STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 14, 2009
v	No. 289352 Oakland Circuit Court
DAVID WAYNE TWEED, Defendant-Appellant.	LC No. 2008-008814-AR

Before: Servitto, P.J., and O'Connell and Zahra, JJ.

PER CURIAM.

Defendant appeals by leave granted from a circuit court order reversing a district court's decision dismissing a charge of first-degree premeditated murder, MCL 750.316(1)(a), for failure to establish the corpus delicti of the crime and reinstating the charge. We affirm.

In February 2008, defendant was charged with murdering 71-year-old Donald Vance in 1986. Vance's death was originally ruled to have been from natural causes, but was reevaluated as part of an investigation after defendant confessed to murdering Vance by smothering him with a pillow. In one of his confessions, defendant stated that he decided to kill Vance before going to Vance's house and that the death was "premeditated." Following defendant's preliminary examination, the district court found that the prosecution had not sufficiently established the corpus delicti of the crime because it failed to show by a preponderance of the evidence, independent of defendant's confessions, that Vance's death resulted from a criminal agency. Therefore, it dismissed the charge. The prosecutor appealed to the circuit court, which held that the corpus delicti of the crime was sufficiently established and reinstated the charge of first-degree premeditated murder. Defendant thereafter filed an interlocutory application for leave to appeal the circuit court's decision, which this Court granted.

The question whether defendant should have been bound over for trial turns on whether there was sufficient evidence to establish the corpus delicti of murder, thereby allowing consideration of his confessions. "[A] challenge to the admission of a defendant's statement under the *corpus delicti* rule constitutes a challenge to the admission of evidence, not to the sufficiency of evidence." *People v Harden*, 474 Mich 862, 862; 703 NW2d 189 (2005); see also *People v Konrad*, 449 Mich 263, 269; 536 NW2d 517 (1995). A decision to admit or exclude evidence is generally reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). In this particular case, however, the evidentiary challenge concerns whether the prosecutor sufficiently established a foundational fact, i.e., a death by a criminal

agency. We review preliminary questions of fact for clear error.[1] *People v Barrera*, 451 Mich 261, 268-269; 547 NW2d 280 (1996).

> In Michigan, it has long been the rule that proof of the corpus delicti is required before the prosecutor is allowed to introduce the inculpatory statements of an accused." "The underlying purposes of the corpus delicti rule are (1) to guard against, indeed to preclude, conviction for a criminal homicide when none was committed, and (2) to minimize the weight of a confession and require collateral evidence to support conviction. [*People v McMahan*, 451 Mich 543, 548-549; 548 NW2d 199 (1996) (internal quotations and citations omitted).]

The corpus delicti rule "provides that a defendant's confession may not be admitted unless there is direct or circumstantial evidence independent of the confession establishing (1) the occurrence of the specific injury (for example, death in cases of homicide) and (2) some criminal agency as the source of the injury." *Konrad*, *supra* at 269-270. However, these elements "need not be proved beyond a reasonable doubt and courts may draw reasonable inferences and weigh the probabilities." *People v Mumford*, 171 Mich App 514, 517; 430 NW2d 770 (1988). Only a preponderance of the direct or circumstantial evidence is required to satisfy the rule. *People v King*, 271 Mich App 235, 239; 721 NW2d 271 (2006). "'Preponderance of the evidence' means such evidence, as, when weighed with that opposed to it, has more convincing force and the greater probability of truth." *People v Cross*, 281 Mich App 737, 740; 760 NW2d 314 (2008).

Once the necessary showing of the corpus delicti has been made, "[a] defendant's confession then may be used to elevate the crime to one of higher degree or to establish aggravating circumstances." *People v Ish*, 252 Mich App 115, 117; 652 NW2d 257 (2000) (citation omitted); see also *King*, *supra* at 241-242. Thus, it is not necessary to prove all elements of the crime before a confession is admitted.[2] *Ish*, *supra*. "[F]or first-degree premeditated murder, the corpus delicti consists of a showing of the death of the victim and some criminal agency as a cause of the death." *People v Hughey*, 186 Mich App 585, 587; 464 NW2d 914 (1990). The degree of homicide is not part of the corpus delicti. *Id*. at 587-588.

At defendant's preliminary examination, the medical examiner testified that an examination of the crime scene photographs and autopsy photographs led him to conclude that Vance's death was the result of a criminal agency. The medical examiner explained that the photographs depicted lividity on both sides of Vance's body, which indicated that the body had been moved after death. This shifting of lividity was not mentioned in the autopsy report.

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[1] Conversely, preliminary questions of law, such as whether a rule or statute precludes the admission of evidence, are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

[2] For example, "[p]roof of the identity of the perpetrator of the act or crime is not part of the corpus delicti." *Konrad*, *supra* at 270 (citation omitted). Similarly, malice is not part of the corpus delicti. See *People v Spearman*, 195 Mich App 434, 440; 491 NW2d 606 (1992), rev in part sub nom *People v Rush*, 443 Mich 870; 504 NW2d 185 (1993).

Further, there was evidence of defecation, which occurs when a death results from stress. In addition, fecal matter was found smeared on Vance's body and at the side of the bed, away from where the body was found, which further indicated that the body had been moved post mortem. These facts also were not discussed in the original autopsy report. The photographs also revealed a recent injury to Vance's forehead that could have been caused by an application of force to Vance's face. That injury was unrelated to Vance's immediate surroundings, thereby indicating that force was applied to Vance somewhere else, not where he was found. The autopsy photographs also revealed distortion on the opposite side of Vance's face from the abrasions. The medical examiner explained that this meant that Vance was moved after the abrasions were inflicted, and that the distortion was the result of being placed face down on the pillow where his body was found. The distortion of Vance's face was not discussed in the autopsy report.

Although the medical examiner did not examine Vance's body, his opinions and conclusions were based on the crime scene photographs, the autopsy photographs, his experience, and the original autopsy report. The district court seemed to believe that it was not acceptable for a medical examiner to find fault with an autopsy report that had stood unchallenged for over 20 years, especially where the medical examiner did not personally examine the victim's body. We disagree.

In *People v Burns*, 250 Mich App 436, 437; 647 NW2d 515 (2002), the defendant's eleven-month daughter died of asphyxiation in 1987, when a frozen plastic "ice cube" used to relieve teething pain became lodged in her throat. The death was ruled accidental and no charges were brought. *Id*. In 1997, however, the police reopened the case after receiving information from the defendant's niece, who indicated that the defendant had admitted responsibility for the death and had confessed to lying to the police. *Id*. In 1998, the defendant was charged with second-degree murder. *Id*. at 438. He was subsequently tried and convicted of voluntary manslaughter. *Id*. at 437. On appeal, the defendant argued that the corpus delicti of the offense was not independently established and, therefore, his statements were improperly admitted at trial. *Id*. at 438. Specifically, like defendant in this case, the defendant in *Burns* argued that "the prosecutor failed to prove that some criminal agency caused the child's death because the medical examiner's conclusion, that her death was a homicide, was unsupported by objective medical evidence." *Id*. at 439. This Court disagreed, explaining:

> [T]he medical examiner's testimony was that (1) given the size limitations of the throat, (2) the normal response of the gag reflex, (3) the size, shape, and dimensions of the object that was lodged in the child's throat, and (4) the extent of bruising in her throat, the object was forced into the child's throat. The testimony sufficiently established that the child's death was caused by a criminal agency; therefore, defendant's argument is without merit. [*Id*. at 439.]

In this case, as in *Burns*, it is undisputed that a death occurred, there was an autopsy, the death was ruled not to be a homicide, and a death certificate was prepared. Many years later, as in *Burns*, defendant's statements caused the police to reopen the investigation. The medical examiner was asked to reconsider the matter and he offered an opinion that, as in *Burns*, was based on the available, objective evidence, not on an examination of the victim's body. As in *Burns*, the medical examiner disagreed with the original autopsy report and concluded that the objective evidence showed that the death was the result of a criminal agency.

Aside from the original autopsy report, no evidence was presented in opposition to the medical examiner's testimony. His opinions and conclusions, although questioned by defendant, were based on the available, objective evidence, which preponderated in favor of a finding that Vance's death resulted from a criminal agency. Thus, the circuit court did not err in finding that the corpus delicti was sufficiently established and that defendant's confessions were therefore admissible in establishing probable cause to bind defendant over for trial for first-degree murder.

Affirmed.

/s/ Deborah A. Servitto
/s/ Peter D. O'Connell
/s/ Brian K. Zahra