s conduct is probative of his consciousness of guilt inasmuch as it is akin to evidence of tampering or witness intimidation” (*People v Cotton*, 184 AD3d 1145, 1146 [4th Dept 2020]).

Examples of evidence that did not warrant an inference of consciousness of guilt are:

- The defendant’s assertion, on being questioned by police, of his right to counsel, did not infer a consciousness of guilt. (*People v Al-Kanani*, 26 NY2d 473, 478 [1970].)
- It was error to introduce evidence of an attempted murder of an eyewitness to the crime as consciousness of guilt when the evidence did not connect the person who made the attempt to the defendant. (*People v McKnight*, 52 NY2d 760 [1980], *rev’d for reasons stated in dissent below* 71 AD2d 801, 802-804 [4th Dept 1979].)
- In an arson prosecution, the defendant’s false statements “regarding efforts to assist others are not inconsistent with his innocence. An innocent person in defendant’s position may have uttered such statements not because of knowledge of his own guilt but because of a misguided desire to gain praise and possibly save his job.” (*People v Marin*, 65 NY2d 741, 746 [1985].)
- Defendant’s attempt to obtain the complainant’s motor vehicle records by false representations did not constitute “consciousness of guilt” evidence in his prosecution for rape of the complainant. (*People v Bennett*, 79 NY2d 464, 470 [1992].)
- Admitting evidence of a “smile” as circumstantial evidence of consciousness of guilt is error. (*People v Harris*, 98 NY2d 452, 492 [2002].)
- The defendant’s resisting arrest six months after the alleged commission of an assault and after violating an order of protection was not admissible as evidence of consciousness of guilt in the assault trial. “The

defendant was not resisting arrest for the crimes charged at trial, and resisting arrest in this instance was too far removed from the underlying incident” and the probative value “was far outweighed by the potential prejudice of creating an inference that the defendant may have violent tendencies” (*People v Ramirez*, 180 AD3d 811, 813 [2d Dept 2020]).

Subdivision (2). New York law is well settled that a trial court not only must exercise care in determining whether proffered evidence constitutes relevant evidence of a “consciousness of guilt,” but also must permit the defense an opportunity to present evidence of an innocent explanation. (*People v Gilmore*, 66 NY2d 863, 867 [1985] [The court erred in preventing the defendant from testifying about what he had learned in his conversation with his mother-in-law that may have motivated his flight other than a consciousness of guilt].)

Subdivision (3). New York law is equally well settled that a court should and must, upon request of the defendant, charge the jury on the limited probative value of “consciousness of guilt” evidence. (*E.g. People v Limage*, 45 NY2d 845 [1978], *affg on mem below* 57 AD2d 906 [2d Dept 1977] [in this case, on request of the defendant, the trial court was required to instruct the jury as to the limited probative value of flight]; *People v Yazum*, 13 NY2d 302, 304 [1963] [“This court has always recognized the ambiguity of evidence of flight and insisted that the jury be closely instructed as to its weakness as an indication of guilt of the crime charged”]; *see* CJI2d[NY] General Applicability, Consciousness of Guilt.)