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(3) Any "other acts" evidence regarding any witness or the victim, under Wis. Stat. § 904.04(2), unless and until a hearing is first held outside the jury's presence as to the admissibility of such evidence. In particular, the State objects to any potential testimony from lobbyists or other representatives of special interest groups that the defendant never extorted contributions from them. State v. Tabor, 191 Wis. 2d 482, 497 (Ct. App. 1995), ("Evidence of noncriminal conduct to negate the inference of criminal conduct is generally irrelevant." (quoting United States v. Dobbs, 506 F.2d 445, 447 (5th Cir. 1975)).

(4) Character evidence of a witness or the victim for the purpose of establishing that a person acted in conformity with that character on a particular occasion unless the defendant complies with the requirements of Wis. Stat. § 904.04(1). In particular, the State objects to witnesses, including lobbyists and other representatives of special interest groups, testifying that defendant has some specific character trait which predisposes him not to commit extortion. In contrast, evidence of more general character traits such as honesty or integrity may be admissible.

(5) Character evidence relating to the credibility of any witness without complying with the requirements of Wis. Stat. § 906.08(1).

(6) Specific acts related to the credibility of any witness without complying with the requirements of § 906.08(2).

(7) "Jury nullification." This would encompass arguments that the law is "unfair," incorrect or should be different than it is, or arguments that the prosecution is unfair. It would also encompass erroneous statements of the law. The defendant has taken the position in exhaustive pretrial submissions that the alleged conduct, even if proven, is lawful. This court and the Court of Appeals have denied those motions.

(8) "Golden rule" argument, requesting jurors to put themselves in the defendant's shoes, shoes of his family members, etc. Such a reference would be for the sole purpose of arousing sympathy or prejudice for the defendant, which is prohibited as reflected in the Jury Instructions. Any such reference during trial would be wholly irrelevant, and at best premature sentencing argument in the event of conviction.

(9) Punishment, disposition, sentence, or any other adverse consequences potentially or allegedly suffered by the defendant resulting from prosecution in this matter, again because any such mention would merely be an attempt to arouse sympathy or prejudice for

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the defendant, and is outside the province of the jury. Defense counsel have during briefing of motions in this case, made irrelevant reference to the potential for "prison" for the defendant, suggesting a tendency to confuse the fact finding and dispositional phases of a criminal case, even in pleadings to the court.

(10) Any decision of the State to call certain persons and not others as trial witnesses. While a defendant may argue about the weight or quality of evidence, it is improper to suggest that the defendant's power to subpoena witnesses is any different from that of the State. The defendant has subpoena power equal to that of the State.

(11) Any alleged constitutional violation of the defendant's rights in the investigation or prosecution of this case. Any alleged violations of the defendant's federal or state Fourth, Fifth, or Sixth Amendment rights must be addressed, if at all, by way of suppression motions and rulings in advance of trial, and are not for the consideration of the jury. All Fourth Amendment claims have been resolved against the defendant in pretrial rulings of this court.

(12) Any alleged discovery violations by the state. Neither side is entitled to allude to discovery issues in front of the jury. Any allegation by either side that a disclosure that should have been made was not, or was made too late, should be directed to the court outside the presence of the jury.

(13) The personal opinion of any witness or of any attorney regarding the guilt or innocence of the defendant. Such expressions are irrelevant and may be highly prejudicial. An opinion regarding the ultimate issue, in the form of evidence or argument, does not tend to make more or less probable the truth of the matter asserted in the opinion. §§ 904.01, 904.02, 904.03.

(14) Any prior conviction or adjudication of any witness, absent prior determination by the court that the probative value substantially outweighs the danger of unfair prejudice. §§ 901.04, 906.09, stats.

(15) The lack of the defendant's criminal record. *State v. Bedker*, 149 Wis. 2d 257, 268, 440 N.W.2d 802 (Ct. App. 1989).

(16) The degree of the offenses charged, *i.e.* felony or misdemeanor or charges that the defendant believes could or should have been issued. Such information is irrelevant to a determination of guilt or innocence under Wis. Stat. §904.02. In arguing the defendant's

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lack of guilt on the counts charged, the defense may not argue that conduct may have violated some other provision of the law, since this would only confuse and divert the jury from its obligation to assess whether the state has introduced proof beyond a reasonable doubt of his violation of the charged offenses.

In addition, the state requests entry of the following additional orders:

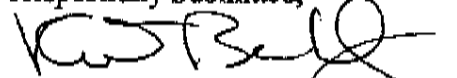
(17) Prohibiting media representatives from covering proceedings in a manner inconsistent with Chapter SCR 61, "Rules Governing Electronic Media and Still Photography Coverage of Judicial Proceedings." Specifically, the state requests the court to limit the number and location of any cameras in the courtroom as specified under SCR 61.03-06. Compliance with the rules will ensure that jurors will focus on the testimony of witnesses and the media presence will not disrupt witness testimony.

(18) Allowing jurors, pursuant to Wis. Stat. § 972.10(1), to take notes of the witnesses' testimony. The basis of the State's motion is Wis. Stat. § 972.10(1)(a), which provides that a court "shall determine if the jurors may take notes of the proceedings." Where notetaking is not permitted, a court must "state the reasons for the determination on the record." Wis. Stat. § 972.10(1)(a)(2). Should the court permit the jurors to take notes, the State proposes that the court instruct the jury pursuant to Wis. JI--Criminal 55 (1991).

(19) Allowing jurors to propose questions for each witness on following all direct and cross-examination questions posed by counsel. The jurors could be specifically instructed not to be distracted by this process in listening to all the evidence, as for example by writing questions during the course of testimony.

Dated at Madison, Wisconsin, this 26th day of September, 2005.

Respectfully Submitted,



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lory modifications many judges persist in using common law language. Second, not all of the common law rules regarding accomplices have been abolished everywhere. Indeed, even in states that appear to have repealed all features of common law, courts have stubbornly resisted some of the changes.

[2] Principal in the First Degree

[a] Definition

A principal in the first degree is the person who, with the mens rea required for the commission of the offense: (1) personally commits the acts that constitute the offense or (2) as described below, commits the offense by use of an innocent instrumentality. In modern language the principal in the first degree frequently is described as the "perpetrator" of the offense. It is his conduct from which all secondary parties' liability derives.

Most typically, the principal in the first degree is the individual who personally commits the crime. If it is the person who shoots or stabs V, has sexual intercourse with V, or takes and carries away the personal property of another—i.e., he is the person who performs the acts proscribed by the statute.

[b] Innocent-Instrumentality Rule

[1] In General

In limited circumstances a person is identified as the principal in the first degree although he does not commit the offense with his own hands. Specifically, D is the "principal in the first degree" if, with the mens rea required for the commission of the offense, he uses X, an innocent instrumentality, to commit the offense.³ The instrumentality used may be: (1) an inanimate object; (2) a living but non-human agent; or (3) a non-culpable human being.

For example, suppose that D opens a window and uses a long stick to remove a watch sitting on a table. He is arrested at this moment and prosecuted for burglary and larceny. D personally broke into the house by opening the window. He did not personally enter the house as required for common law burglary, however, because his own body never entered the dwelling. Nor did he personally take the property as required for common law larceny. Nonetheless, D is the principal in the first degree of burglary and larceny because he committed the offenses through the use of the "innocent instrumentality" of the

Similarity, if D trains his dog to bite people on command he is the principal in the first degree of a homicide if he purposely uses his dog to kill V. Or if he trains the dog to steal property D is guilty of larceny when his dog follows his orders.

³ See Williams § 120.

⁴ E.g., *State v. O'Leary*, 31 N.J. Super. 411, 416, 107 A.2d 73, 13 (1954) (use of an instrument to enter a dwelling is sufficient to constitute a burglary if it is intended to order to effectuate the theft within the dwelling and not solely as a means to break in to it).

Finally, D can be a principal in the first degree even if another human being, X, personally commits the offense as long as X is D's innocent agent. Common law jurisprudence on this matter is not entirely clear and not always definitive.⁴ But it appears that D is the principal in the first degree if he uses or manipulates X as his instrument to commit an offense—i.e., if as if X were a marionette whose strings were pulled by D. For X to qualify as D's innocent instrumentality, however, he must be innocent of the crime that he has personally committed—i.e., he must be subject to acquittal on the basis of the lack of mens rea or the presence of an exculpatory condition.

Suppose that D falsely informs X that V's television set belongs to D, and he convinces X to "retrieve" the property from V's house. When X breaks into V's house under D's false representation, he is D's innocent instrumentality in the burglary and theft. X will be acquitted of both offenses because he lacked the requisite mental state to commit either offense. D will be guilty of both crimes as the principal in the first degree.

A party is also the principal in the first degree if he causes an insane person⁵ or a child⁶ to commit an offense, or if he coerces X to commit the crime. In these circumstances X is innocent as the result of an excuse (insanity, infancy, or duress).

[ii] Difficulties in Application of the Rule

Sometimes application of the innocent-instrumentality doctrine presents difficulties for courts. Usually this occurs when the crime for which a defendant is prosecuted, and for which he is the principal in the first degree if the innocent-instrumentality rule is applied, is one that he is legally incapable of committing personally.

For example, common law rape involves a man having non-consensual sexual intercourse with a woman who is not his wife. At common law, therefore, a husband could not personally rape his wife nor could a woman rape another woman. Conceptually, however, a husband or a woman could be guilty of rape as an accomplice of a male who was not the husband of the victim.⁷

⁵ See Note 6, *infra*.

⁴ Blackstone at "35 (stating that a party is a principal if he kills another by "inculcating a madman to commit murder"). Sometimes courts use the innocent-instrumentality doctrine in circumstances in which it is inappropriate. For example, in *Regina v. Tyler*, 3 C. & P. 916, 173 Eng. Rep. 643 (1838), X, an insane person, was the instigator of a criminal plot that included D1 and D2. X stated that he would kill any law officer who resisted him. Later he carried out his threat. At trial it was proved that X was insane. The court treated D1 and D2 as the principals in the first degree although they did not use X as his agent.

⁷ *Queen v. Mervin*, 1 Car. Crm. Cas. 104 (1844) (Eng.) (by dictum, D is the principal in the first degree if he convinces a child to take money from his father).

⁶ E.g., *Cady v. State*, 361 P.2d 507, 319 (Ore. Crim. App. 1961), *overruling*, 376 P.2d 622 (Ore. Crim. App. 1963) (a husband may be an accessory in the rape of his wife); *People v. Kelly*, 85 Misc.2d 702, 709, 381 N.Y.S.2d 733, 739 (1976) (a woman may be an accessory in the rape of another woman).

Suppose, however, that the husband coerces X to rape his wife or a woman forces X, a man, to rape another woman. Under ordinary rules this would make the husband or the woman the principal in the first degree of the rape, sometimes,¹⁴ but by no means always,¹⁵ courts have been unwilling to conclude that the coercing husband or woman was the principal in the first degree because to do so would ignore the specific language of the statute or the definition of the crime. In such circumstances courts may seek to treat the defendant as a second-degree party or simply allow him to escape punishment.

[3] Principal in the Second Degree

A principal in the second degree is one who intentionally assists¹⁶ the principal in the first degree to commit an offense and who is actually or constructively present when it is committed. A person is "constructively present" if he is situated in a position to assist the principal in the first degree during the commission of the offense, as when S serves as a lookout or "getaway" driver outside a bank that P robs.

[4] Accessory Before the Fact

An accessory before the fact does not differ appreciably from a principal in the second degree except that he is not present actually or constructively when the crime is committed. Although the assistance of an accessory may take any of the forms applicable to principals in the second degree, frequently an accessory is one who solicits, counsels, or commands (short of coercing) P to commit the offense.

[5] Accessory After the Fact

An accessory after the fact is one who intentionally assists a known felon to wrongfully avoid arrest, trial, or conviction.¹⁷ Today no jurisdiction treats an accessory after the fact as an accomplice in the commission of the offense by the primary party. Instead, such conduct is punished as a separate crime that

¹⁴ E.g., *Harshbarger v Commonwealth*, 230 Va. 710, 712, 263 S.E.2d 392, 394 (1980) (D ordered X and Y to have sexual intercourse with each other and was prosecuted for rape of the female (Y). The court overturned D's conviction as a principal in the first degree of Y's rape because prior state rulings "establish[ed] that one element of rape is the penetration of the female sexual organ by the sexual organ of the principal in the first degree."); E.g., *People v. Hernandez*, 18 Cal. App. 3d 651, 657, 95 Cal. Rptr. 71, 74 (1977) (D coerced her husband to have sexual intercourse with a non-consenting woman; the court upheld the conviction of D as the principal in the first degree of the rape of another woman on the basis of the "junctive control theory" of criminal responsibility). See also the discussion of *Regnier v. Cogan & Leuk*, [1976] 1 Q.B. 217 (Eng.), in § 30.06[B][3][a] *infra*.

¹⁵ "Assistance" may take many forms. See § 30.04, *infra*.

¹⁶ If S coerces P to commit the offense then S would be the principal in the first degree through an innocent instrumentality.

¹⁷ The common law does not recognize accessories after the fact in misdemeanors.

crimes comparatively minor punishment.¹⁸ As a result, this chapter does not consider further the liability of accessories after the fact.

[D] Procedural Implications of the Distinctions¹⁹

[1] General Comments

Although the common law differentiated between principals in the first and second degree, no matters of practical significance depended on this distinction. The distinction between principals (of either degree) and accessories was of substantial significance because courts developed procedural rules that made it difficult to bring prosecutions successfully against accessories.

Most of the procedural rules lack theoretical justification and occasionally are illogical. Their use proved to be counter-productive to efficient law enforcement. They may have developed as a tool of English common law judges to reduce the numbers of persons who could be excused for their crimes.²⁰

[2] Jurisdiction

At common law, principals in the first or second degree had to be prosecuted by a court in the jurisdiction in which the crime was committed. An accessory had his accessoryship act.

Therefore, if the prosecutor believed that S was a principal in the first or second degree and brought the prosecution in jurisdiction A, the county in which the offense was perpetrated, a conviction of S could not stand no matter how strong the evidence was that he was a participant in the offense if it was proven at trial that he was not a principal but was an accessory whose participation occurred in jurisdiction B.

[3] Rules of Pleading

At common law an indictment (the official pleading document in most criminal proceedings) had to state correctly whether the party charged was a principal or an accessory. If the prosecutor alleged that X was the principal in the first degree and that Y was the principal in the second degree and the evidence at trial demonstrated that the roles of the parties were reversed, both defendants could still be convicted. On the other hand, if the evidence demonstrated that Y was not the principal in the second degree as alleged but was an accessory before the fact his conviction could not stand.

The result was the same if the error was committed in reverse. That is, if a person was indicted as an accessory but it was proven at trial that he was a principal in either degree, then the indictment was faulty and the conviction could not stand.

¹⁸ E.g., Model Penal Code § 241.3 (Hindering Approaches or Prosecution). See generally Perkins, *Purviser to Crime*, 59 U. Va. L. Rev. 381, 607-16 (1941), *id.* at 607.