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Colorado Law Concerning Accomplices and Complicity

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by Marianne Wesson

Criminal law always has recognized that persons who do not actually engage in the conduct necessary to the commission of a crime may nevertheless incur some criminal liability if they contribute in certain ways to the planning, encouragement or execution of the crime.[1] Hence, the hiring party as well as the contract killer may be guilty of murder; the getaway driver as well as the robber may be guilty of robbery; and the fence as well as the thief may be guilty of theft.[2] Colorado provides that the guilt of the party who does not actually commit the crime is equal to that of the party who does, provided the former's contribution to the crime satisfies the principles of accomplice liability.[3]

The law of accomplice liability also is known as the law of complicity or of accountability. Because an individual convicted as an accessory faces precisely the same punishment as one convicted of the same crime as a principal,[4] it is imperative that Colorado attorneys understand the law of accomplice liability.

Statutory Background

CRS § 18-1-602(1) provides:

(1) A person is legally accountable for the behavior of another if:

(a) He is made accountable for the conduct of that person by the statute defining the offense or by specific provision of this code; or

(b) He acts with the culpable mental state sufficient for the commission of the offense in question and he causes an innocent person to engage in such behavior.

The second method [in (1)(b)] of establishing vicarious liability for the conduct of another is seldom invoked.[5] It is more common for cases of alleged accomplice liability to fall within subsection (1)(a), according to which the accused accomplice "is made accountable for the conduct of [the actor] by the statute defining the offense or by specific provision of [the Colorado Criminal Code]." Further, in practically every reported case, the source of the defendant's accountability is not the statute defining the offense, but rather "specific provisions" of CRS § 18-1-603:

> A person is legally accountable as principal for the behavior of another constituting a criminal offense if, with the intent to promote or facilitate the commission of the offense, he aids, abets, or advises the other person in planning or committing the offense.

This apparently simple language conceals some uncertainty about exactly what is required for accomplice liability under its provisions. Employing the usual dichotomy of acts and mental states, questions might be asked about (1) the conduct necessary to convict an individual as an accomplice and (2) the mental state or states necessary for such a conviction.

The "Act" of Complicity

CRS § 18-1-603's designation of "aiding, abetting, or advising" as the possible varieties of complicitous acts by no means eliminates the uncertainties of the matter of conduct. It has been held that the term "abets" encompasses encouragement.[6] Thus, in Colorado, an individual who sells a would-be criminal an instrumentality that is necessary or useful to the commission of the crime may well have committed an act of complicity.

In a case that predates the present statute but appears to reflect the Colorado view of complicity, the Colorado Supreme Court held that an innkeeper who rented rooms to prostitutes could

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be guilty of keeping and maintaining a house of ill-fame. According to the court, such conduct constituted "aiding, abetting, and assisting" such an enterprise.[7] If this case is still good law, it is difficult to distinguish the tolerant innkeeper from an individual who sells a firearm to a bank robber or sells a can of gasoline to an arsonist.

Distinctions may be made between various cases of aid by considering differences between the mental states of the various aiders. This consideration, however, requires an understanding of what mental state or states are necessary to the commission of a crime as an accomplice.

The "Mens Rea" Of Complicity

CRS § 18-1-603 designates the mental state necessary for accomplice liability as "intent to promote or facilitate the commission of the offense." As it has been interpreted in Colorado, this language is somewhat ambiguous. It seems at a minimum that an individual could not be guilty of an offense as an accomplice unless he or she had every mental state necessary to the commission of the offense as a principal. For example, to the extent an offense requires knowledge of a circumstance, an individual could not be guilty of the offense as an accomplice without having known of the circumstance at the time of furnishing aid or encouragement.

The only Colorado decision that seems to cast any doubt on this proposition is *People v. Simien*.[8] In *Simien*, the trial court neglected to instruct the jury in the elements of accomplice liability, but told it that the defendant could only be convicted if he had every mental state necessary to commit the crime as a principal. The Court of Appeals found no plain error in the trial court's having failed to instruct the jury in the elements of accomplice liability, in light of its other mental state instruc tion.

The opinion in *Simien* seems to suggest that the error, if any, inured to the defendant's benefit.[9] This suggestion, if taken seriously, could lead to the conclusion that an individual may sometimes be convicted as an accomplice without evidence that he or she had the *mens rea* necessary to commit the offense. Nevertheless, this proposition is only vaguely hinted at and is contrary to other precedents[10] and to common sense.

Assuming that an individual must display every mental state necessary to the commission of the offense in order to be convicted as an accomplice, the question remains whether anything more is required. Arguably, "intention to promote or facilitate" means that something more may be required, at least where the crime committed by the principal is one of knowledge, recklessness or negligence, rather than one of intention.

> "Distinctions may be made between various cases of aid by considering differences between the mental states of the various aiders."

For example, an individual may commit fourth-degree arson as a principal with a mental state of recklessness (toward the possibility that he or she is creating a danger of death, injury or damage).[11] It seems to strain the meaning of the intent language, however, to suggest that an equally reckless individual who furnishes a match to such a careless arsonist may be convicted as an accomplice to fourth-degree arson. If the match-supplier is merely careless about the prospect of destruction by fire, it is difficult at best to say that he or she has "intention to promote or facilitate the commission of" fourth-degree arson.

To equate the alleged accomplice's recklessness to "intention" is to erase the careful distinctions between the various mental states that the Colorado Criminal Code sets forth.[12] Prior to recent Colorado decisions, it seemed clear that an individual could not be convicted as an accomplice to any crime unless he or she intended every consequential element of the crime. This logical conclusion, however, has been rejected by the Colorado courts, as discussed in the following section.

Complicity in Colorado Cases

In *People v. R.V.*,[13] the Colorado Supreme Court reviewed a delinquency adjudication for the juvenile's complicity in a theft. The trial judge had refused to instruct the jury in the meaning of "intentionally or with intent" under the Criminal Code's definitions of the various culpable mental states. Affirming the adjudication of delinquency, the majority held that the instructions did not offend the principle that a judge should instruct on the meaning of every mental state that is an element of the offense. The court observed that complicity is not itself an offense, but rather a theory of liability for some offense defined elsewhere in the Code. It then held that the term "intent" in the phrase "intent to promote or facilitate the commission of the offense" does not necessarily mean the same thing that the phrase "intent" would mean in the definition of a crime—that is, a conscious objective to cause a particular result.[14]

What alternative meaning the term "intent to promote or facilitate the commission of an offense" might have was not addressed by the *R.V.* court. The opinion stated that the phrase was not composed of "words of uncommon meaning which are apt to be misunderstood by a jury and therefore require further definition."[15]

The *R.V.* decision, then, rejected the dissenters' view that conviction for complicity necessarily requires "a purposive attitude or conscious objective on the part of the offender towards the completion of the crime."[16] The less culpable or less purposive attitude toward the completion of the crime that might suffice was hinted at in the Colorado Supreme Court's 1985 decision in *People v. Krovarz*.[17]

In *Krovarz*, the issue was similar to that in *R.V.*: whether the trial judge's instructions concerning the definition of a particular mental state were adequate. The basis of the charge in *Krovarz*, however, was attempt rather than complicity. The court recognized that attempt, like complicity, is not a crime in the abstract but can create liability only in conjunction with some other offense defined by the Criminal Code.[18] The attempt statute by its language required proof of "purpose to complete the commission of the offense," and the court earlier had held that "purpose" in that context has the same meaning as "intent."[19] Nevertheless, in *Krovarz* the court held that proof that the actor knew his conduct would result in the completed offense is sufficient for conviction of attempt. In other words, the court ruled that in the context of an attempt charge, knowledge is as good as intent.

In a later case concerning the law of attempt, the court pushed that reasoning even further. In *People v. Thompson*,[20] the court held that a person may be convicted of attempting a crime of recklessness if that person "intends to engage in acts or conduct that produce a substantial and unjustifiable risk of death of another." Significantly, this formulation does not require that the actor intend to cause the consequential element of the crime attempted. The relaxation of the mental state requirement for attempts in *Krovarz* and *Thompson* presaged a similar loosening of the law of accomplice liability.

When the precise question of the mental state required for accomplice liability for a non-specific intent crime came before the Colorado Supreme Court recently, its ruling was even more surprising. In *People v. Wheeler*,[21] a 1989 decision, the court held that a person may be guilty of aiding and abetting the crime of negligent homicide even if that person has neither intention nor knowledge that the victim will die as a result of the principal's conduct. It is sufficient, said the court, that defendant intend to promote or facilitate the acts or conduct of the principal; it is not necessary that the defendant's mental state be greater than negligence toward the consequence of death.[22] This decision probably suggests the end, in Colorado, of any distinction between the mental state necessary to commit a crime as a principal and that necessary to commit the same crime as an accomplice.

Evidence of Complicity

It has been held that an alleged accomplice may not be convicted without evidence that the principal actually committed the crime.[23] It is no defense to a charge of complicity, however, that the alleged principal was never prosecuted for the crime, or even that he or she was acquitted of it.[24] Courts occasionally will say that mere presence at the scene of a crime is by itself insufficient to establish accomplice liability.[25] Nevertheless, is is apparently unnecessary to give such an instruction to the jury if the other requirements of accomplice liability are the subject of a proper instruction.[26]

Furthermore, it may be possible to convict a person on a showing that, although neither the individual nor his or her confederate has committed all of the acts necessary to constitute the crime, between the two of them each conduct element of the crime is satisfied.[27] In such a case (or in any case, it seems) the prosecution is not required to commit itself, either in its accusation or in its evidence, to a view about which actor is the principal and which is the accomplice.[28] Indeed, according to the Colorado courts, it is possible for a person to be charged as a principal and convicted on a theory of complicity, or vice versa, without any fatal variation between the accusation and the proof.[29]

Exemptions, Exceptions and Affirmative Defenses

CRS § 18-1-604 sets forth some exemptions from, or exceptions to, the general law of accomplice liability. In general, these exceptions conform to certain exceptions recognized by the common law of complicity.[30] An individual cannot be convicted as an accomplice to a crime if he or she is "a victim" of that crime.[31] Hence, a minor could not be convicted as an accomplice to a sexual offense of which the minor was the victim, no matter how willing his or her participation.

Somewhat more subtle is the exception for the defendant as to whom "the offense is so defined that his conduct is inevitably incidental to its commission."[32] For example, CRS § 18-7-205 prohibits "patronizing a prostitute," an offense that is so defined that it cannot be committed without the participation of a prostitute. Because the prostitute's conduct is "inevitably incidental" to the commission of the offense by the patrons, he or she cannot be convicted as an accomplice to their violations of § 18-7-205. (Prostitutes may, however, be liable as a principal for any crimes that their own conduct may amount to, notably the crime of "prostitution" as defined in CRS § 18-7-201.)

CRS § 18-1-604(2) also creates an affirmative defense to charges of accomplice liability. It provides:

> It shall be an affirmative defense to a charge under section 18-1-603 if, prior to the commission of the offense, the defendant terminated his effort to promote or facilitate its commission and either gave timely warning to law enforcement authorities or gave timely warning to the intended victim.

Although there are no decisions in Colorado construing this provision, it seems at least somewhat problematic. As discussed above, persons need not be

"charged" under CRS § 18-1-603 in order to be convicted on principles of accomplice liability.[33] This circumstance leaves uncertain the issue of when a jury should be instructed concerning the existence of this affirmative defense. In this author's opinion, a sensible rule would require instruction in this defense any time (1) the jury is instructed in the principles of accomplice liability; and (2) there is some credible evidence that the defendant can satisfy the terms of the affirmative defense.[34]

Relationship to Accessorial Liability

The law of accomplice liability corresponds roughly to the common law of the liability of an "accessory before the fact."[35] At common law, liability also could be imposed on accessories "after the fact" who aided or harbored a felon with knowledge that he or she had committed a crime.[36] In Colorado, the latter situation is addressed by the "Accessory to Crime" statute, CRS § 18-8-105.[37]

Conclusion

The law of accomplice liability in Colorado is subtle and not always logical. The feature that most distinguishes it from the law of other jurisdictions is the erosion of the requirement that an aider and abetter must intend to cause every consequential element of a crime in order to be guilty as an accomplice. This development makes the law of complicity in Colorado more attractive to the prosecutor, and a charge of complicity more difficult to defend against, than is the case in most American jurisdictions.

NOTES

1. For a summary of the common law of parties to crimes, *see*, *State v. Powell*, 83 S.E. 310, 313 (N.C. 1914).
2. *See, People v. Lamirato*, 504 P.2d 661 (Colo. 1972).
3. CRS §§ 18-1-601 to 18-1-603.
4. CRS §§ 18-1-601 and 18-1-603.
5. Despite the fact that it is seldom used, this form of accountability may sometimes be important. In *U.S. v. Bryan*, 483 F.2d 88 (3d Cir. 1973), the evidence suggested that the true criminal had induced another to pick up several hundred cases of stolen liquor from a pier. The other individual was acquitted, and the inducer argued that his conviction should be overturned as well, since an accomplice can be no more guilty than the principal. The court rejected his argument, reasoning that the "innocent dupe" still could be regarded as having committed the crime, either as principal or as accomplice, because his physical conduct satisfied the crime's definition, even if his mental state did not (483 F.2d at 92). Had this case arisen in Colorado, the inducer's guilt could have been analyzed under the "innocent person" provision without any theoretical difficulty.
6. *Alonzi v. People*, 597 P.2d 560 (Colo. 1979).
7. *Griffin v. People*, 99 P. 321 (Colo. 1908).
8. 671 P.2d 1021 (Colo.App. 1983).
9. *Id.* at 1023.
10. *See, e.g., People v. R.V.*, 635 P.2d 892 at n.2, 893 (Colo. 1981) (accused accomplice is entitled to instruction on mental elements of substantive crime he is claimed to have aided or abetted).
11. CRS § 18-4-105.
12. *Compare*, CRS § 18-1-501(5) (definition of "intentionally" or "with intent") *with*, CRS § 18-1-501(8) (definition of "recklessly").
13. Note 10, *supra*.
14. CRS § 18-1-501(5).
15. Note 13, *supra*, at 894.
16. *Id.* at 895 (Quinn, J., dissenting).
17. 697 P.2d 378 (Colo. 1985).
18. *Id.* at 380.

19. *People v. Frysig*, 628 P.2d 1004 (Colo. 1981).
20. 729 P.2d 972 (Colo. 1986).
21. 772 P.2d 101 (Colo. 1989).
22. *Id.*
23. *People v. Martin*, 561 P.2d 776 (Colo. 1977).
24. CRS § 18-1-605.
25. *See, e.g., Quintana v. People*, 102 P.2d 486 (Colo. 1940).
26. Note 8, *supra*.
27. *Reed v. People*, 467 P.2d 809 (Colo. 1970).
28. *People v. Scheidt*, 513 P.2d 446 (Colo. 1973).
29. *People v. Mason*, 642 P.2d 8 (Colo. 1982) (defendant charged as principal, convicted as accomplice); *People v. Buckner*, 504 P.2d 669 (Colo. 1972) (defendant charged as accomplice, convicted as principal).
30. *See*, Lafave and Scott, *Criminal Law* 594-96 (2d ed. 1986).
31. CRS § 18-1-604(1).
32. *Id.*
33. *See*, note 29, *supra* and accompanying text.
34. *See*, CRS § 18-1-407.
35. *See*, Perkins and Boyce, *Criminal Law* 722 (3d ed. 1982).
36. *Id.*
37. For a discussion of this statute, *see*, Wesson, *Crimes and Defenses in Colorado* (Norcross, GA: Harrison Publishing Co., 1989).

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DU Law Professor Receives Honor

Chicago's DePaul University has appointed University of Denver law professor Paul Stephen Dempsey as its first Distinguished Visiting Professor of Law. Dempsey has taught law at DU for the past ten years and is director of the University's Transportation Law Program. He will return to DU in 1990.

Dempsey is the author of *Law & Economic Regulation in Transportation, Law & Foreign Policy in International Aviation* and *The Social and Economic Consequences of Deregulation.*