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Burden of Proof as to Perpetrators of Crimes

to social guests as a group is to hold them entitled to reasonable care. This is not to emphasize particularly the desirability of decisions in favor of plaintiffs in tort cases, but rather to provide a more effective and practical means of enabling the courts to consider all relevant circumstances in each case. Hence it is urged that when confronted with this problem the Virginia courts adopt either the Restatement rule or the due care standard rather than extend the gross negligence theory of liability.

TIMOTHY G. IRELAND

BURDEN OF PROOF AS TO PERPETRATORS OF CRIMES

In criminal law, a difficult problem sometimes arises in those cases involving two persons when it is not clear whether one or both of them committed the crime. If the evidence shows that only one person could have committed the crime, the prosecution certainly must prove beyond a reasonable doubt which person is guilty.[1] If, however, it appears that the two persons co-operated in the crime, it would seem that the prosecution should not be required to prove beyond a reasonable doubt the exact part played by each.

The Supreme Court of North Carolina was recently confronted with this problem in *State v. Hargett*.[2] According to the state's evidence, Weingardner, Parrish and two other soldiers left Fort Bragg in Weingardner's car and drove to a nearby town. On reaching their destination, Weingardner remained at the home of a friend, while Parrish and others, later joined by Hargett, visited several food and liquor establishments. When Weingardner rejoined the group he was drunk and quarrelled with Parrish. Later, Parrish, Hargett and Weingardner left in Weingardner's automobile for the ostensible purpose of putting Weingardner on a bus for Fort Bragg. After twenty minutes, Parrish and Hargett returned, asserting that they had done so.[3] Three days afterward the body of Weingardner was

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131 Atl. 501 (1925); Schmidt v. George H. Hurd Realty Co., 170 Minn. 322, 212 N.W 903 (1927); Roper v. Commercial Fibre Co., 105 N.J.L. 10, 143 Atl. 741 (1928); Le Roux v. State, 307 N.Y. 397, 121 N.E.2d 386 (1954); Caldwell v. Village of Island Park, 304 N.Y. 268, 107 N.E.2d 441 (1952); Hise v. City of North Bend, 138 Ore. 150, 6 P.2d 30 (1931). See also Prosser, Torts § 78 (2d ed. 1955).

[1]Aylward v. State, 216 Ala. 218, 113 So. 22 (1927).

[2]255 N.C. 412, 121 S.E.2d 589 (1961).

[3]Later in the evening Hargett said that Weingardner was in his (Hargett's) car. In referring to this acknowledgement, the Supreme Court said that if Parrish

found in a ditch at the city dump. An autopsy showed the cause of death to have been drowning.

Hargett was indicted for murder. At his trial, Parrish testified that Hargett drove the car to the dump, and, after a brief altercation, shoved Weingardner into the ditch. This testimony was in direct conflict, however, with the statement made to the police by Hargett in which he said that Parrish was the one who hit the deceased and pushed him into the ditch. The jury returned a verdict that Hargett was guilty of manslaughter.

Hargett appealed, and the Supreme Court of North Carolina reversed on the ground that there was error in the instructions given to the jury. The lower court had given instructions embodying the prosecution's contention that even if Hargett was not guilty as a principal in the first degree, he might be guilty of aiding and abetting.[4] The instructions on the law of aiding and abetting were correct, but the Supreme Court thought there was no basis for a conviction as an aider and abettor,[5] stating that Hargett could be guilty only as a perpetrator. A new trial was ordered.

Although there was no affirmative testimony at the trial that the defendant was an aider and abettor, it can hardly be said that he was a disinterested bystander.[6] At the trial, Parrish accused Hargett of committing the crime, whereas, in an earlier statement Hargett had

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was the perpetrator the statement might be evidence of Hargett's guilt as an accessory after the fact, but was not sufficient to make him an aider and abettor.

[4]A principal in the first degree actually commits the crime with his own hands. State v. Allison, 200 N.C. 190, 156 S.E. 547 (1931). A principal in the second degree is not the perpetrator, but one who is present at the commission of the crime and either aids and abets, counsels, commands or encourages its commission. Spradlin v. Commonwealth, 195 Va. 523, 79 S.E. 2d 443 (1954). The distinction between the two is usually of little importance other than for descriptive purposes, since the degree of guilt for each is usually the same, State v. Holland, 211 N.C. 284, 189 S.E. 761 (1937). Only in those cases where some factor of mitigation or aggravation applies to one and not the other will the punishment vary as between the two. Red v. State, 39 Tex. Crim. App. 667, 47 S.W 1003 (1898).

[5]The Supreme Court felt that the evidence only showed that Hargett was at the dump with Parrish, and that he did not attempt to prevent the crime. Mere presence at the scene of the crime of a person who does not in any way participate in or encourage its commission does not make an aider and abettor. The court also stated that Hargett could not be considered an aider and abettor on the theory that he was bound to impede the commission of the felony or to recover the deceased from the ditch.

[6]Generally, a bystander is one who is present at the scene of the felony, but who does not act in concert with those who commit it. Hilmes v. Strobel, 59 Wis. 74, 17 N.W 539 (1883). To be guilty as an aider and abettor, the evidence must show, beyond a reasonable doubt, that he participated in the crime before or at the time of its occurrence. Drury v. Territory, 9 Okla. 398, 60 Pac. 101 (1900).

said that Parrish perpetrated the crime. Neither admitted that one perpetrated the crime with the other present aiding and abetting. However, it would not be inconsistent with either man's statement to find that one did aid and abet the other in the commission of the crime.

Furthermore, it was disclosed at the trial that both Parrish and Hargett were together for the greater part of the evening; that they told their friends they were going to the bus station to put Weingardner on a bus, when in fact they took him to the city dump; that Hargett drove Weingardner's car to the dump; that they were present at the scene of the crime; that neither interfered to prevent the crime, nor to recover Weingardner from the ditch; and that Hargett attempted to conceal the crime.[7] From these facts it would seem a jury might reasonably conclude that Hargett either perpetrated the crime or aided and abetted in its commission.[8]

Even though there was no concrete evidence of Hargett's aiding and abetting, it does not necessarily follow that an instruction relating to this degree of crime was wrong. In many jurisdictions,[9] the jury may convict the defendant of a lesser included offense even though the evidence shows the greater offense.[10] Once convicted, the defendant is not entitled to a new trial on the ground that the court erred in instructing on the less serious crime as to which there was no evidence.[11] The theory is that the accused is not prejudiced by an instruction that he can be convicted of a crime of a less serious nature than the one for which he should be convicted.[12]

Therefore, in *State v. Hargett,* if the punishment for aiding and

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[7]Although not disclosed at the trial, it may also be assumed that both were at the dump on their own accord, since neither testified otherwise.

[8]Notwithstanding that these facts, when considered separately, do not have much legal significance, yet when they are considered by the jury in connection with other circumstances, they indicate that one was the perpetrator of the crime and the other an aider and abettor.

[9]Some of these jurisdictions are: Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kentucky, Mississippi, Missouri, Nebraska, Nevada, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, and Wisconsin. For cases upholding this rule in the above jurisdictions see: Annot., 21 A.L.R. 603, 622 (1922); Annot., 27 A.L.R. 1097, 1100 (1923); Annot. 102 A.L.R. 1019, 1026 (1936).

[10]North Carolina holds that if the evidence warrants a conviction of a higher degree of homicide and does not warrant an acquittal, the jury can find the accused guilty of a lower degree. State v. Matthews, 142 N.C. 621, 55 S.E. 342 (1906); State v. Branch, 193 N.C. 621, 137 S.E. 801 (1927).

[11]State v. Bidwell, 150 Wash. 656, 274 Pac. 716 (1929).

[12]People v. Wolcott, 137 Cal. App. 355, 30 P.2d 601 (1934).

abetting was less than that for perpetrating the crime, the former would be a lesser included offense. Accordingly, an instruction on aiding and abetting, even though the evidence did not show such, would not be prejudicial error. There is no reason why this rule should not also apply if the penalty imposed on a perpetrator of a crime and one who aids and abets is of equal degree. Consequently, even if the giving of the aiding and abetting instruction was error, it hardly seems to have been prejudicial error.

A somewhat different approach could also be taken. In all criminal trials, the burden as to those facts which are material to the crime rests on the prosecution.[13] Evidence must be produced to overcome the presumption that the accused is innocent[14] and to establish his guilt beyond a reasonable doubt.[15] Thus, where the perpetrator of a single crime must be one of two persons, the evidence affording no reasonable inference that they acted in co-operation, the burden is upon the prosecution to prove one or the other of them guilty.[16] If there is a reasonable doubt as to which of the two perpetrated the crime, the doubt will operate so as to require an acquittal of both.[17]

State v. Hargett, however, can be distinguished from the above situation since the state had evidence tending to show that both participants were guilty. The difficulty was that the state did not have enough evidence to show the part that each played in the crime. But, when it can be inferred that both parties are guilty, is it necessary for the state to prove their respective roles in the crime?

The doctrine of the "non-shifting" burden of proof in criminal trials has become a firmly implanted principle of law due to the absence of affirmative pleadings by the defendant, and the general policy

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[13]State v. Helms, 181 N.C. 566, 107 S.E. 228 (1921); State v. Kline, 190 N.C. 177, 129 S.E. 417 (1925); State v. Walker, 193 N.C. 489, 137 S.E. 429 (1927). See 1 Wharton's Criminal Evidence § 16 (12th ed. 1955).

[14]The presumption of innocence cautions the jury to consider only the evidence, and that they should not make any surmises based on the present situation of the accused. 9 Wigmore, Evidence § 2511 (3d ed. 1940).

[15]If a juror has a reasonable doubt of the guilt of the accused he cannot vote for a conviction. State v. Ellis, 210 N.C. 166, 185 S.E. 663 (1936). In defining "reasonable doubt" Chief Justice Shaw of Massachusetts said: "It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they can not say they feel an abiding conviction, to a moral certainty, of the truth of the charge." Commonwealth v. Webster, 59 Mass (5 Cush.) 295 (1850).

[16]Aylward v. State, 216 Ala. 218, 113 So. 22 (1927).

[17]People v. Woody, 45 Cal. 289 (1873).

of caution in favor of accused persons.[18] Nevertheless, this rule has been relaxed in some jurisdictions which hold that the burden of producing evidence, in certain instances, may be upon the accused.[19] Thus, if the prosecution has established proof which would convince the jury of the defendant's guilt, the accused has been placed in a position where he should go forward with countervailing evidence.[20] Although the defendant is not required to do so,[21] his failure to present rebutting proof may be regarded as confirming the conclusion indicated by the evidence shown by the prosecution.[22] Hence, many jurisdictions, including North Carolina, place on the accused the burden to show certain facts in the nature of excuse or mitigation;[23] to prove that he acted in self-defense;[24] to rebut the presumption of malice arising from the use of a deadly weapon;[25] to establish intoxication at the time of the crime;[26] and to establish insanity.[27]

The defendant's duty to produce contervailing evidence has been interpreted to mean that the accused must support his cause by those facts peculiarly within his knowledge.[28] This rule might be extended

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[18]1 Greenleaf, A Treatise on the Law of Evidence § 81(b) (1899).

[19]Although the burden of producing evidence as to certain facts may be upon the defendant, the burden of ultimately convincing the jury, beyond a reasonable doubt remains upon the prosecution. See Cardozo's reasoning in Morrison v. California, 291 U.S. 82, 88 (1934).

[20]Lee v. State, 259 Ala. 455, 66 So. 2d 881 (1953).

[21]Hurston v. State, 235 Ala. 213, 178 So. 223 (1938); State v. Davis, 214 N.C. 787, 1 S.E.2d 104 (1939).

[22]The viewpoint is that once the prosecution has presented evidence which the accused could explain or deny, the accused's failure to testify raises a strong inference that he cannot truthfully explain or deny them. Vanderheiden v. State, 156 Neb. 735, 57 N.W.2d 761 (1953); State v. Anderson, 137 N.J.L. 6, 57 A.2d 665 (1948); State v. Levine, 117 Vt. 320, 91 A.2d 678 (1952).

[23]State v. Whitson, 111 N.C. 695, 16 S.E. 332 (1892); State v. Jones, 98 N.C. 651, 3 S.E. 507 (1887).

[24]State v. Barringer, 114 N.C. 840, 19 S.E. 275 (1894).

[25]Mealy v. Commonwealth, 135 Va. 585, 115 S. E. 528 (1923).

[26]State v. Corrivau, 93 Minn. 38, 100 N.W 638 (1904).

[27]People v. Allender, 117 Cal. 81, 48 Pac. 1014 (1897); Commonwealth v. Berchine, 168 Pa. 603, 32 Atl. 109 (1895).

[28]For example, in a case in which the defendant's whereabouts at the time of a crime is in question, the burden is on him to show where he was, as this knowledge is peculiarly within his power. White v. State, 31 Ind. 262 (1869). Many states have passed statutes making the proof of certain facts a prima facie showing of unascertained facts peculiarly within the knowledge of the accused. People v. Osaki, 209 Cal. 169, 286 Pac. 1025 (1930). Therefore, if the crime charged involves proof of a negative (i.e., that defendant did not have a license to carry a pistol) which is difficult to prove and is peculiarly within the knowledge of the defendant, proof of the doing of the prohibited act (i.e., carrying a pistol) makes out a prima facie case for the state and the burden is cast upon the accused to disprove the negative. McHenry v. State, 58 Ga. App. 410, 198 S.E. 818 (1938). In support of