

Colorado Revised Statutes: Title 18: Criminal Code:
18-2-201. Conspiracy.

TITLE 18. CRIMINAL CODE. ARTICLE 2. INCHOATE OFFENSES.
PART 2. .

<http://www.lexisnexis.com/hottopics/Colorado>

(1) A person commits conspiracy to commit a crime if, with the intent to promote or facilitate its commission, he agrees with another person or persons that they, or one or more of them, will engage in conduct which constitutes a crime or an attempt to commit a crime, or he agrees to aid the other person or persons in the planning or commission of a crime or of an attempt to commit such crime.

(2) No person may be convicted of conspiracy to commit a crime, unless an overt act in pursuance of that conspiracy is proved to have been done by him or by a person with whom he conspired.

(3) If a person knows that one with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring to commit a crime with the other person or persons, whether or not he knows their identity.

(4) If a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are part of a single criminal episode.

(4.5) Conspiracy to commit any crime for which a court is required to sentence a defendant for a crime of violence in accordance with section 18-1.3-406 is itself a crime of violence for the purposes of that section.

(5) If a person conspires to commit a felony which is defined by any statute other than one contained in this title and for which conspiracy no penalty is specifically provided, he is guilty of a class 6 felony. If a person conspires to commit a misdemeanor which is defined by any statute other than one contained in this title and for which conspiracy no penalty is specifically provided, he is guilty of a class 3 misdemeanor.

Case Notes, Annotation:

Editor's note: This title was numbered as chapter 40, C.R.S. 1963. The substantive provisions of this title were repealed and reenacted in 1971, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this title prior to 1971, consult the Colorado statutory research explanatory note beginning on page vii in the front of this volume. For a detailed comparison of this title, see the comparative tables located in the back of the index.

Editor's note: This title was repealed and reenacted in 1971. For historical information concerning the repeal and reenactment, see the editor's note following the title heading.

Cross references: For the legislative declaration contained in the 2002 act amending subsection (4.5), see section 1 of chapter 318, Session Laws of Colorado 2002.

~~~~~

### **I. General Consideration.**

II. Essential Elements of Crime.

III. Trial and Punishment.

A. In General.

B. Evidence.

C. Instructions and Jury.

D. Verdict and Sentence.

IV. Illustrative Cases.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Criminal Law", which discusses Tenth Circuit decisions dealing with conspiracy, see 62 Den. U. L. Rev. 125 (1985).

Annotator's note. Since § 18-2-201 is similar to former § 40-7-35, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Conspiracy has legal significance only with respect to some other crime which is the object of the conspiracy. *Watkins v. People*, 655 P.2d 834 (Colo. 1982).

Conspiracy and commission of contemplated crime are different and distinct offenses. *Davis v. People*, 22 Colo. 1, 43 P. 122 (1895).

The charge of conspiracy to commit confidence game and the charge of confidence game are separate and distinct offenses, and proof of one does not hinge upon proof of the other. *Roll v. People*, 132 Colo. 1, 284 P.2d 665 (1955).

The crime of conspiracy to commit burglary and burglary are distinct and separate offenses. *Pooley v. People*, 164 Colo. 484, 436 P.2d 118 (1968).

The commission of a substantive offense and a conspiracy to commit the same crime are separate and distinct offenses, since the proof of the substantive offense rests on separate facts and does not hinge

upon the proof of the conspiracy. *DeBose v. People*, 175 Colo. 356, 488 P.2d 69 (1971); *People v. Steele*, 193 Colo. 187, 563 P.2d 6 (1977).

Conspiracy and crime which is the object of the conspiracy are different and distinct offenses. *People v. Rivera*, 178 Colo. 373, 497 P.2d 990 (1972); *People v. Grass*, 180 Colo. 346, 505 P.2d 1301 (1973).

Conspiracy is a substantive offense, separate from the underlying charge itself, which punishes an agreement intentionally entered into for the purpose of promoting criminal acts. *People v. Ganatta*, 638 P.2d 268 (Colo. 1981).

One can be convicted of a conspiracy and not of the offense which is the object of the conspiracy, if the evidence implicates the defendant in a conspiracy separate and apart from the evidence offered to prove the substantive offense. *People v. Leonard*, 644 P.2d 85 (Colo. App. 1982).

However, conviction of conspiracy cannot stand absent conviction of the substantive offense. *People v. Bath*, 890 P.2d 269 (Colo. App. 1994).

This state adopts a unilateral approach to conspiracy. The defendant must agree with another person to commit a prohibited act; the second party can feign agreement. The fact that the second party was an undercover police officer and not a true co-conspirator does not, as a matter of law, preclude defendant's conviction for conspiracy. *People v. Vecellio*, 2012 COA 40, 292 P.3d 1004.

Complicity distinguished. Under the complicity statute, a defendant is held accountable for a criminal offense committed by another if the defendant participates in the criminal act, i.e., intentionally aids, abets, or advises the other person in planning or committing the offense. In contrast, the essence of the crime of conspiracy is an illegal agreement or combination, plus an overt act in furtherance of that agreement. *People v. Hood*, 878 P.2d 89 (Colo. App. 1994).

Solicitation distinguished. A conspiracy may be committed without the inducement required for the crime of solicitation, and solicitation may be committed without the parties ever reaching an agreement or without any overt act taken to complete the object of the solicitation. Therefore, neither crime is included in the other and the two crimes do not merge. *People v. Hood*, 878 P.2d 89 (Colo. App. 1994).

Verdict acquitting defendant of conspiracy not inconsistent with verdict convicting the defendant of distribution of a controlled substance. *People v. Saldana*, 899 P.2d 208 (Colo. 1995).

Consistency of verdicts is not required. The court of appeals erred in holding that the defendant could attack his conviction for distribution of a controlled substance on the ground that it is inconsistent with his acquittal on the conspiracy offense. *People v. Saldana*, 899 P.2d 208 (Colo. 1995).

Section proscribes a conspiracy to commit any conduct which constitutes a crime, and not merely those acts designated as criminal in this title. *People v. Cabus*, 626 P.2d 1159 (Colo. App. 1980).

It is not a violation of double jeopardy to be convicted of both aggravated robbery and conspiracy to commit robbery. *People v. Rivera*, 178 Colo. 373, 497 P.2d 990 (1972).

Defendant charged with assault with a deadly weapon and conspiracy to assault with deadly weapon was not subjected to double jeopardy by conspiracy instruction in combination with accessory instruction. *People v. Grass*, 180 Colo. 346, 505 P.2d 1301 (1973).

Conspiracy to commit reckless manslaughter is not a crime in Colorado. *Palmer v. People*, 964 P.2d 524 (Colo. 1998).

Where the underlying substantive criminal offense is of no effect, the conspiracy to commit it is likewise void. *People v. Larkin*, 183 Colo. 363, 517 P.2d 389 (1973).

Conviction on a charge of conspiracy to commit assault to rape was not inconsistent with an acquittal on a substantive charge of assault with intent to commit rape. *People v. Walker*, 182 Colo. 317, 512 P.2d 1243 (1973).

Acquittal of substantive offense forecloses conviction of conspiracy to commit that offense, if the identical evidence relied upon to establish the conspiracy is the same evidence which proved insufficient to establish the substantive offense. *People v. Albers*, 196 Colo. 66, 582 P.2d 667 (1978).

When conspiracy terminates. Although a conspiracy need not necessarily terminate with the completion of its targeted crime, nor even the arrest of a conspirator, when it does terminate depends upon the "particular facts and purposes of such conspiracy". *People v. Burke*, 37 Colo. App. 289, 549 P.2d 419 (1976).

Actions which establish continuing conspiracy. It is the actions taken in concert by the conspirators which alone can establish that the conspiracy was to continue beyond the completion of the substantive crime. *People v. Burke*, 37 Colo. App. 289, 549 P.2d 419 (1976).

The mere recognition that a desire to conceal participation in a crime is generally present does not constitute sufficient basis to conclude that each and every criminal conspiracy survives the completion of the crime at which it was directed. *People v. Burke*, 37 Colo. App. 289, 549 P.2d 419 (1976).

A conspiracy to commit theft does not continue, per se, until the proceeds are returned. *People v. Burke*, 37 Colo. App. 289, 549 P.2d 419 (1976).

Without evidence to support the contention that the defendants cooperated to effect the concealment of the crime, conspiracy ended upon the division of the proceeds of the robbery. *People v. Burke*, 37 Colo. App. 289, 549 P.2d 419 (1976).

Whether single set of facts constitutes one criminal episode. *Pinelli v. District Court*, 197 Colo. 555, 595 P.2d 225 (1979).

Case remanded to district court for a new preliminary hearing because district court had interrupted prior hearing before a proper determination of probable cause for conspiracy could be made. *People v. Nygren*, 696 P.2d 270 (Colo. 1985).

Conspiracy to commit second degree burglary is not a violent felony for purposes of the federal Armed Career Criminal Act. The ordinary Colorado case of conspiracy to commit second burglary does not present a risk of violent confrontation comparable to the risk inherent in a completed burglary.

Accordingly, defendant's Colorado conviction is not a violent felony as that term is defined in 18 U.S.C. § 924(e)(2)(B), and it should not have been used as a basis for the imposition of the armed career criminal enhancement. *United States v. Fell*, 511 F.3d 1035 (10th Cir. 2007).

#### Applied in

*Powers v. People*, 53 Colo. 43, 123 P. 642 (1912); *West v. People*, 60 Colo. 488, 156 P. 137 (1915); *Bunch v. People*, 87 Colo. 84, 284 P. 766 (1930); *Vigil v. People*, 150 Colo. 582, 375 P.2d 103 (1962); *People v. Mojo*, 173 Colo. 422, 480 P.2d 571 (1971); *People v. Mangum*, 189 Colo. 246, 539 P.2d 120 (1975); *People v. Schuemann*, 190 Colo. 474, 548 P.2d 911 (1976); *People v. Talarico*, 192 Colo. 445, 560 P.2d 90 (1977); *People v. Girard*, 196 Colo. 68, 582 P.2d 666 (1978); *People in Interest of C.B.*, 196 Colo. 362, 585 P.2d 281 (1978); *People ex rel. Brown v. District Court*, 196 Colo. 359, 585 P.2d 593 (1978); *Goodwin v. District Court*, 196 Colo. 246, 586 P.2d 2 (1978); *People in Interest of R.A.D.*, 196 Colo. 430, 586 P.2d 46 (1978); *Goodwin v. District Court*, 197 Colo. 6, 588 P.2d 874 (1979); *Hughes v. District Court*, 197 Colo. 396, 593 P.2d 702 (1979); *People v. Smith*, 198 Colo. 120, 597 P.2d 204 (1979); *People ex rel. Losavio v. Gentry*, 199 Colo. 153, 606 P.2d 57 (1980); *People v. Myers*, 43 Colo. App. 256, 609 P.2d 1104 (1979); *People v. Malacara*, 199 Colo. 243, 606 P.2d 1300 (1980); *Graham v. People*, 199 Colo. 439, 610 P.2d 494 (1980); *People v. Hearty*, 644 P.2d 302 (Colo. 1982); *People v. Franklin*, 645 P.2d 1 (Colo. 1982); *Law Offices of Bernard D. Morley, P.C. v. MacFarlane*, 647 P.2d 1215 (Colo. 1982); *People v. Sanchez*, 649 P.2d 1049 (Colo. 1982); *People in Interest of R.M.S.*, 651 P.2d 377 (Colo. 1982); *People v. Hoffman*, 655 P.2d 393 (Colo. 1982); *People v. Luciano*, 662 P.2d 480 (Colo. 1983); *Holmes v. District Court*, 668 P.2d 11 (Colo. 1983); *People v. Rivera*, 56 P.3d 1155 (Colo. App. 2002).

## II. ESSENTIAL ELEMENTS OF CRIME.

Crime of conspiracy is a crime of specific intent. *Watkins v. People*, 655 P.2d 834 (Colo. 1982).

A different specific intent is required for accessory offenses than for the crime of conspiracy; one cannot commit both by performing the same act. *People v. Broom*, 797 P.2d 754 (Colo. App. 1990).

Charge of conspiracy has legal significance only with respect to some other crime which is the object of the conspiracy. *People v. Montoya*, 667 P.2d 1377 (Colo. 1983); *People v. Finnessey*, 747 P.2d 673 (Colo. 1987).

In proving that a "wheel and hub" conspiracy is a single conspiracy rather than multiple conspiracies, it is not necessary to prove that each conspirator knew every other conspirator so long as an overall plan with a common object is shown. *People v. Serrano*, 804 P.2d 253 (Colo. App. 1990).

The unlawful agreement is the gist of the crime of conspiracy. *Short v. People*, 27 Colo. 175, 60 P. 350 (1900); *Roll v. People*, 132 Colo. 1, 284 P.2d 665 (1955).

The gravamen of the crime of conspiracy is the illicit agreement to commit a felony. *DeBose v. People*, 175 Colo. 356, 488 P.2d 69 (1971).

Essence of the crime of conspiracy is the illegal agreement or combination. *People v. Grass*, 180 Colo. 346, 505 P.2d 1301 (1973).

The relationship between coconspirators is part and parcel of the first element of conspiracy, which involves an agreement, combination, or confederation between two or more persons. *People v. Johnson*, 189 Colo. 28, 536 P.2d 44 (1975).

There must be a combination of two or more persons; one person cannot conspire with himself. *Archuleta v. People*, 149 Colo. 206, 368 P.2d 422 (1962).

This state adopts a unilateral approach to conspiracy. The defendant must agree with another person to commit a prohibited act; the second party can feign agreement. The fact that the second party was an undercover police officer and not a true co-conspirator does not, as a matter of law, preclude defendant's conviction for conspiracy. *People v. Vecellio*, 2012 COA 40, 292 P.3d 1004.

The essential elements of conspiracy are: (1) An agreement; (2) a common design between two or more persons; and (3) an unlawful purpose to be accomplished, which purpose amounts to a crime in Colorado. *Pooley v. People*, 164 Colo. 484, 436 P.2d 118 (1968).

To constitute the crime of conspiracy there must be a combination of two or more persons, the existence of an unlawful purpose to be accomplished, which in Colorado must amount to a crime, and a real agreement, combination, or confederation with a common design; mere passive cognizance of the crime to be committed or mere negative acquiescence is not sufficient. *Salazar v. People*, 166 Colo. 508, 445 P.2d 60 (1968); *Dressel v. People*, 174 Colo. 238, 483 P.2d 367 (1971); *Davis v. People*, 176 Colo. 378, 490 P.2d 948 (1971).

The three elements necessary to prove a conspiracy are: (1) A real agreement, combination, or confederation, (2) with a common design between two or more persons, (3) to accomplish an unlawful purpose amounting to a crime. *Digiallonardo v. People*, 175 Colo. 560, 488 P.2d 1109 (1971); *People v. Albers*, 196 Colo. 66, 582 P.2d 667 (1978); *People v. Williams*, 707 P.2d 1023 (Colo. App. 1985).

The three elements necessary to prove a conspiracy are: (1) An agreement, combination, or confederation, (2) between two or more persons, (3) to accomplish an unlawful purpose which must amount to a crime. *People v. Dowell*, 182 Colo. 11, 510 P.2d 436 (1973).

The elements of a conspiracy are: (1) An agreement, (2) between two or more persons, (3) to commit a crime. *Young v. People*, 180 Colo. 62, 502 P.2d 81 (1972); *People v. Lamirato*, 180 Colo. 250, 504 P.2d 661 (1972).

An agreement with common design between defendant and his coconspirator to engage in conduct which constitutes a crime or to aid in the planning or commission of the crime must be proven to establish a conspiracy. *People v. Wilkinson*, 38 Colo. App. 365, 561 P.2d 347 (1976).

For a conspiracy to commit theft, the prosecution is not required to prove an agreement to take goods valued at a particular amount of money. It is required to prove only that there was an agreement to

commit theft. For purposes of classifying the level of the crime, the prosecution is required to plead and prove the value of the goods taken. *People v. Samson*, 2012 COA 167, 302 P.3d 311.

Intent to promote or facilitate commission of a crime is a necessary element of the crime of conspiracy. *People v. Wilkinson*, 38 Colo. App. 365, 561 P.2d 347 (1976).

To establish conspiracy there need only be circumstantial evidence that indicates that the conspirators, by their acts, pursued the same objective, with a view toward attainment of the same objective. Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to convict the defendant on the conspiracy counts. There was evidence that the defendant and his gang agreed to kill two people and that he and others tried to kill those people. *People v. McGlotten*, 166 P.3d 182 (Colo. App. 2007).

These elements must be proven beyond a reasonable doubt. To convict anyone of conspiracy, the state must prove beyond a reasonable doubt that there was a real agreement, combination, or federation with a common design between two or more persons to accomplish an unlawful purpose, which must amount to a crime. *People v. Armijo*, 176 Colo. 547, 491 P.2d 1384 (1971); *Feltes v. People*, 178 Colo. 409, 498 P.2d 1128 (1972); *Bates v. People*, 179 Colo. 81, 498 P.2d 1136 (1972).

Where the evidence showed that defendant approached the money bag on two occasions, looked into the cars surrounding the drop site, and pointed out a car containing the officers to the man who eventually attempted to retrieve the money, a jury could reasonably conclude that each material element of conspiracy to commit criminal extortion had been proven beyond a reasonable doubt. *People v. Williams*, 707 P.2d 1023 (Colo. App. 1985).

None of the elements of conspiracy require the use of physical force. Self-defense is therefore not an affirmative defense to conspiracy. *People v. Tardif*, 2017 COA 136, -- P.3d --.

Concerted commission of crime is not necessarily conspiracy. If people act in concert in the commission of a crime, it does not follow that they must have had a conspiracy as that term is defined in the statutes. *Jacobs v. People*, 174 Colo. 403, 484 P.2d 107 (1971).

As to when crime requires two persons to participate. An agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission. Conspiracy charges may be filed when more or different people participate in the conspiracy than are necessary to commit the substantive offense. *People v. Incerto*, 180 Colo. 366, 505 P.2d 1309 (1973).

The "Wharton" rule states generally that one may not be convicted of conspiracy when the principal crime charged is one that must necessarily be committed by two or more persons agreeing among themselves, such as adultery or common-law bribery, and the agreement did not exist between parties other than those committing the underlying crime. *People v. Ganatta*, 638 P.2d 268 (Colo. 1981).

An exception to the "Wharton" rule permits conspiracy charges to be filed when more or different people participate in the conspiracy than are necessary to commit the substantive offense. *People v. Ganatta*, 638 P.2d 268 (Colo. 1981).

Success or failure of object of conspiracy does not determine guilt or innocence of conspirators. *People v. Gill*, 180 Colo. 382, 506 P.2d 134 (1973).

When conspirators agree to engage in conduct that would result in crime if facts were as conspirators believe them to be, and take step towards completion, danger is manifest and conspiracy is consummated. *People v. Gill*, 180 Colo. 382, 506 P.2d 134 (1973).

Coconspirator need not be specifically named. Where information named an alleged coconspirator, but evidence created the possibility that defendant had conspired with another person or persons and jury instruction did not name any specific person, there was no reasonable probability that defendant was convicted of an offense for which she was not charged. *People v. Kurz*, 847 P.2d 194 (Colo. App. 1992).

Although a criminal attempt is not readily understandable to a person of ordinary intelligence without some further explanation by the court, the trial court's failure to instruct on "attempt" was harmless error, as the jury specifically found defendant guilty of first-degree murder after deliberation. *People v. Rodriguez*, 914 P.2d 230 (Colo. 1996).

### III. TRIAL AND PUNISHMENT.

#### A. In General.

Crime is not readily understandable. The crime of conspiracy to commit burglary is not the type of offense readily understandable from a mere reading of the information at a guilty plea hearing without further explanation of its elements. *People v. Leonard*, 673 P.2d 37 (Colo. 1983).

One conspiracy does not become several because it may involve the violation of several statutes. The principle that no one shall be twice put in jeopardy is guaranteed and prohibits double punishment for the same crime. *People v. Bradley*, 169 Colo. 262, 455 P.2d 199 (1969).

One conspiracy may be formed to commit a number of offenses. The conspiracy is one offense and a single offense, no matter how many repeated violations of the law may have been the object of the conspiracy. *Bingham v. People*, 157 Colo. 92, 401 P.2d 255 (1965).

Although there may have been several unlawful objects of the conspiracy, there is only one conspiracy. *People v. Brown*, 185 Colo. 272, 523 P.2d 986 (1974), overruled in *Villafranca v. People*, 194 Colo. 472, 573 P.2d 540 (1978).

Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which this section punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one. *People v. Brown*, 185 Colo. 272, 523 P.2d 986 (1974) overruled in *Villafranca v. People*, 573 P.2d 540 (1978).

Conspiracy constitutes a single offense even though the agreement upon which the charge is founded contemplates the performance of several criminal acts. *People v. Forbes*, 185 Colo. 410, 524 P.2d 1377 (1974); *People v. Morgan*, 189 Colo. 256, 539 P.2d 130 (1975).



A single conspiracy may have more than one crime as its object. *People v. Leonard*, 644 P.2d 85 (Colo. App. 1982).

One who is not a conspirator is not of necessity precluded from being an accessory. *Jacobs v. People*, 174 Colo. 403, 484 P.2d 107 (1971).

A husband and wife may conspire to commit a criminal offense. *Dalton v. People*, 68 Colo. 44, 189 P. 37 (1920).

Indictment must contain every element necessary to constitute crime. In an indictment for conspiracy to commit a crime under this section, the indictment must contain every element necessary to constitute that crime, as fully as if the indictment was for its perpetration. *Lipschitz v. People*, 25 Colo. 261, 53 P. 1111 (1898).

A district attorney need not inform against other conspirators. *Bradley v. People*, 157 Colo. 530, 403 P.2d 876 (1965).

Dismissal before trial is same as not filing charges. Where there was no judgment of acquittal or dismissal against the conspirators other than defendant, but a dismissal before trial, it is as though no charge of conspiracy had ever been filed against any of the conspirators other than defendant. *Bradley v. People*, 157 Colo. 530, 403 P.2d 876 (1965).

A person may be convicted of conspiracy without others being tried for the same crime, as in the case where the count of conspiracy has been dismissed against the other codefendants. *Salazar v. People*, 166 Colo. 508, 445 P.2d 60 (1968).

A failure to charge coconspirators or the dismissal of conspiracy charges before trial against coconspirators does not require dismissal of conspiracy charges against the remaining coconspirators or render invalid a verdict of guilty against the remaining coconspirators. *Hughes v. People*, 175 Colo. 351, 487 P.2d 810 (1971).

Coconspirators may be alleged to be unknown in a conspiracy count. *People v. Holter*, 185 Colo. 47, 521 P.2d 765 (1974).

Variance in burglary charge fatal to conspiracy charge. Where defendant was not guilty of burglary as charged in the information because the locale was not a building, it necessarily follows that he was not guilty of conspiracy to commit burglary. *Macias v. People*, 161 Colo. 233, 421 P.2d 116 (1966).

Defendant's involvement as a conspirator and as a complicitor was tied to separate and distinct crimes, and the doctrine of merger did not apply. *People v. Shannon*, 189 Colo. 287, 539 P.2d 480 (1975).

Conspiracy punishable even if underlying crime not contained in criminal code. The general assembly intended that the conspiracy to commit a crime be punishable even if the underlying crime is proscribed by some section other than one contained in this title. *People v. Cabus*, 626 P.2d 1159 (Colo. App. 1980).

Explicit mention of conspiracy in narcotics violation's provision carries out legislative intent. The explicit mention of conspiracy in § 12-22-322 (1)(h), setting out the penalties for a narcotics violation,

was necessary to carry out the general assembly's intent to punish narcotics conspiracies as severely as the underlying offenses. *People v. Cabus*, 626 P.2d 1159 (Colo. App. 1980).

Obscenity provisions cannot support injunction or criminal charge. The Colorado obscenity statute, § 18-7-101 et seq., cannot be relied upon to support either a civil injunction or a criminal charge. *People v. New Horizons, Inc.*, 200 Colo. 377, 616 P.2d 106 (1980).

Procuring agent defense requires that defendant act as exclusive agent for the buyer. As such, the defendant becomes a principal, or a conspirator, in the purchase rather than in the sale of the narcotics and, therefore, he cannot be convicted of sale or conspiracy to sell. *People v. Smith*, 623 P.2d 404 (Colo. 1981).

#### B. Evidence.

In a prosecution for conspiracy, considerable latitude is allowed because of the inherent problems of proof involved in proving a crime, the veil around which is secrecy. *People v. Broncucia*, 189 Colo. 334, 540 P.2d 1101 (1975), cert. denied, 431 U.S. 937, 97 S. Ct. 2647, 53 L. Ed. 2d 254, reh'g denied, 433 U.S. 915, 97 S. Ct. 2989, 53 L. Ed. 2d 1101 (1977).

A conspiracy need not be proved directly, but may be inferred by the jury from the facts proved. *Gomez v. People*, 152 Colo. 309, 381 P.2d 816 (1963).

Conspiracy is generally covert and consequently must be established in most cases by circumstantial evidence. *Medina v. People*, 154 Colo. 4, 387 P.2d 733 (1963), cert. denied, 379 U.S. 848, 85 S. Ct. 88, 13 L. Ed. 2d 52 (1964); *People v. In Interest of A.G.*, 43 Colo. App. 514, 605 P.2d 487 (1979).

The evidence in proof of a conspiracy will generally be circumstantial. *Abeyta v. People*, 156 Colo. 440, 400 P.2d 431 (1965).

Direct testimony that the parties charged with conspiracy entered into a specific agreement to commit the crime is not necessary. It is sufficient if there is evidence in the record from which the jury can infer such an agreement or meeting of the minds. *Griffin v. People*, 157 Colo. 72, 400 P.2d 928 (1965); *Pooley v. People*, 164 Colo. 484, 436 P.2d 118 (1968); *Salazar v. People*, 16 Colo. 508, 445 P.2d 60 (1968).

The proof necessary to support a conviction for conspiracy is necessarily not direct or clear. The nature of the offense and the secrecy involved require that the elements of the crime be established by circumstantial evidence. *Pooley v. People*, 164 Colo. 484, 436 P.2d 118 (1968).

The evidence in proof of a conspiracy will generally, from the nature of the case, be circumstantial. *Grass v. People*, 172 Colo. 223, 471 P.2d 602 (1970).

The existence of the agreement or assent of minds necessary to constitute a conspiracy need not be proved directly, but may be inferred from the facts provided. *People v. Johnson*, 189 Colo. 28, 536 P.2d 44 (1975).

Although elements of a conspiracy must be proven beyond a reasonable doubt, they may be proven by circumstantial evidence. *People v. LeFebre*, 190 Colo. 307, 546 P.2d 952 (1976).

Conspiracies by their very nature are often covert and surreptitious in nature, and for that reason, conspiracies may be established by circumstantial evidence alone. *People v. Shannon*, 189 Colo. 287, 539 P.2d 480 (1975).

Because of the nature of conspiracy, it often may only be proven by circumstantial evidence of involvement, which gives rise to the inference that an agreement to promote or facilitate the commission of the underlying crime was present. *People v. Ganatta*, 638 P.2d 268 (Colo. 1981).

Proof in a conspiracy case will necessarily be mostly circumstantial due to the covert and secretive nature of the offense. *People v. LeFebre*, 190 Colo. 307, 546 P.2d 952 (1976).

Since most conspiracies are covert, agreement frequently must be proven by circumstantial evidence. *People v. Wilkinson*, 38 Colo. App. 365, 561 P.2d 347 (1976).

In a prosecution for conspiracy, proof of an agreement may be shown by circumstantial evidence which indicates that the conspirators, by their acts, pursued the same objective, with a view toward obtaining a common goal. *People v. Cabus*, 626 P.2d 1159 (Colo. App. 1980).

The circumstances necessary to support a conviction for conspiracy are those which show that the alleged conspirators pursued by their acts the same objective, one performing one part, and the other another part, with a view to completing the acts and attaining the common objective. *People v. Wilkinson*, 38 Colo. App. 365, 561 P.2d 347 (1976); *People v. Williams*, 707 P.2d 1023 (Colo. App. 1985).

Proof of common design. A common design is the essence of a conspiracy and must be proved, and such proof may be fashioned from evidence other than that the parties came together and actually agreed upon a method of operation for the accomplishment of an offense. If it be shown that the defendants pursued by their acts the same object, often by the same means, one performing one part and another part of the same so as to complete it, the question of the existence of a conspiracy is presented and may be inferred by the jury. *Medina v. People*, 154 Colo. 4, 387 P.2d 733 (1963), cert. denied, 379 US 848, 85 S. Ct. 88, 13 L. Ed. 2d 52 (1964); *Abeyta v. People*, 156 Colo. 440, 400 P.2d 431 (1965); *Bingham v. People*, 157 Colo. 92, 401 P.2d 255 (1965); *Grass v. People*, 172 Colo. 223, 471 P.2d 602 (1970); *Husar v. People*, 178 Colo. 300, 496 P.2d 1035 (1972).

A criminal conspiracy need not be proved by direct evidence, and a common purpose or plan may be inferred from the development or the combination of circumstances. *Pooley v. People*, 164 Colo. 484, 436 P.2d 118 (1968).

Although the facts as shown do not reflect an expressed agreement, this is not required if the evidence portrays facts from which clear inferences can be drawn that a plan to rob the victim was the subject of at least a tacit or implied understanding or agreement between them. *Morehead v. People*, 167 Colo. 287, 447 P.2d 215 (1968).

Prosecution showed an agreement, a common design between the defendants, and an unlawful purpose and the evidence was sufficient to sustain a conviction of conspiracy to commit theft. *People v. Todd*, 189 Colo. 117, 538 P.2d 433 (1975).

Evidence of the consummation of the conspiracy is admissible as a circumstance tending to prove, and as throwing light upon it. *Short v. People*, 27 Colo. 175, 60 P. 350 (1900); *Pooley v. People*, 164 Colo. 484, 436 P.2d 118 (1968).

Acts and declarations of coconspirator admissible upon proof of conspiracy. The declarations of a defendant are not admissible in evidence against his codefendants under a charge of conspiracy until there be prima facie proof of the existence of the alleged conspiracy. A concert of action between the defendants in the unlawful enterprise as charged being shown to the satisfaction of the trial court, the acts and declarations of each conspirator in furtherance of the unlawful object may be given in evidence against all the coconspirators. *Rollins v. Bd. of Comm'rs*, 15 Colo. 103, 25 P. 319 (1890); *Smith v. People*, 38 Colo. 509, 88 P. 453 (1906).

In a prosecution for conspiracy when the fact of a conspiracy is shown, the acts and declarations of the conspirators, or of any of them, in furtherance of the conspiracy, are admissible in evidence not only against the persons who originally conspired together, but also against any person who joined with them in the consummation or attempt at consummation of the conspiracy. *Moore v. People*, 31 Colo. 336, 73 P. 30 (1903).

Where in a prosecution for larceny a conspiracy between defendant and another party to steal had been shown by the admissions of defendant to the witness, it was not error to permit the witness to testify to admissions made by the coconspirator relative to the transaction, made when the defendant was not present, but previous to the consummation of the crime. *Porter v. People*, 31 Colo. 508, 74 P. 879 (1903).

The decisions of the court of appeals for the tenth circuit adhere to the conservative requirements of a subsisting conspiracy and statements in furtherance of it before admitting the declarations of a coconspirator. *United States v. Mares*, 260 F. Supp. 741 (D. Colo. 1966), rev'd on other grounds, 383 F.2d 805 (10th Cir. 1967), cert. denied, 394 U.S. 963, 89 S. Ct. 1314, 22 L. Ed. 2d 564 (1969).

To render evidence of the acts or declarations of an alleged conspirator admissible against an alleged coconspirator, the existence of the conspiracy must be shown and the connection of the latter therewith established by independent evidence. *People v. Braly*, 187 Colo. 324, 532 P.2d 325 (1975).

The acts and utterances of one conspirator become the acts and utterances of all conspirators if such are done during the existence and the furtherance of the conspiracy. *People v. Trujillo*, 181 Colo. 350, 509 P.2d 794 (1973).

Evidence tended to show a continuing plan, scheme, design, and intent on the part of the coconspirators to deal in illicit drugs with an undercover agent over a period of time which extended from January 1973, to the date of the defendant's arrest. Given these facts, the testimony of conversations and transactions between the principals was properly admitted, and a limiting instruction was not necessary after the testimony was offered and received in evidence. *People v. Geller*, 189 Colo. 338, 540 P.2d 334 (1975).

The declarations of an alleged conspirator are admissible against an alleged coconspirator only when the existence of the conspiracy is shown by independent evidence. *People v. Burke*, 37 Colo. App. 289, 549 P.2d 419 (1976).

To be admissible under the coconspirator exception to the hearsay rule, the coconspirator's out-of-court statement must be made during the course and in furtherance of the conspiracy. *Villafranca v. People*, 194 Colo. 472, 573 P.2d 540 (1978).

Likewise, exhibits admissible in trial of accomplices to common plan. Defendant and his codefendant jointly participated in the criminal venture which resulted in the homicide. They acted in concert in furtherance of a common illegal purpose, and each, as to the other, was an accomplice. Admitting in evidence as against defendant the articles found in the possession of his codefendant was not error where they were a part of the people's case against both defendants. *Miller v. People*, 141 Colo. 576, 349 P.2d 685, cert. denied, 364 U.S. 851, 5 L. Ed. 2d 75, 81 S. Ct. 97 (1960).

The exhibits were admissible to establish the guilt of the principal and therefore relevant to the trial of defendant as an accessory and coconspirator. *Pooley v. People*, 164 Colo. 484, 436 P.2d 118 (1968).

Admission of postconspiracy statements was reversible error. When the conspiracy ends the theory that the participants are agents for each other has no further validity, and statements thereafter made are not admissible against the others. Such statements are then no different from any other hearsay. After the conspiracy has come to an end, as when defendants had been arrested and jailed, the admissions of one conspirator, by way of narrative of past facts, are not admissible in evidence against the others. *United States v. Mares*, 260 F. Supp. 741 (D. Colo. 1966), rev'd on other grounds, 383 F.2d 805 (10th Cir. 1967), cert. denied, 394 U.S. 963, 89 S. Ct. 1314, 22 L. Ed. 2d 564 (1969).

Acts or declarations made by one of the conspirators outside of the presence of other conspirators after the consummation of the conspiracy are inadmissible against other conspirators jointly charged. *People v. Peery*, 180 Colo. 161, 503 P.2d 350 (1972).

Statements of coconspirators admissible where conspiracy was continuing. The acts and statements after the completion of the offense were admissible and in furtherance of a going conspiracy because: (1) There is ample evidence that the defendants were continuing to act in concert after the robbery and prior to their arrest, in that they attempted to conceal a joint buying spree, they acted on behalf of one another and maintained communications; (2) the utterances were made in close proximity in time and space; and, (3) the utterances were circumstantial and spontaneous rather than testimonial or narrative. *United States v. Mares*, 260 F. Supp. 741 (D. Colo. 1966), rev'd on other grounds, 383 F.2d 805 (10th Cir. 1967), cert. denied, 394 U.S. 963, 89 S. Ct. 1314, 22 L. Ed. 2d 564 (1969).

Evidence must establish particular conspiracy charged. To sustain a verdict on an information charging one particular conspiracy, the evidence must establish the conspiracy charged; evidence that establishes another conspiracy or several other conspiracies will not sustain a verdict. *Dressel v. People*, 174 Colo. 238, 483 P.2d 367 (1971).

Evidence of conspiracy is not inadmissible because of failure of crime. Evidence of conspiracy to commit aggravated robbery is not inadmissible and is not meaningless and to be ignored merely because plans to commit robbery were frustrated and ended with commission of second-degree assault. *People v. Shannon*, 189 Colo. 287, 539 P.2d 480 (1975).

Properly instructed, a jury may convict upon the uncorroborated testimony of an accomplice. *People v. Burke*, 37 Colo. App. 289, 549 P.2d 419 (1976).

Admissibility of hearsay. Although the court may, in its discretion, allow hearsay to be introduced, the independent proof requirement must be met before the jury may consider hearsay statements of the alleged coconspirator against the defendant. If sufficient independent proof is not shown, then the jury must be instructed to disregard the testimony. Although the proof of the existence of the conspiracy may be circumstantial, it must be independent of the hearsay statements. *People v. Braly*, 187 Colo. 324, 532 P.2d 325 (1975).

If the court, in its discretion, admits the hearsay first, and independent evidence is not later introduced to support the initial determination by the court that the conspiracy continued, the jury must be instructed to disregard the testimony. *People v. Burke*, 37 Colo. App. 289, 549 P.2d 419 (1976).

Admissibility is question for judge. While the issue of whether the conspiracy had ended at the time of the declaration may properly be submitted to the jury, the issue of admissibility of the testimony initially presented a question of law to be decided by the trial judge. *People v. Burke*, 37 Colo. App. 289, 549 P.2d 419 (1976).

The alleged unreliability of a coconspirator's testimony involved a determination by the jury of the weight to be given this testimony. *People v. Silvola*, 190 Colo. 363, 547 P.2d 1283, cert. denied, 429 U.S. 886, 97 S. Ct. 238, 50 L. Ed. 2d 167 (1976).

The criminal record and admitted prior perjury of a coconspirator do not go to the admissibility of his testimony but rather to the weight to be given it, which was properly left for the jury's determination. *People v. Silvola*, 190 Colo. 363, 547 P.2d 1283, cert. denied, 429 U.S. 886, 97 S. Ct. 238, 50 L. Ed. 2d 167 (1976).

Coconspirator's mental state not relevant. Only the defendant's mental state is relevant in proving a charge of conspiracy. Accordingly, it is no defense that the person with whom the defendant acted is legally not responsible for the crime. *People v. McCoy*, 944 P.2d 577 (Colo. App. 1996).

Mere presence does not amount to sufficient independent evidence to support the existence of the conspiracy to sell narcotics. *People v. Braly*, 187 Colo. 324, 532 P.2d 325 (1975).

The same circumstantial evidence may provide the basis for a conviction of both the substantive crime and conspiracy. *People v. O'Neill*, 185 Colo. 202, 523 P.2d 123 (1974).

An acquittal of a substantive offense forecloses conviction on a conspiracy if, and only if, the only evidence relied on to prove the existence of the conspiracy was also the only evidence used to prove the substantive offense. *People v. Gallegos*, 181 Colo. 264, 509 P.2d 596 (1973).

Where alleged coconspirators are tried in separate proceedings, the rule of consistency is inapplicable, and an alleged coconspirator may be found guilty despite the acquittal of his alleged coconspirator. *People v. Marquiz*, 726 P.2d 1105 (Colo. 1986).

Evidence sufficient to uphold conviction. Evidence showed that informant set up a drug deal between two people, the two people showed up at the drug deal with the drugs, and there were scales in the car. Based on that evidence the jury could infer an agreement to sell drugs and the overt act of traveling to the location. *People v. Robinson*, 226 P.3d 1145 (Colo. App. 2009).

#### C. Instructions and Jury.

Instruction on elements of conspiracy held sufficient. *Young v. People*, 180 Colo. 62, 502 P.2d 81 (1972).

An instruction that to find defendant guilty of conspiracy the jury must find beyond a reasonable doubt that there was a common design or purpose to commit an unlawful act by concert of action, although not a model of preciseness, does set forth the essential elements of the offense charged in understandable language. The law does not require more. *Hampton v. People*, 171 Colo. 101, 465 P.2d 112 (1970).

Instruction on conspiracy to commit a misdemeanor properly refused. *Goddard v. People*, 172 Colo. 498, 474 P.2d 210 (1970).

Erroneous instruction on intent requires reversal. A verdict of guilty cannot stand where the element of specific intent is material as to one count of the information or indictment which is related to and joined with a count on conspiracy, when the court's instructions on intent covering either count are erroneous. *Gonzales v. People*, 166 Colo. 557, 445 P.2d 74 (1968).

Finding of jury conclusive. Where the question of the existence of a conspiracy is clearly presented by the evidence and is properly submitted to the jury, the finding of the jury is conclusive. *Davis v. People*, 176 Colo. 378, 490 P.2d 948 (1971).

Failure to instruct the jury in meaning of "overt act" harmless error since the plain meaning of "overt act" is not so abstruse as to be incomprehensible to the average juror. *People v. Schruder*, 735 P.2d 905 (Colo. App. 1986).

Failure to instruct the jury in meaning of "intent", although erroneous, did not rise to the level of plain error because defendant never argued or suggested that the person depicted in the surveillance video did not intend to dispossess the lawful owner of the seized property. *People v. Howard-Walker*, 2017 COA 81M, -- P.3d --.

#### D. Verdict and Sentence.

Conspiracy and object crime are separately punishable. Since the substantive offense and the conspiracy are separate and distinct crimes, the doctrine of merger does not apply and the crimes are separately punishable. *Roll v. People*, 132 Colo. 1, 284 P.2d 665 (1955); *DeBose v. People*, 175 Colo. 356, 488 P.2d 69 (1971).

Conspiracy is a separate and distinct offense from that which is the object of the conspiracy, and as such may be punishable by a consecutive sentence. *People v. Morgan*, 189 Colo. 256, 539 P.2d 130 (1975); *People v. Madonna*, 651 P.2d 378 (Colo. 1982).

Accused may be convicted of both crimes. Accused who participates in a crime as a principal may be convicted of both the substantive offense and conspiracy to commit such substantive offense. *People v. Rivera*, 178 Colo. 373, 497 P.2d 990 (1972).

Where conspiracy verdict failed to specify the crime which was the subject of the conspiracy, it is a nullity. *People v. Pleasant*, 182 Colo. 144, 511 P.2d 488 (1973).

An acquittal of all conspirators but one renders verdict of guilty invalid as to him since he cannot conspire with himself. *Bradley v. People*, 157 Colo. 530, 403 P.2d 876 (1965).

Where defendant and others were jointly charged with conspiracy to commit larceny from the person, and others were found not guilty of conspiring with defendant or with each other, a conviction of defendant of such offense was without sanction in law or fact. *Archuleta v. People*, 149 Colo. 206, 368 P.2d 422 (1962).

Where alleged coconspirators are tried in separate proceedings, the rule of consistency is inapplicable, and an alleged coconspirator may be found guilty despite the acquittal of his alleged coconspirator. *People v. Marquiz*, 726 P.2d 1105 (Colo. 1986).

Summary judgment inappropriate. Even where it is extremely doubtful that a genuine issue of fact exists as to whether all defendants joined in a conspiracy to libel, even assuming that libel can be proven, summary judgment is not appropriate. *Abrahamsen v. Mtn. States Tel. & Tel. Co.*, 177 Colo. 422, 494 P.2d 1287 (1972).

Conviction on a charge of conspiracy to commit assault to rape was not inconsistent with an acquittal on a substantive charge of assault with intent to commit rape. *People v. Walker*, 182 Colo. 317, 512 P.2d 1243 (1973).

Conviction of conspiracy to commit a robbery is totally inconsistent with an acquittal of attempt to commit aggravated robbery. *People v. Berry*, 191 Colo. 125, 550 P.2d 332 (1976).

An erroneous conspiracy conviction must be reversed regardless of the fact that concurrent sentences were imposed for the conspiracy and for the underlying substantive crime. *Villafranca v. People*, 194 Colo. 472, 573 P.2d 540 (1978).

Under subsection (4.5), conspiracy to commit a per se crime of violence is itself a crime of violence to which the sentence enhancing provisions of § 16-11-309 apply. *Terry v. People*, 977 P.2d 145 (Colo. 1999).

#### IV. ILLUSTRATIVE CASES.

Agreement not established. When there is no evidence to suggest an agreement to commit a crime other than that the defendants wanted to get some money, the evidence does not rise to the dignity of agreeing to commit a crime. *People v. Armijo*, 176 Colo. 547, 491 P.2d 1384 (1971).



Proof of conspiracy to bribe. Where jury does not find defendant guilty of bribery but does find that defendant had agreed with other person to bribe a judge, defendant's conviction of conspiracy to commit bribery of a judge is proper. *People v. Incerto*, 180 Colo. 366, 505 P.2d 1309 (1973).

Conspiracy to commit perjury. Although defendant contends that there was a fatal variance between the charge contained in the indictment and the proof, and that although one conspiracy, involving all the alleged perjurers, was charged, the prosecution proved at least four conspiracies, only one of which involved the defendant where there was a single overall plan with a common object, and the success or failure of the conspiracy depended upon the successful linkage of each member's testimony, and the perjury of one person was not and could not have been an end in itself, the testimony was sufficient to establish circumstantially a single conspiracy to commit perjury involving all the defendants. *People v. Quintana*, 189 Colo. 330, 540 P.2d 1097 (1975).

Conspiracy to commit burglary. *People v. Montoya*, 667 P.2d 1377 (Colo. 1983).

Conspiracy to commit third degree arson. The main object of a conspiracy to commit third degree arson is not the burning of a building, but the collection of insurance proceeds. *People v. Peltz*, 701 P.2d 98 (Colo. App. 1984).

Conviction did not deny due process. The evidence of conspiracy between the two defendants to possess narcotics is very weak but not totally nonexistent. Appellants were each in possession of the same prohibited drug and each in possession of crude but common instruments associated with the use and possession of narcotics. Federal due process is denied when conviction results without any evidence of guilt, but not otherwise. *Casias v. Patterson*, 398 F.2d 486 (10th Cir. 1968), cert. denied, 393 U.S. 1108, 89 S. Ct. 918, 21 L. Ed. 2d 804 (1969).

Evidence sufficient for submission to jury. *People v. Gilkey*, 181 Colo. 103, 507 P.2d 855 (1973).

The evidence shown that the four who took part in the robbery entered the store simultaneously, that each performed a given task toward the accomplishment of the robbery, and that they all fled together was sufficient to submit the charge of conspiracy to the jury. *Abeyta v. People*, 156 Colo. 440, 400 P.2d 431 (1965).

Evidence did not present jury question. There was some evidence of conspiracy to buy or receive stolen property, but that was not the charge. The evidence of conspiracy to commit the larceny was insufficient as a matter of law to submit that issue to the jury, particularly since the district attorney absolved those to whom the evidence pointed as being coconspirators. *Attwood v. People*, 165 Colo. 345, 439 P.2d 40 (1968).

Where the evidence was not sufficient to establish, either directly or by legitimate inference, a real agreement, combination, or confederation between the defendant and his alleged conspirator with the common purpose of embezzling the grain of a third person stored in an elevator, as charged, the question was not one for the jury's determination, and the defendant's motion for judgment of acquittal should have been sustained. *Dressel v. People*, 174 Colo. 238, 483 P.2d 367 (1971).

Evidence sufficient to establish conspiracy. *Roll v. People*, 132 Colo. 1, 284 P.2d 665 (1955); *Hughes v. People*, 175 Colo. 351, 487 P.2d 810 (1971); *Husar v. People*, 178 Colo. 300, 496 P.2d 1035 (1972); *People v. Lamirato*, 180 Colo. 250, 504 P.2d 661 (1972); *People v. Incerto*, 180 Colo. 366, 505 P.2d 1309 (1973); *People v. Vandiver*, 191 Colo. 263, 552 P.2d 6 (1976).

Even though the defendants may have offered their help to the victim separately, as claimed, they then cooperated with each other in carrying the drunk victim out of the club and they both participated in assaulting him. This constitutes sufficient and independent evidence of conspiracy to rob. *Morehead v. People*, 167 Colo. 287, 447 P.2d 215 (1968).

Where defendant's fingerprints were found on the inside of the entry door and on an envelope normally kept in a desk drawer in the victim's bedroom, and where defendants theorize that the prints could have been made at a time other than during the commission of the crime, but did not testify nor present other testimony to buttress the theory, the evidence was sufficient for conviction of robbery. *People v. Hannaman*, 181 Colo. 82, 507 P.2d 466 (1973).

Evidence held insufficient to establish conspiracy. *Ziatz v. People*, 171 Colo. 58, 465 P.2d 406 (1970).

Evidence that defendant has physical makeup fitting witnesses' general physical description of one of the robbers, without witness' statement to police linking defendant to robbery or testimony being offered at trial, is insufficient to support defendant's conviction for robbery and conspiracy to commit robbery. *Velarde v. People*, 179 Colo. 207, 500 P.2d 125 (1972).

**Subsection (5) did not lower the classification of the offense of the defendant. The defendant pled guilty to a conspiracy to commit the class 4 felony of distribution and sale of marijuana and thus was convicted of a class 5 felony. *People v. Hartkemeyer*, 843 P.2d 92 (Colo. App. 1992).**