

PUBLIC
ANNEX G

**J. Dressler, *Understanding Criminal Law* (4th edn., New York:
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[B] Significant *Mens Rea* Issues

[1] The Feigning Accomplice

It is frequently said that, to be an accomplice, a person "must not only have the purpose that someone else engage in the conduct which constitutes the particular crime charged, but the accomplice must also *share in the same intent which is required for commission of the substantive offense*."⁸² It is almost always reasonable to infer that when a person intentionally assists another to engage in the conduct that constitutes an offense, he does so because he wants the other person to succeed in his endeavor, i.e., he shares the criminal intent of the primary party. Sometimes, however, this inference is inaccurate. Matters of complexity arise, for example, when a police officer or private person joins a criminal endeavor as an "accomplice" and feigns a criminal intent in order to obtain incriminating evidence against the primary party or in order to ensnare the other in criminal activity.

Consider the classic case of *Wilson v. People*.⁸³ *S* and *P*, drinking partners, got into an argument over *S*'s assertion that *P* had stolen his watch. A conversation followed in which the two men agreed to steal property from *V*'s drugstore. In furtherance of the agreement, *S* assisted *P* to enter *V*'s store. While *P* was inside, *S* called the police and then returned to the drugstore and took property handed to him by *P*. Before the parties could leave, the police arrived and arrested *S* and *P* for burglary and larceny.

S's conviction as an accomplice was overturned by the state supreme court. Some of its reasoning was unpersuasive. It analogized *S*'s conduct to that of a detective who enters an existing criminal endeavor in order to "explode" it. *S*, however, hardly fit that characterization. He did not join a crime already in play; he helped devise the plan, apparently in order to set up *P* for arrest, in retaliation for the latter's alleged theft of *S*'s watch.

So, was *S* properly acquitted as an accomplice? *S* had the intent to assist *P* to engage in the conduct that (on *P*'s part) constituted burglary and larceny; that is, he intended to assist *P* to enter *V*'s store and to take property out of it. But, did *S* possess the second (and, ultimately, key) *mens rea* of an accomplice, namely, the mental states required for commission of the offenses of larceny and burglary?

Larceny requires a specific intent to deprive another person of his property permanently. Although *P* possessed this intent (and, therefore, was guilty of larceny as the perpetrator), *S*'s act of calling the police demonstrated that he did not intend for *V* to be deprived of the property permanently. Consequently, *S*

⁸² State v. Williams, 718 A.2d 721, 723 (N.J. Super. Ct. Law Div. 1998) (emphasis added).

⁸³ 87 P.2d 5 (Colo. 1939).

lacked the specific intent of larceny, and was properly acquitted as an accomplice of this offense.

The burglary charge is a more difficult issue. Plausibly, *S* should have been convicted of burglary as an accomplice. The argument would run as follows: *S* knew that *P* intended to enter *V*'s drugstore for the purpose of committing larceny (which made *P* guilty of burglary), and with that knowledge and for the very purpose of securing *P*'s conviction for burglary, *S* assisted *P* to go inside *V*'s drugstore — the *actus reus* of the burglary. Therefore, *S* *did* want a burglary (as distinguished from a larceny) to occur, and thus should be convicted for assisting in that offense.

But, there is a strong — this author contends, better — case for relieving *S* of responsibility for the burglary. The reason goes back to the *mens rea* requirement, as stated in subsection [a]: an accomplice must possess two states of mind: (1) the intent to assist the primary party to engage in the conduct that forms the basis of the offense; and (2) the mental state required for commission of the offense, as provided in the definition of the substantive crime. Here, *S* possessed the first intent: As noted in the preceding paragraph, he intended to assist *P* to engage in the conduct (entering the drugstore) that constituted the social harm of burglary. But, *S* did not possess the second mental state: Because *S* did not intend for a larceny to occur, he personally lacked the "specific intent" requirement of burglary. He did not share with *P* the felonious intent that constitutes the "specific intent" that converts a criminal trespass into a burglary.⁸⁴

The latter analysis does not provide a ready-made escape hatch for persons to join crimes in order to arrest or ensnare suspects. *Wilson* was an unusual case because both of the offenses charged are "inchoate offenses in disguise,"⁸⁵ and also required proof of specific states of mind that *S* lacked. However, if *S* had intentionally assisted *P* to kill *V*, *S* would be guilty of murder because he shared with *P* the intent for the latter to kill *V*. The fact that *S*'s motive for wanting *V* dead was to set up *P* for arrest would not negate the requisite *mens rea*.

[2] "Purpose" versus "Knowledge": The Meaning of "Intent"

The *mens rea* of accomplice liability is usually described in terms of "intention." As with the crime of conspiracy, however, there is considerable debate regarding whether a person may properly be characterized as an accomplice if he *knows* that his assistance will aid in a crime, but he lacks the *purpose* that the crime be committed. For example, suppose that *S* rents his house to *P*, the manager of an illegal gambling enterprise.⁸⁶ Is *S* an accomplice in *P*'s illegal

⁸⁴ Conceptually and uncontroversially, *S* was an accomplice in *P*'s criminal trespass.

⁸⁵ See § 27.02[F], *supra*.

⁸⁶ United States v. Giovannetti, 919 F.2d 1223, 1227 (7th Cir. 1990) (holding that a person may not be convicted as an accomplice unless he participates in something that he wishes to bring about).

activities if he rented the property with knowledge of his tenant's intended activities, or must it be proved that he shared *P*'s criminal purpose?

The policy arguments for and against imposing liability on the basis of knowledge, rather than purpose, have been summarized elsewhere in the context of conspiracy law.⁸⁷ As in that area, the case law is mixed. Most courts, however, hold that a person is not an accomplice in the commission of an offense unless he "share[s] the criminal intent of the principal; there must be a community of purpose in the unlawful undertaking."⁸⁸ In the words of Judge Learned Hand, the complicity doctrine requires that the secondary party "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used — even the most colorless 'abet' — carry an implication of purposive attitude towards it."⁸⁹

[3] Liability for Crimes of Recklessness and Negligence⁹⁰

Courts and statutes frequently express the culpability requirement for accomplice liability in terms of "intent," e.g., the "intent to promote or facilitate the commission of the offense."⁹¹ The implication of these words is that the secondary party must want the crime to be committed by the primary party (or, at least, know that it will take place). If so, it is logically impossible for a person to be an accomplice in the commission of a crime of recklessness or negligence. For example, suppose that *S* encourages *P* to drive at an exceedingly high rate of speed on a busy public road near a school. While speeding, *P* loses control of his car and strikes and kills *V*, a child leaving school for the day. We may assume that *P* is guilty of manslaughter as the result of his criminal negligence. Of what is *S* guilty? Based on a statute interpreted to require an intent to commit the substantive offense, *S* cannot be convicted as an accomplice in the negligent manslaughter. If *S* must "intend that the offense be committed," then he must "intend that the offense [of negligent manslaughter] be committed." However, how can one intend a negligent killing? Essentially, that would mean that *S* intended *V* to die in a negligent manner, which means that *S* intended *P* to kill *V*. In the latter case, the offense would be murder, not negligent homicide.

⁸⁷ See § 29.05[B][1], *supra*.

⁸⁸ *State v. Duran*, 526 P.2d 188, 189 (N.M. Ct. App. 1974); see *People v. Beeman*, 674 P.2d 1318, 1326 (Cal. 1984); *State v. Gladstone*, 474 P.2d 274, 278 (Wash. 1970); Weisberg, Note 1, *supra*, at 239 (stating that "the majority of jurisdictions . . . require a showing of purpose").

⁸⁹ *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938).

⁹⁰ See generally Sanford H. Kadish, *Reckless Complicity*, 87 J. Crim. L. & Criminology 369 (1997); Audrey Rogers, *Accomplice Liability for Unintentional Crimes: Remaining Within the Constraints of Intent*, 31 Loy. L.A. L. Rev. 1351 (1998).

⁹¹ E.g., Alaska Stat. § 11.16.110(2) (2005).

In the past, some courts analyzed accomplice liability in this manner,⁹² but the overwhelming majority rule now is that accomplice liability is allowed in such circumstances. Conviction of an accomplice in the commission of a crime of recklessness or negligence is permitted as long as the secondary party has the two mental states described in the second paragraph of subsection [A]: (1) the intent to assist the primary party to engage in the conduct that forms the basis of the offense; and (2) the mental state — intent, recklessness, or negligence, as the case may be — required for commission of the substantive offense.⁹³

In the present hypothetical, *S* should be treated as an accomplice in the negligent death. First, he intended to encourage *P* to engage in the conduct that formed the basis of the offense, i.e., he intended to encourage *P* to drive at a high rate of speed on a public road near a school, which speeding resulted in *V*'s death. Second, *S* was criminally negligent in relation to *V*'s death by encouraging *P* to drive in this manner. This outcome is sensible:

[B]ecause accessorial liability is not a distinct crime, but only an alternative means by which a substantive crime may be committed, it would be illogical to impose liability on the perpetrator of the crime, while precluding liability for an accessory, where both possess the mental state required for the commission of the crime.⁹⁴

On the other hand, if *P*, while speeding at *S*'s encouragement, had negligently turned the wrong way on a one-way street, thereby striking and killing *V*, *S* might not be an accomplice in *this* negligent homicide. It is quite arguable that the conduct that formed the basis of *this* homicide was the act of wrong-way driving, and not the conduct that *S* intentionally encouraged, i.e., the speeding.

⁹² E.g., *Echols v. State*, 818 P.2d 691, 694-95 (Alaska Ct. App. 1991) (overturning accomplice conviction for reckless assault on the ground that such an offense does not exist), overruled by *Riley v. State*, 60 P.3d 204 (Alaska Ct. App. 2002); *State v. Etzweiler*, 480 A.2d 870, 874-75 (N.H. 1984) (quashing an indictment of *S* as an accomplice of *P* in a negligent homicide), superseded by statute as recognized in *State v. Anthony*, 861 A.2d 773, 775 (N.H. 2004).

⁹³ E.g., *Ex Parte Simmons*, 649 So. 2d 1282, 1284-85 (Ala. 1994) (*S* may be convicted of reckless murder as an accomplice if he purposely aided or encouraged another to fire a weapon on a public street, recklessly resulting in the death of a child); *State v. Garnica*, 98 P.3d 207, 209 (Ariz. Ct. App. 2004) (affirming conviction of an accomplice for second-degree, reckless murder; held: an accomplice need only have the kind of culpability with respect to the result that is sufficient for commission of the crime); *People v. Wheeler*, 772 P.2d 101, 103 (Colo. 1989) (affirming *S*'s conviction as an accomplice in a negligent homicide, as long as *S* intended to promote or facilitate the conduct of *P* that negligently resulted in the death); *State v. Anthony*, 861 A.2d 773, 776 (N.H. 2004) (affirming conviction of an accomplice to the crime of negligent cruelty to animals; held: conviction is permitted if the secondary party (1) intended to promote or facilitate the other person's dangerous conduct; and (2) acted with the culpable mental state regarding the result specified in the underlying statute); *State v. Chaney*, 989 P.2d 1091, 1101 (Utah Ct. App. 1999) (*S* may be convicted as an accomplice in rape of a child, in which *S* may not have possessed the specific intent that *P* have intercourse with the child, as long as he was at least reckless as to the possibility of intercourse, since recklessness was the minimum level of culpability required for rape).

⁹⁴ Weisberg, Note 1, *supra*, at 225.