

CRIMINAL LAW:
ATTEMPT, ACCESSORY & CONSPIRACY
ONLINE

PRESENTED BY:

DPS – Law Enforcement Academy
Santa Fe, New Mexico

Date: _____

GOALS

- For students to understand the initiatory criminal statutes of attempt, conspiracy, and solicitation and applying these statutes to criminal charges.
- Understanding how to use the accessory theory when filing criminal charges.

OBJECTIVES

Upon completion of this course, students will be able to:

- Explain and give examples of attempt to commit a felony.
- Explain and give examples of conspiracy to commit a felony.
- Explain and give examples of solicitation to commit a felony.
- Provide examples of being charged as an accessory to a crime.
- Describe the difference between conspiracy and being charged as an accessory.

SOURCES

- New Mexico Criminal and Traffic Manual.
- New Mexico Statutes Annotated.
- State and federal case law.

ESTIMATED TIME

Included in a ten hour block on Criminal Law.

PREPARED BY

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DATE APPROVED _____

ACCREDITATION NUMBER _____

INTRODUCTION TO INITIATORY CRIMES:

We will discuss initiatory crimes in this class.

NMSA 1978, Section 30-28-1 Attempt to commit a Felony

NMSA 1978, Section 30-28-2 Conspiracy

NMSA 1978, Section 30-28-3. Criminal Solicitation

- Example: Attempted murder.
A person decides to poison someone and leaves poison in their coffee cup. In addition, the first person has gotten a large insurance policy on the second person. The second person drank a small amount, became ill, but didn't die. There may not be a murder but we do have attempted murder.
- Example: Conspiracy to commit murder.
Two people plan to murder someone. They get guns, a getaway map, a rental car, and make other arrangements. Police learn of their plans and stop the murder from happening. There may not be a murder but we do have a conspiracy to commit murder.

We will also discuss being charged as an accessory which is similar and often confused to being charged as a conspirator. NMSA 1978, Section 30-1-13.

ATTEMPT

- [Attempt to commit a felony consists of an overt act in furtherance of and with intent to commit a felony and tending but failing to effect its commission. NMSA 1978, Section 30-28-1.](#)
 - - overt act
 - - intent to commit a felony
- What separates attempt from a completed crime?
Usually the offender wanted to do the crime, intended to do the crime, but failed because of some kind of intervention.
- If the crime is not committed because of outside intervention, attempt still applies.
- Penalty for attempt:

Penalties – punished by one degree less than actual crime.

Attempt only applies to felonies.

No person shall be charged for attempt to commit a misdemeanor.

CONSPIRACY

Conspiracy consists of knowingly combining with another for the purpose of committing a felony within or without this state. NMSA 1978, Section 30-28-2.

- Under attempt, one can be charged with either attempt or the completed act; it's either one or the other.
- But conspiracy is different: one can be charged with conspiracy and the underlying charge.
- A formal agreement isn't required for conspiracy; we can infer from the actions of the conspirators that there was an agreement to commit a felony.
- Penalties - punished by one degree less than actual crime.
- No person shall be charged with conspiracy to commit a misdemeanor.

CRIMINAL SOLICITATION

- A person is guilty of criminal solicitation if, with the intent that another person engage in conduct constituting a felony, he or she solicits, commands, requests, induces, employs or otherwise attempts to promote or facilitate another person to engage in conduct constituting a felony within or without the state. NMSA 1978, Section 30-28-3.

ACCESSORY

- Not a crime but a legal theory that is very helpful for law enforcement.
- Similar to conspiracy but different.
- A person may be charged with and convicted of the crime as an accessory if he or she procures, counsels, aids or abets in its commission and although he or she did not directly commit the crime and although the

principal who directly committed such crime has not been prosecuted or convicted, or has been convicted of a different crime or degree of crime, or has been acquitted, or is a child under the Children's Code. NMSA 1978, Section 30-1-13.

- An accessory is charged at the same level and with the same crime as the actual perpetrator of the crime. In other words, if you assist someone to commit a crime, in addition to conspiracy you can also be charged with the primary crime.
- Do not have to be present at the time the crime is being committed to be charged as an accessory.
- Must share criminal intent of the primary offender. By giving a number of examples, we can better understand the legal theory of accessory.

EXAMPLES OF ACCESSORY

- 1960's. Charles Manson lived in a desert commune outside of Los Angeles. He gave guns to members of his group and told them to go into town and kill people. They killed a number of people and were charged with first degree murder. What can he be charged with?

Answer:

Even though Charles Manson was fifty miles away when the crimes occurred, he was charged and convicted of first degree murder. This is because he was an accessory. He helped plan the murder and also gave guns to the others so that they could commit murder.

- 1990's. Tanya Harding was an ice skater who wanted to get ahead of her main rival. She was in Oregon and told her bodyguard that her rival would be in Michigan. She gave him maps and suggested he injure her. The bodyguard went to Michigan (Tanya Harding stayed in Oregon) and injured her opponent. He used a deadly weapon. Since Tanya Harding aided and abetted the commission of this crime, what crimes should she be charged with?

Answer:

Tanya Harding can be charged with Aggravated Battery (deadly weapon) and conspiracy. She gave maps and assisted – aided and abetted – the bodyguard to commit the crime. Therefore, she can be charged with the same crimes that her bodyguard was charged with.

- Can a female be charged with rape? In the summer of 2002, in Salt Lake City, a self-proclaimed prophet and his wife went into a house and kidnapped a fourteen year old girl named Elizabeth Smart. When the trio reached a remote campsite, the wife tried to remove Elizabeth's pajamas. When she resisted, the wife threatened to have her husband forcibly do it.

The husband then raped her with his wife's help. Can she be charged with rape?

Answer:

Yes. The female helped take clothes off of Elizabeth Smart, thereby assisting – aiding and abetting - the male to commit the crime of rape. She also can be charged with rape.

More examples . . .

Three civil rights workers in the 1960's were ambushed by the Ku Klux Klan and killed. In 2005, a federal jury convicted the leader, now eighty, of manslaughter.

The leader wasn't present when they were killed but set a black church on fire which lured the workers to the ambush site. He also planned the attack and recruited the Klansmen.

Auschwitz in the 1940's was a Nazi death camp. In 2015, the bookkeeper – the one who ordered gas for the gas chamber – was found guilty as an accessory to murder because of his role in killing thousands of people.

- Mere presence is not enough
The fact that defendant was with the forger of checks when she cashed them is not sufficient to show aiding and abetting.
State v. Hermosillo (1973).
- But helping the forger can be aiding and abetting
Defendant did not pass the check but was convicted of forgery.
There was evidence that he aided and abetted the unidentified woman who actually passed the check. The evidence showed that he vouched for and endorsed the check forged by his unidentified companion. His conviction was affirmed. State v. Martinez (1973)

Facts:

Two males are in a vehicle at a drive up window at a bank. The driver gives a forged check to the teller. Do we have enough to arrest the passenger?

Answer:

Mere presence is not enough. The officers who are dispatched need to establish that the passenger and the driver share an intent to commit a forgery.

EXAMPLE OF CONSPIRACY AND ACCESSORY

FACTS

The amount required for felony shoplifting used to be \$250. NMSA 1978, Section 30-16-20. Two offenders wandered through the Sears store in Albuquerque, sometimes close to one another, and shoplifted jeans which they placed in shopping bags they carried. They appeared to be working together. Defendant took merchandise worth \$175 while the other offender took

merchandise worth \$145. State v. Armijo (1995).

Can we combine the value of the items taken ($175 + 145 = 320$) to make this a felony shoplifting? Let's look at accessory and conspiracy once more.

- Accessory

This is a legal theory, not a criminal offense, but it's helpful for law enforcement. Under this theory, one who participates (aids or abets) with others in a criminal activity is treated as if he or she committed the criminal acts of the other members. In this case, to have a felony, we first have to show they were an accessory to one another. If we can't show accessory, we simply have two misdemeanors. Do we have accessory here? (yes)

- Conspiracy

We do not need to show a formal agreement that they conspired together to commit a particular crime. Look at the actions here: they wander together, sometimes close to one another, and both put jeans into shopping bags. Do we have enough to charge conspiracy here? Remember, we can only charge conspiracy if we have a felony offense. State v. Armijo (1995). What charges?

Answer:

Court of Appeals affirmed convictions of felony shoplifting and conspiracy.

FACTS:

Defendant sat in the backseat of a parked vehicle in Curry County. The driver got out, entered a nearby vehicle, and sold drugs. Bad move on the driver's part: the buyer was an undercover police officer. Eight officers quickly surrounded the two vehicles.

Defendant, in the nearby vehicle, was handcuffed and searched. He had over \$500 cash and meth in his pocket. Based on these facts, should we charge him as an accessory?

State v. Morales (2008).

Answer:

Mere presence is not enough. The state must show Defendant had knowledge of what was going on. Next, the state must show Defendant had intent to distribute drugs. But there was no evidence that Defendant knew the driver was going to sell drugs when he left the vehicle. There was no evidence he saw a drug deal or aided or conspired with the driver.

Court of Appeals held there were not enough facts to support probable cause to arrest. More facts might have changed the outcome. For example, what was Defendant's demeanor? What did Defendant say to the officer? What did the Driver say? Because there was no probable cause, everything found on the Defendant was suppressed.

PARTIES TO A CRIME

According to the Parties to a Crime statute, any person who aids or abets another in the

commission of a crime in violation of any provision of the Motor Vehicle Code shall be guilty of such offense. NMSA 1978, Section 66-8-120.

- When there is a traffic code violation, and the accessory theory is applicable, the Parties to a Crime statute may be helpful.

FACTS:

In Quay County (Tucumcari), Defendant (passenger) and driver were so intoxicated they were refused service in two different bars. Defendant (passenger) bought a twelve-pack of beer and suggested Driver drive so they could continue to party. Soon, Driver rear-ended a van filled with people. Two died and five others were injured. Seven open cans were found in Driver's vehicle.

The driver had a breath alcohol content of .19. Defendant (passenger) told officers he knew Driver was intoxicated at the time of the crash, that he should have taken Driver's keys away, and he should have avoided the trip. Driver was charged with vehicular homicide. What about the passenger?

Answer:

For aiding and abetting, generally the parties must share intent. Vehicle homicide, however, has a different standard: that the driver purposefully engaged in an unlawful act (conscious wrongdoing) and the passenger encouraged and gave assistance.

Court of Appeals found Defendant provided encouragement and assistance to Driver. He was aware Driver was intoxicated (denied service twice), encouraged Driver to continue to drive, and purchased additional alcohol. These facts suggest a shared knowledge of conscious wrongdoing. Passenger's conviction for vehicle homicide upheld. State v. Marquez (2009).

FACTS:

The driver of the vehicle was a lawyer, the passenger a sergeant with the New Mexico State Police. It was Defendant's (passenger) idea to go out for a few drinks in Santa Fe. Defendant (passenger) encouraged Driver to go to a second bar where both consumed more alcohol, purchased by Defendant. In downtown Santa Fe, Driver struck and killed a pedestrian.

Driver (the lawyer) was convicted of vehicular homicide. Can both the driver and passenger be charged with vehicular homicide?

Answer:

Court of Appeals, noting the accessory theory of the Parties to a Crime statute, said yes. In the criminal code we say we're charging someone as an accessory, NMSA 1978, Section 30-1-13, in the traffic code as a party to the crime.

More than mere presence is required; the state must show aiding and abetting. Obviously the passenger didn't drive but he encouraged another to do so – and that's aiding and abetting. Defendant (passenger) will go to trial. State v. Lovato (2011).

News item: Cleared in Death

A Santa Fe Judge agreed with the Defense that there was insufficient evidence to convict the passenger (former NMSP Sergeant) with vehicle homicide. Albuquerque Journal, February 21, 2012.

Note:

Even though passengers can be charged as a parties to a crime, the state still has the burden of proving the passenger is guilty.

WHAT CRIMES WOULD YOU CHARGE IN THE FOLLOWING SITUATIONS?

- Two or more people conspire to commit a residential burglary and are caught during the burglary. What charges?

Answer:

Residential Burglary and Conspiracy for all people involved.

- One person robs a store, another is the getaway driver. What charges for the robbery and the getaway driver.

Answer:

Robbery and Conspiracy for the robber and the getaway driver. The getaway driver is being charged because he or she assisted – aided and abetted – the robber to commit the crime.

- One person robs a store, a second person is the getaway driver, and a third person is the lookout person. What charges for the robber, the driver, and the lookout person?

Answer:

Robbery and Conspiracy for all parties involved.

- One person robs a store, a second person is in the backseat, and a third person, heavily intoxicated, is in the backseat, sound asleep. What charges for the person who is sound asleep?

Answer:

The state must prove that the passenger either aided or abetted the robbery or was a willing participant, a co-conspirator. This will be determined through investigation. Mere presence is not enough.

HELPFUL TIPS

- We have learned about Attempt, Accessory and Conspiracy. It's important to remember that Attempt and Conspiracy are crimes. Accessory is not a crime but a legal theory that is helpful to law enforcement.

- If two or more people are involved in a crime, we generally charge the primary crime (robbery, burglary, etc.) and also conspiracy.
- For accessory and conspiracy mere presence is not enough. We must show that the second person shared the criminal intent of the first person.
- There is no crime of attempt to commit a misdemeanor.
- There is no crime of conspiracy to commit a misdemeanor.

CONCLUSION

We have discussed a number of initiatory crimes. Most difficult to understand, perhaps, is the difference between conspiracy and aiding and abetting. One goal of this outline has been to give you the basis to understand these legal terms and others.

