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Criminal Law -- Aiding and Abetting -- Presence as a Factor

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Criminal Law—Aiding and Abetting—Presence as a Factor

State v. Ham[1] raised an interesting question in a relatively undefined area of the criminal law: Under what circumstances may one who performs no overt act of assistance be guilty of aiding and abetting?

In the principal case an affray between two groups of women, known as the Teaster group[2] and the Church group,[3] resulted in homicide. The defendant drove the Teaster group in his automobile to visit a prison camp, where they first encountered the Church group. During the visit the two groups were openly hostile and on leaving the camp a member of the Church group declared they would "waylay" the defendant's group down the road. Later in the day the evidence showed that the Church group had stopped beside a narrow road to let some people out when the Teaster group arrived on the scene. Defendant's testimony was that he stopped the car because of rocks in the road, but on stopping, the women with him, including his wife, jumped out of the car and proceeded to attack the Church group. In the course of the fight one of the Church women was killed. It is clear that the defendant did not take an active part in the fracas, but after the deceased was hit the defendant said, "Girls, you all get in the car and let's go." All but one obeyed and she obeyed when defendant said, 'you done killed one and you had better get in here." The evidence is conflicting, as to whether the defendant was in his car or standing outside during the fight.

On these facts the lower court found the defendant guilty of manslaughter as an aider and abetter. On appeal, the Supreme Court reversed, holding that the defense's motion for a non-suit should have been allowed, saying mere presence at the scene of the crime without any active participation is insufficient to constitute a person an aider and abettor.

By the Supreme Court's decision that the evidence in this case was insufficient to go to the jury the legal question is thus raised; as a matter of law, would it be possible under all the circumstances in this case to find the defendant guilty of aiding and abetting.

Black's Law Dictionary[4] defines to aid and abet as: "Help, assist or facilitate the commission of a crime, promote the accomplishment thereof, help in advancing or bringing it about, or encourage, counsel, or incite as to its commission." It comprehends all assistance rendered by words, acts, encouragement, support or presence, actual or constructive, to render assistance if necessary.[5] If there is actual participation, *i.e.*, an overt act, on the part of the defendant, this is clearly assistance, and renders him guilty, and in such cases there is little need to inquire into the more neb-

[1] 238 N. C. 94, 76 S. E. 2d 346 (1953).
[2] The Teaster group constituted the defendants.
[3] The Church group constituted the state's witnesses.
[4] Quoting State v. Lord, 42 N. M. 638, 84 P. 2d 80 (1938).
[5] State v. Davis, 191 Iowa 720, 183 N. W. 314 (1921).

ulous concept of whether the principal was "encouraged" by the act of the defendant.[6]

The more interesting and the more controversial area of aiding and abetting however is where the defendant performs no overt act, but is held criminally responsible because of his presence at the scene in conjunction with: events prior to the commission of the crime, or an express or implied understanding between the defendant and the actual perpetrator, or because of his relationship with the perpetrator. In the many cases which have found criminal responsibility even though the defendant performed no overt act, some one or more of the above factors, it is submitted, have been found to exist. At the outset, however, it would be well to distinguish this line of cases which have found the defendant guilty as an aider and abettor from those cases which have found the defendant guilty of an independent crime and not as a participant in the crime of the perpetrator. For example, in *State v. Trott*[7] the two defendants, in a drunken condition, caused a serious automobile accident in which a young girl was killed. Before the accident the defendant, who owned the car, having become too drunk to drive, placed the other defendant in control. At the time of the accident the owner was in the back seat. In finding him guilty of murder in the second degree along with the driver of the car, the court did not base its decision on the grounds of aiding and abetting, but rather found the defendant criminally responsible of an independent crime because of his own wanton and reckless disregard of the lives of others. An Australian case[8] in point makes this very distinction with an opposite result. The defendant stood on a river bank and watched his wife drown their two children and herself. The court said that while the husband was perhaps guilty of an independent crime, he was certainly guilty as a participator in the murders committed by his wife. The court concluded that the accused's moral duty to save his children, his legal control over his wife, and his moral duty to exercise that control were all elements which gave to the father's presence the quality of participation. Thus the court held that by his deliberate abstention from taking steps to save his family and by giving encouragement and authority of his presence and approval to his wife's act, he was guilty of aiding and abetting.

Although there do not appear to be any American decisions which place upon an acused such a positive duty as did the Australian court, there are cases in many jurisdictions, including North Carolina, which

[6] People v. Roberts, 211 Mich. 187, 178 N. W. 690 (1920); State v. Noeninger, 108 Mo. 166, 18 S. W. 990 (1892); Watson v. State, 21 Lex. App. 598, 1 S. W. 451 (1886).

[7] 190 N. C. 674, 130 S. E. 627 (1925); See also Moreland v. State, 164 Ga. 467, 139 S. E. 77 (1927).

[8] Rex. v. Russell, 1933 V. L. R. 59 (Austr. 1932), See *Comment* 47 HARV. LAW REV. 531 (1934).

emphasize many of the factors present in that case as tending to show a defendant's complicity in a crime. In a North Carolina case[9] defendants Ray and Chase were first cousins and good friends. The two were together when an altercation occurred between Ray and deceased. Ray shot at deceased, injuring him slightly, and threatened to kill him later. It doesn't appear that Chase did or said anything at this time. Later the two defendants were again together when by chance they met deceased on the street. The evidence conflicts as to who spoke first, but both being armed, they attempted to shoot it out, at which time Ray shot and killed deceased. On this occasion Chase had moved out of the way to the center of the street; and again it does not appear whether he said or did anything. The question was then raised, from these facts was there sufficient evidence to be submitted to the jury on the guilt of Chase as an aider and abettor? The court, answering in the affirmative, considered these factors: The close relationship and association of the two defendants, the defendant's awareness of Ray's attitude toward deceased, having been present at the first encounter, and finally the fact that defendant was present and in a position to have assisted Ray if such had been necessary. The court held that these circumstances consist of more than a mere conjecture or suspicion of guilt and constitute evidence of sufficient definite probative value to justify its submission to the jury.

In *State v. Tyndall,*[10] defendants Howard and Tyndall went to one Jones' store with the avowed purpose, as expressed by Howard, of settling with Jones for reporting a whiskey still to the police. While at the store Howard accused, cursed and threatened Jones. Tyndall did and said nothing but was present throughout the incident. The court was equivocal as to whether or not Tyndall was guilty of a forcible trespass, as it found Howard to be, but concluded that Tyndall was at least guilty of aiding and abetting Howard. Here it was not Tyndall's presence alone which caused the court to fasten criminal responsibility, but it was the fact that he accompained Howard knowing full well of his intent. It was this that gave to Tyndall's action that aspect of encouragement which constitutes aiding and abetting. This principle is further illustrated in *State v. Ochoa*[11] where the New Mexico court held that the defendant, a member of a mob, aided and abetted the person or persons who actually killed the sheriff. The court said that to render one an aider and abettor there should be evidence of his knowledge of the intention or purpose of the principal to commit the offense; and that aiding and abetting may be shown by acts, conduct, words, signs, or any means sufficient to incite, encourage or instigate the commission of the offense

[9] State v. Ray, 212 N. C. 725, 194 S. E. 482 (1938).
[10] 192 N. C. 559, 135 S. E. 451 (1926).
[11] 41 N. M. 589, 72 P. 2d 609 (1937).

or to express the defendant's support or approval. This the court concluded was a question for the jury.

In a recent Missouri case[12] the defendant and two others picked up complainant, a Negro man, who wished to be taken to his "bossman." According to the complainant, the three agreed to take him for one dollar. When the four were returning to town, the defendant was sitting in the front seat with the complainant. Suddenly one of the boys in the back seat hit complaint over the head; defendant stopped the car and the two boys in the back proceeded to knock complainant onto the highway. Defendant did nothing at this time, but said, "just because you took his money don't kill him." Defendant contended this affair was not prearranged and that he did not participate in it. He asserted that he was nothing more than a mere by-stander. The court however held that presence of one at the commission of a felony by another is evidence to be considered in determining whether he was guilty of aiding and abetting, and presence, companionship and conduct before and after the offense are circumstances from which one's participation in the criminal intent may be inferred. There are other cases to the same effect.[13]

Following the same line of reasoning, an Illinois court,[14] in discussing the evidence against defendant, a party to the crime, said, ". . . of course, an innocent spectator is not criminally responsible because he happens to see another commit a crime, but if the proof shows that a person is present at the commission of a crime without disapproving or opposing it, it is competent for the jury to consider this conduct in connection with other circumstances and thereby reach the conclusion that he assented to the commission of the crime, lent to it his countenance and approval, and was thereby aiding and abetting the same."[15] Such a situation was recognized in *State v. Jarrell*[16] where an argument had arisen over passage in a narrow road. The defendant Hicks jumped out of his buggy and stabbed the deceased. Defendant Jarrell actually did nothing

[12] State v. Corbin, 353 Mo. 1154, 186 S. W. 2d 469 (1955).

[13] In a fairly recent California case complainant met defendant and a stranger in a certain tavern. The three left together for the purpose of getting a drink. After having gone some distance down the street the unidentified man suddenly asked complainant for his wallet. Under protest the victim finally handed it over telling the defendant that this was a serious offense. At that instant the stranger raised his hand and this was the last complainant remembered. Throughout the entire altercation between the victim and his assailant the defendant stood some feet away and did nothing, except possibly to serve as a lookout. The defendant contended he was only present whereupon the court held that presence of a defendant at the commission of a felony by another is evidence to be considered together with all the circumstances immediately preceding, attending and following the perpetration of the felony as tended to show defendant's complicity of the offense. People v. Hughes, 70 Cal. App. 2d 457, 161 P. 2d 285 (1945).

[14] People v. Smith, 391 Ill. 172, 62 N. E. 2d 669 (1945).

[15] *Id.* at 176, 62 N. E. at 671.

[16] 141 N. C. 722, 53 S. E. 127 (1906); See also State v. Cloninger, 149 N. C. 567, 63 S. E. 154 (1908).

but the court said it is a fair inference that Jarrell was in a situation to be able to go readily to the assistance of Hicks had it been necessary, and this fact realized by Hicks was enough to give to Jarrell's presence that degree of encouragement which constitutes aiding and abetting. The court went on to point out that when the bystander is a friend of the perpetrator and, as such, gives encouragement and protection, presence alone may be regarded as encouraging.

Although there are statutes and decisions[17] creating a duty to act to prevent a crime, lest one's mere presence constitute him an aider and abettor, it is admitted that the vast majority rule is that mere presence will not constitute one an aider and abettor. The majority of courts readily agree that when one is merely present no liability will occur. But when there are other circumstances in addition to one's presence the courts tend to recognize this as a different situation.

In the instant case it would seem that the court was somewhat begging the question by resolving the case with a statement that mere presence at the scene of the crime without any actual participation in its commission is insufficient to constitute a person an aider and abettor. It is not the purpose of this writer to presume to disagree with the court's interpretation of the evidence or to suggest that a jury should have found the defendant guilty. However by the court's dismissal of the case with a summary statement that mere presence "is not enough to convict the defendant of aiding and abetting" several interesting questions are raised. If the court was implying that an overt act is necessary to constitute aiding and abetting on the part of the defendant, it is clearly out of line with prior North Carolina cases and the modern trend of authority, which recognize other incriminating circumstances. Likewise if the court meant to imply by "mere presence" that there was no evidence of other circumstances present in the case upon which criminal responsibility could attach, it would seem it ignored a combination of circumstances: the fact that defendant was aware of the open contention between the parties, having been present at the prison earlier in the day; the close relationship between the defendant and the actual perpetrators, one being his wife; the fact that defendant was a man among these women and the driver of the car, and being aware of this, the defendant must have realized the likelihood that his presence would lend encouragement; lastly and foremost the fact that defendant had some degree of control over the group was manifested when he said "let's go" and they obeyed.

In the instant case, the court stated, "we find no decision of this

[17] A statute in Colorado provides that one is an accessory who stands by without interfering or giving such help as may be in his or her power to prevent a criminal offense from being committed. COLO. C. L. Sec. 6645; A New York Case held that a servant who stands by passively knowing that his employer is being robbed, and permits it, will be guilty as a principal. In re Sherman, 6 City Hall Recorder (N. Y.) 2 (1922).