Chapter VI

Parties to Crime and Vicarious Liability

Chapter Overview:

Under the common law, parties involved in the commission of a crime were divided into four categories: principles in the first degree, principles in the second degree, accessories before the fact, and accessories after the fact. Today, however, most states have done away with these categories and replaced them with a simplified set of two categories, accomplices and accessories, though the language used may vary by state. Accomplices are generally anyone involved before or during the commission of a crime, and accessories include anyone who aids an offender after the crime.

It does not require a great deal of involvement for one to be considered an accomplice. Generally anyone who is viewed to have aided and abetted or otherwise encouraged the commission of a crime can be held liable for the crime itself. An accomplice's role in criminal activity does not have to be found to have been necessary for the commission of the crime in order for that person to be held liable. The operative element of accomplice liability is the intent, which includes two parts. First the accomplice must intend to provide assistance. Additionally, though, the accomplice is also required to have intended the primary party to commit the particular crime being charged.

Accessories to a crime provide assistance to the perpetrator after the crime has been committed, such as by helping them escape prosecution. The charge of accessory typically requires that a felony have been carried out, that the accessory have knowledge of the felony and that the individual they are aiding has committed that felony, that the accessory take affirmative action in aiding the perpetrator and not merely an act of omission in failure to aid prosecution, and that the accessory have the criminal intent to hinder legal action against the perpetrator of the felony.

In some cases where a crime has been committed, prosecutors may hold accountable persons other than those who directly committed the crime. This is called vicarious liability and it can be extended to parents of a minor offender, employer of an offender who committed a crime while acting in their capacity as an employee, and owners of automobiles that an offender is driving. A special category of vicarious liability is known as corporate liability, by which a corporate entity can be held liable for the acts of its employees. Vicarious liability is typically also applied to the owner of a vehicle that receives a parking ticket, whether the owner is the person who carried out the illegal parking or not.

Some states have laws extended various liability to the parents of youthful offenders, called parental responsibility laws. Individuals others than parents may also be subject to vicarious liability for the acts of a minor when drinking is involved. If the drinking of minors leads to accident or injury, an adult providing alcohol to said minors could be held accountable. In this supplemental chapter you will read Virginia statutes and case laws that will show you how Virginia defines and treats the various parties to a crime.

I. Parties to a Crime:

Section Introduction: Many people may be involved in the commission of a crime and they may be subject to varying degrees to criminal liability. The following statutes show how Virginia defines the various actors in a crime. It is important, however, to note that generally, the law makes no distinction between principals and accessories with crimes that are misdemeanors. If a defendant is shown to have had the requisite mental state and to have done sufficient acts to have criminal liability is a principal; otherwise, he is innocent. Furthermore, for many of the criminal actions included in the code, all persons involved in the crime are made liable as principals in the first degree. The portion of the arson statute included below is an example of such an elimination of the distinction.

Virginia Code § 18.2-18. How principals in second degree and accessories before the fact punished.
In the case of every felony, every principal in the second degree and every accessory before the fact may be indicted, tried, convicted and punished in all respects as if a principal in the first degree; provided, however, that except in the case of a killing for hire under the provisions of subdivision 2 of § 18.2-31 or a killing pursuant to the direction or order of one who is engaged in a continuing criminal enterprise under the provisions of subdivision 10 of § 18.2-31 or a killing pursuant to the direction or order of one who is engaged in the commission of or attempted commission of an act of terrorism under the provisions of subdivision 13 of § 18.2-31, an accessory before the fact or principal in the second degree to a capital murder shall be indicted, tried, convicted and punished as though the offense were murder in the first degree.

Virginia Code § 18.2-19. How accessories after the fact punished; certain exceptions.
In the case of every felony, every accessory after the fact shall be guilty of a Class 1 misdemeanor; provided, however, no person in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister, by consanguinity or affinity, or servant to the offender, who, after the commission of a felony, shall aid or assist a principal felon or accessory before the fact to avoid or escape from prosecution or punishment, shall be deemed an accessory after the fact.

Virginia Code § 18.2-21. When and where accessories tried; how indicted.
An accessory, either before or after the fact, may, whether the principal felon be convicted or not, or be amenable to justice or not, be indicted, tried, convicted and punished in the county or corporation in which he became accessory, or in which the principal felon might be indicted. Any such accessory before the fact may be indicted either with such principal or separately.

Virginia Code § 18.2-77. Burning or destroying dwelling house, etc.
A. If any person maliciously (i) burns, or by use of any explosive device or substance destroys, in whole or in part, or causes to be burned or destroyed, or (ii) *aids, counsels or procures the burning or destruction of any dwelling house* ... he shall be guilty of a felony, punishable by imprisonment for life or for any period not less than five years and, subject to subdivision g of § 18.2-10, a fine of not more than $100,000. Any person who maliciously sets fire to anything, or *aids, counsels or procures the setting fire to anything*, by the burning whereof such occupied

dwelling house, manufactured home, hotel, hospital, mental health facility or other house, or railroad car, boat, vessel, or river craft, jail or prison, church or building owned or leased by a church that is immediately adjacent to a church, is burned shall be guilty of a violation of this subsection. (emphasis added)

II. Accomplice Liability:

Section Introduction: If an individual assists the perpetrator of a crime with the dual intentions both to providing the assistance and that the party receiving assistance commit the crime in question, then that individual can be held liable as an accomplice. Consider the following Virginia case which draws a defendant's liability into question.

Jones v. Commonwealth, 208 Va. 370 (1967)

Procedural History: The Corporation Court of the City of Norfolk, H. Lawrence Bullock, J., found defendant guilty of breaking and entering with intent to commit robbery and attempted robbery and he appealed.

Issue(s): Was the evidence that accused came to house in company with actual perpetrator of crimes and was present during commission of the offenses, and fled scene in order to escape arrest sufficient to support the conclusion that accused was aider and abettor beyond a reasonable doubt?

Facts: On January 27, 1966 Bessie F. Brown, an elderly woman notified the police that she had heard that her 'house was going to be robbed' and asked for protection. Acting on this information, Detective D. C. Scott and another police officer were sent to the Brown residence. They arrived about 9:15 P.M., and Detective Scott took a position at a window in the living room where he could not be seen from the outside but could observe the street. The other officer took a position in the dining room from which he operated a radio telephone, while Mrs. Brown stood in the hall at the front door.

A few minutes later Detective Scott saw Jones and another man, later identified as Waddell Flood, walking along the street toward the Brown house. Both men walked up the steps and onto the porch. One of the men knocked on the door and said that he had a telegram for Mrs. Brown. She opened the door and on envelope was handed to her. Flood jumped through the door and grabbed her. Detective Scott immediately came to her rescue, knocked Flood down, and subdued him.

After leaving Flood in the custody of the other officer, Scott went through the front door in the effort to apprehend Jones whom he had seen standing on the porch. However, when he reached the porch Jones fled and Scott was unable to overtake him. By radio telephone Scott notified other police officers in the vicinity of Jones' escape and asked their assistance in apprehending him. Within five minutes thereafter Jones was picked up by an officer about one block from the Brown house. Jones was taken to the Brown house and was positively identified by Scott as one

of the two men he had seen come onto the porch just before Flood's entrance. When searched Jones was found to be carrying on his person a straight razor in a brown leather case.

At the trial Jones denied that he was with Flood at the time of the alleged burglary and attempted robbery. He said that at the time of his apprehension he was returning home from a neighborhood restaurant. While he admitted at the trial that he was at Flood's home about two hours prior to the incident which had occurred at the Brown house, he further admitted that he had previously testified falsely in the police court that he did not know Flood and had not been with him during the day of the alleged offense.

Holding: *Reversed and remanded.*

Opinion: EGGLESTON, Chief Justice.

A principal in the first degree is the actual perpetrator of the crime. A principal in the second degree, or an aider or abettor as he is sometimes termed, is one who is present, actually or constructively, assisting the perpetrator in the commission of the crime. In order to make a person a principal in the second degree actual participation in the commission of the crime is not necessary. The test is whether or not he was encouraging, inciting, or in some manner offering aid in the commission of the crime. If he was present lending countence, or otherwise aiding while another did the act, he is an aider and abettor or principal in the second degree. 1A Mich.Jur. Accomplices and Accessories ss 3, 4, pp. 64, 65, and cases there collected.

Code s 18.1-11 (Repl.Vol.1960) provides: 'In the case of every felony, every principal in the second degree and every accessory before the fact may be indicted, tried, convicted and punished in all respects as if a principal in the first degree, * * *.'

In the present case the trial court sustained the contention of the Commonwealth that Jones, although not the actual perpetrator of the crimes of burglary and attempted robbery, was present lending countenance while Flood perpetrated the acts. The defendant admits that Detective Scott's positive identification of him warrants the court's finding that he was present at the scene. But he contends on appeal, as he did in the trial court, that such evidence merely shows that he (Jones) was present while Flood perpetrated the crimes and fails to show that he was the aider and abettor in the commission of the offenses.

It is, of course, well settled that mere presence and consent are not sufficient to constitute one an aider and abettor in the commission of a crime. 'There must be something done or said by him showing (a) his consent to the felonious purpose and (b) his contribution to its execution. To make him an aider or abettor, he must be shown to have 'procured, encouraged, countenanced, or approved' the commission of the crime. * * * To constitute one an aider and abettor, it is essential that he share the criminal intent of the principal or party who committed the offense.' 1A Mich.Jur. Accomplices and Accessories s 4, pp. 66, 67, and cases there collected.

As was said in Triplett v. Commonwealth, 141 Va. 577, 586, 127 S.E. 486, 489, 'To constitute one an aider and abettor, he must be guilty of some overt act, or he must share the criminal intent of the principal or party who commits the crime.' See also, Stone v. Commonwealth, 176 Va.

570, 576, 11 S.E.2d 728, 730, 731, and cases there cited; Foster v. Commonwealth, 179 Va. 96, 100, 18 S.E.2d 314, 316.

In the present case the evidence adduced by the Commonwealth falls short of this requirement. There is no showing of any overt act by Jones which indicated his participation in the illegal conduct of Flood. Nor is there any direct evidence that Jones shared the criminal intent of Flood. There is no evidence from either Mrs. Brown or the police officers that Jones was involved in a plot to burglarize the Brown house. There is no evidence that Mrs. Brown had any money or other valuable property at her home, or that Jones thought she had such.

The only evidence which would tend to support the inferences that Jones was acting in concert with Flood is the fact that the two men were together a short time before the incident, approached the Brown house together and walked onto the porch, and that Jones remained on the porch while Flood entered the house and attacked Mrs. Brown. But as we have frequently said, mere presence of a party when a crime is committed is not sufficient to constitute one an aider and abettor in the commission of a crime. Snyder v. Commonwealth, 202 Va. 1009, 1015, 121 S.E.2d 452, 457, and cases there cited.

At the trial below and on appeal the Commonwealth stressed the fact that Jones fled the scene when he observed that the police officer had interrupted Flood's attack on Mrs. Brown. It is true that we have said that evidence of flight to avoid arrest is admissible as tending to show consciousness of guilt on the part of the accused. Sturgis v. Commonwealth, 197 Va. 264, 268, 88 S.E.2d 919, 921; Bowie v. Commonwealth, 184 Va. 381, 392, 35 S.E.2d 345, 350, and cases there cited. But as we pointed out in Jenkins v. Commonwealth, 132 Va. 692, 696, 111 S.E. 101, 25 A.L.R. 882, the flight of an accused does not raise a presumption of guilt but is only a circumstance to be considered by the jury or fact-finding court along with other facts and circumstances tending to establish the guilt of the accused.

The evidence on behalf of the Commonwealth amounts to this: Jones came to the Brown house in company with Flood, the actual perpetrator of the crimes, was present during the commission of the offenses, and fled the scene in order to escape arrest. While these related circumstances create a strong suspicion that Jones was an aider and abettor in the commission of the offenses, they do not support such a conclusion beyond a reasonable doubt. See United States v. Paige, 4 Cir., 324 F.2d 31, 32, where it was held that mere presence at the perpetration of a crime and flight from the scene are not sufficient to prove *Particeps criminis* beyond a reasonable doubt.

For these reasons the judgment order complained of is reversed and the cases are remanded for a new trial in conformity with the principles here stated.

Critical Thinking Questions: If the court determined that Jones was only in “mere presence” which does not qualify him as a principle to the crime, why was the case remanded for a new trial? Were there enough facts upon which a jury can draw a reasonable inference that the defendant was a party to the crime other than presence and flight? Is it reasonable to assume that defendant was a party since he expressed no there reason for being at the victim’s house with the defendant? Is a reasonable assumption enough to find in favor of the jury verdict?

III. Accessory After the Fact:

Section Introduction: Accessories to a crime are individuals who aid the perpetrators after the commission of the initial crime. Accessories can be held criminally accountable for their actions, such as in the following Virginia case.

Wren v. Commonwealth, 26 Gratt. 952 (1875)

Procedural History: The accused was indicted in the said Hustings court, as *accessory* after the fact to a felony, of which one John Dull was convicted in said court. The indictment after setting out, in proper form, the felony committed by the said John Dull, charged "that John Wren" (the plaintiff in error), "well knowing the said John Dull to have committed the said felony in form aforesaid; to-wit, since the said felony was committed in the year aforesaid, in the city aforesaid, him the said John Dull did then and there unlawfully *receive, harbor and maintain,* against the peace and dignity of the commonwealth of Virginia."

Under this indictment the accused was found guilty at the November term of the said Hustings court; and his fine assessed by the jury at one cent; and was sentenced by the court to twelve months imprisonment in the city jail; and to labor upon the public streets, or other public works, for seven hours a day during said term of imprisonment. To that judgment a writ of error was awarded by this court; and upon the hearing of said writ of error at the last term, the judgment was reversed, and the accused was remanded to the said Hustings court for a new trial.

It is proper to remark, that the judgment and opinion of this court upon the former hearing was confined to a single point; and that was that the instructions given by the court were calculated to mislead the jury, and were therefore erroneous. The opinion was confined to the single point, and the judgment was reversed upon that ground only.

At the February term of the said Hustings court, the accused was again tried upon the same indictment; was again found guilty, and his fine assessed by the jury at $200; and was sentenced by the court to imprisonment for the period of ten months and until payment of said fine.

To this judgment a writ of error was awarded by this court.

Issue(s): Was it proper in this case for an instruction to be given to the jury regarding the elements of a principle?

Facts: The evidence shows that the accused is a detective officer, belonging to the police force of the city of Richmond. One Jos. M. Fowlkes, a gentleman from the country, who seems to have been an easy victim of certain swindlers and sharpers, was inveigled into the house of one John Dull, and induced by an accomplice of Dull to try his chances in the drawing of a bogus lottery. The whole thing was a cheat and swindle; and Mr. Fowlkes, after being induced to believe that he was drawing large sums of money, soon found himself the loser of five hundred and seventy dollars. When he left Dull's house he went to see a friend (his commission merchant), who called a policeman near by, and he returned with the policeman to the scene of the swindle, but found

the house closed, and the inmates gone. The policeman introduced him to Wren (the plaintiff in error), whom they met on the street, as a detective, and Fowlkes told him that he had been robbed of five hundred and seventy dollars, and said he wanted him to try to get his money back. Wren took Fowlkes in a carriage and carried him to the house of Knox, whom he called the chief detective of the city, and who it seems was a partner of Wren in the detective business. After some consultation with Knox, whom they found at dinner, it was agreed that they would meet at the St. Charles hotel that evening. Fowlkes says he did not ask Wren to arrest the parties, but told him he wanted to get his money back; that his object in employing Wren was to get his money. Wren and Fowlkes, after seeing Knox, separated to meet at the St. Charles hotel. In the meantime, after parting with Wren, Mr. Fowlkes met with an old friend, a lawyer, Mr. Saml. Page, and consulted with him, giving him an account of what had happened at Dull's house. When near the St. Charles hotel, and about to go into an office of a justice of the peace for the purpose of getting a warrant of arrest, Wren approached them, and said he had "brought the old man down" (meaning Dull), and Page, Fowlkes and Wren went together into the St. Charles hotel, where they found Dull. Fowlkes demanded his money of Dull, saying he had been robbed of it at his house. This Dull denied, saying Fowlkes had lost it at gambling, while Fowlkes declared it had been stolen from him. Dull then said he had nothing to do with it; that he was not in the room when the money was lost, and told Fowlkes with an oath to go after those who had won the money. Wren was present and heard what passed, but was not asked to arrest Dull. Fowlkes asked Page to have him arrested; but Page said no, the time had not come yet.

Page's testimony as to the interview between himself, Fowlkes, Dull and Wren, is the same as that above detailed by Fowlkes. He says that Wren was not requested to arrest Dull; that he (Page) had no doubt Wren would have arrested Dull if he had been requested, and that he (Page) did not want Dull arrested then, because his arrest would have frustrated his plan in getting all the money he could out of Dull for his friend Fowlkes. The next time Wren appears on the scene is on the next day, when he informed Mr. George D. Wise, a practising attorney, that Knox wanted to see him at the Dispatch corner on Main street, and went with him to the corner, where they parted, and Knox took him (Wise) to the American hotel, where he was shown into a room occupied by Dull, Lewis and Purdy; and that Purdy gave him a sum of money to be paid over to Mr. Fowlkes. The parties then met at the Circuit court room, Page being present as the counsel of Fowlkes, and Wise as the counsel of Dull. A certain sum of money was paid to Fowlkes, and the following receipt signed by him:

> Richmond Va. Octo. 8th 1874. "Rec'd of John C. Dull two hundred and eighty-five dollars, in full settlement of all demands and claims against the house of Mr. Dull; hereby binding myself to make no more demands upon him, his house or any one else for any occurrence there: this is to be a settlement in full.
>
> Signed Jos. M. FOWLKES."

Wren was present at this interview, but took no part in it, sitting some distance off in the judge's chair, but near enough to hear all that occurred. After the money was paid over Wren requested Page to see Fowlkes, and get him to pay him for his services. This Fowlkes refused to do.

Holding: *Reversed.*

Opinion: CHRISTIAN, Judge.

The court below refused to certify the facts proved because the evidence was conflicting; but certified all the evidence offered, both by the Commonwealth and the accused. According to the rules established by this court, in considering such a bill of exceptions, the court will reject all the evidence offered by the prisoner in conflict with that offered by the Commonwealth, and determine, upon the testimony of the Commonwealth alone and all fair and legal inferences to be drawn therefrom, whether the offence charged in the indictment is made out and established by the proof: in other words, whether admitting all the facts proved by the Commonwealth, without reference to those proved by the accused, these facts constitute the offence charged in the indictment.

The accused is charged with accessorial guilt. He is charged in the indictment with unlawfully receiving, harboring and maintaining John Dull, knowing him to have committed a felony. This charge constitutes what the law denominates "an accessory after the fact." The common law definitely and distinctly defines who is such an offender. He is a person who knowing a felony to have been committed by another, receives, relieves, comforts or assists the felon. 1 Hale P. C. 618; 1 Arch. Crim. Pract. 78, and cases there cited.

The reason on which the common law makes a party in such a case criminal, is that the course of public justice is hindered, and justice itself is evaded by facilitating the escape of the felon.

To constitute one an accessory after the fact, three things are requisite: 1. The felony must be completed; 2. He must know that the felon is guilty; 3. He must receive, relieve, comfort or assist him. It is necessary that the accessory have notice, direct or implied, at the time he assists or comforts the felon, that he has committed a felony. 2 Hawk. ch. 29, § 32. And although it seemed at one time to be doubted, whether an implied notice of the felony will not in some cases suffice, as where a man receive a felon in the same county in which he has been attainted, which is supposed to have been a matter of notoriety, it seems to be the better opinion, that some more particular evidence is requisite to raise the presumption of knowledge. 1 Hale 323, 622; 3 P. Wms. R. 496; 4 Black. Com. 37.

But knowledge of the commission of the felony must be brought home to the accused, and whether he had such knowledge is always a question for the jury.

As to the receiving, relieving and assisting, one known to be a felon, it may be said in general terms, that any assistance given to one known to be a felon in order to hinder his apprehension, trial or punishment, is sufficient to make a man accessory after the fact; as that he concealed him in the house, or shut the door against his pursuers, until he should have an opportunity to escape; or took money from him to allow him to escape; or supplied him with money, a horse or other necessaries, in order to enable him to escape; or that the principal was in prison, and the jailer was bribed to let him escape; or conveyed instruments to him to enable him to break prison and escape. This and such like assistance to one known to be a felon, would constitute a man accessory after the fact. 1 Hale 619, 621; 2 Hawk. c. 29, § 26. But merely suffering the principal to escape, will not make the party accessory after the fact; for it amounts at most but to a mere omission. 1 Hale 619; 9 H. iv., 1. Or if he agree for money not to prosecute the felon; or if

knowing of a felony, fails to make it known to the proper authorities; none of these acts would be sufficient to make the party an accessory after the fact. If the thing done amounts to no more than the compounding a felony, or the misprision of it, the doer will not be an accessory. 1 Bishop, § 633; 1 Hale 371, 618. “The true test (says Bishop, § 634) whether one is accessory after the fact, is to consider whether what he did was done by way of personal help to his principal, with the view of enabling his principal to elude punishment; the kind of help rendered appearing to be unimportant.”

In *Regina v. Chapple & others*, 9 Car. & Payne R. 355, it was held that “to substantiate the charge of harboring a felon, it must be shown that the party charged did some act to assist the felon personally.” This decision is in strict accordance with the established principles of the common law. See Arch. Crim. Plead. and Pract. 78-9, note.

Now applying these well recognized principles to the case before us, we are of opinion that the Commonwealth has failed to show that the plaintiff in error is an accessory after the fact to the felony committed by John Dull. Upon the Commonwealth's evidence, giving to it full force and effect, with all the fair and legal inferences to be drawn from it, and discarding the evidence offered by the accused, the case made out does not contain the constituent elements required to make the accused *an accessory after the fact.*

Shortly after the money was paid Dull was arrested; Page having in his pocket, both the evening before at St. Charles Hotel and at the interview at the Circuit court room, a warrant for the arrest of Dull. But Wren was never requested either by Page or Fowlkes to serve the writ. After the arrest of Dull, Page met with Wren, who said to him with an oath, “Don't you think that old fool has gone and had Dull arrested. If Dull is to be shown up then all shall be shown up.”

The only other testimony connecting Wren with Dull, is that of Captain Disney, a police officer; who testified as follows: “That soon after Dull's arrest Wren came to the station house, and was carrying Dull into witness' private office, when witness stopped him; and Wren said he wanted a private interview with him; but witness refused to allow such interview; that immediately afterwards when witness was searching another prisoner, he saw Dull attempting to slip something in Wren's hand; which he also stopped; thought it was money but could not say. Wren said to Dull, when Disney was afterwards searching him, anything you give Captain Disney will be safe. When witness refused the private interview with Dull, Wren said “never mind the Chief will be up here presently; and said with an oath, he would have Dull bailed out if it cost ten thousand dollars.”

This is all the testimony connecting Wren in any way with Dull; and we are constrained to say, that whatever evidence there may be, tending to show that he was guilty of either compounding a felony, or of misprision of felony, there is no evidence sufficient in law to show that he gave any assistance to Dull, or any personal aid of any kind, to hinder his apprehension, trial or punishment. On the contrary he brought Dull into the presence of his prosecutor and his counsel; and though informed by Page that he intended to get a warrant for Dull's arrest, he did not inform Dull of it. He advised Page, it is true, not to take out a warrant at once; and Page concurred with him in that view, thinking it would frustrate his design in getting the money back. His object, as was that of Page, was to get the money of which Fowlkes had been swindled. But there is no

evidence to show that his design was to enable Dull to elude or escape punishment. His failure to make the arrest himself, nor his effort, or expressed purpose to get him bailed after his arrest, nor his threat that as Dull is to be shown up others should be shown up also, none of these acts constitute Wren an accessory after the fact to the felony committed by Dull. If, knowing that a felony had been committed, he concealed it, then he is guilty of misprision of felony. If, knowing a felony to be committed he concealed it, or forebore to arrest and prosecute the felon, for fee or reward, then he is guilty of compounding a felony. Both of these are grave offences; but they do not (if proved) constitute a party an accessory after the fact. This view of the case makes it unnecessary to pass upon the 1st assignment of error:

The court is therefore of opinion, that the Hustings court erred in not setting aside the verdict of the jury as contrary to the law and the evidence. The judgment must therefore be reversed, and the case be remanded to the said Hustings court for a new trial to be had therein in conformity with the foregoing opinion.

Critical Thinking Question(s): Do you believe that the defendant (Wren) was an accessory to Dull the alleged swindler? Would Wren's actions today be considered an "abuse of authority" or, at least, a dereliction of his duties? Would the outcome have been different if Wren was a lay citizen or even a private attorney acting on Dull's behalf? Why or why not?

IV. Vicarious Liability:

Section Introduction: In some circumstances an individual may be held liable for actions that they did not commit based on their relationship to the perpetrator. One such relationship includes that of an individual who hires another to commit a crime. Consider the consequences of such liability in the following case.

Ashford v. Commonwealth, 47 Va.App. 676, 626 S.E.2d 464 (2006).

Procedural History: Appellant was indicted for solicitation of capital murder for hire, in violation of Code §§ 18.2-29 and 18.2-31, and with attempted capital murder for hire, in violation of Code §§ 18.2-25 and 18.2-31. At trial, appellant made a motion to require the Commonwealth to elect between the charges of solicitation and attempted murder for hire because the charges should be merged. The trial court denied the motion. At the end of the Commonwealth's evidence, appellant moved to strike the charge of solicitation, arguing again that the offense of solicitation merged into attempted murder and that both charges could not go forward. That motion was also denied. The jury convicted appellant of both offenses.

After trial, appellant moved to set aside the jury verdict and to grant a new trial on the grounds that appellant committed no direct act and, thus, was wrongly convicted of attempted capital murder for hire and that the jury was prejudiced by the presentation of both charges at the same trial. In response to the motions, the judge stated:

> [W]hat more could [appellant] have done towards hiring a hit man than talking with him on the phone, giving him maps as to where the target, his wife, worked and lived, her

> parents lived, her grandparents lived; discussions telling him how to accomplish the act, making it look like it was a burglary that she had walked into and was killed; giving him instructions along those lines and further again paying $2,000 in cash through his mother?

Counsel for appellant responded: "Mr. Ashford may have done everything he had to." The trial judge denied appellant's motions.

Issue(s): Did the defendant's actions amount to the requisite "overt act" necessary to be convicted of attempted capital murder for hire?

Facts: In May 2003, appellant was charged with a number of offenses against his estranged wife, and placed in Henrico County East Regional Jail. While an inmate there, appellant met Landon Onek (Onek) and began talking about killing his wife. After a number of discussions, appellant finally asked Onek to kill his wife. In exchange, appellant stated that he would give Onek a car, a gun, and one thousand dollars. Appellant gave Onek detailed maps of his wife's neighborhood, her workplace, and a calendar of when he wanted her killed. Appellant's wife testified that the drawings were accurate. Onek told his attorney about the conversations with appellant, and his attorney advised him to cooperate with police officials.

The police interviewed Onek and viewed the maps and diagrams that appellant had drawn. The officers also gave Onek the phone number of a police investigator who would pretend to be a hit man for him to give to appellant. Onek gave the phone number to appellant, and the following day appellant called the investigator who posed as a hit man. Appellant told him that he wanted his wife killed, and the investigator agreed to kill appellant's wife if appellant paid him two thousand dollars. Appellant later told Onek about the conversation and the terms of the agreement.

During the phone conversation, appellant obtained the officer's address. A few days later, the investigator received maps of appellant's wife's house and workplace, a description of the visitation arrangements for appellant's children, and a letter that stated that appellant wanted his wife killed that weekend and that "there is no love lost, so be brutal if you need to." The following day, two thousand dollars arrived at the officer's address along with pictures of appellant's wife.

Holding: *Affirmed.*

Opinion: FITZPATRICK, Chief Judge.

David Ashford (appellant) appeals his convictions in a jury trial of attempted capital murder for hire, in violation of Code §§ 18.2-25 and 18.2-31, and solicitation of capital murder for hire, in violation of Code §§ 18.2-29 and 18.2-31. Appellant contends that (1) his actions did not amount to the requisite "overt act" necessary to be convicted of attempted capital murder for hire, and (2) the presentation of both charges to the jury in the same trial was error. We hold that appellant's actions were sufficient to support a conviction of attempted capital murder for hire and that the

trial court did not err in allowing both charges to be presented to the same jury. Therefore, we affirm.

Appellant first contends that he was wrongfully convicted of attempted capital murder for hire because there was insufficient evidence of an overt act. Appellant acknowledges that he did everything in his power to have his wife killed, but argues that the law requires the hit man perform an additional act toward the commission of the crime.

Whether the actions of a particular defendant rise to the level of an attempted crime is a fact-specific inquiry that must be decided on a case-by-case basis. *Howard v. Commonwealth*, 207 Va. 222, 228, 148 S.E.2d 800, 804 (1966). There are certain guiding principles, however. An attempt to commit a crime consists of: (1) an intent to perpetrate the crime, and (2) a direct act towards its commission. *Sizemore v. Commonwealth*, 218 Va. 980, 983, 243 S.E.2d 212, 213 (1978). The act must be more than mere preparation. *Martin v. Commonwealth*, 195 Va. 1107, 1110-11, 81 S.E.2d 574, 576 (1954); *Fortune v. Commonwealth*, 14 Va.App. 225, 229, 416 S.E.2d 25, 28 (1992). The distinction is that preparation "consists in devising or arranging the means or measures necessary for the commission of the offense and [] the attempt is a direct movement towards the commission after the preparations are made." *Martin*, 195 Va. at 1111, 81 S.E.2d at 577 (citation omitted). Additionally, where the intent is clearly shown, " 'any slight act done in furtherance of this intent will constitute an attempt.' " *Siquina v. Commonwealth*, 28 Va.App. 694, 701, 508 S.E.2d 350, 354 (1998) (quoting *Fortune*, 14 Va.App. at 229, 416 S.E.2d at 28).

Appellant clearly intended that his wife be murdered. He spoke incessantly about her impending death while he was in jail; attempted to hire two individuals to kill her; and drew detailed diagrams and maps in order to effectuate her murder. The issue, then, is whether his actions amount to an overt act in furtherance of the crime. Appellant has conceded that he did everything possible to accomplish the murder of his wife. Appellant argues, however, that because the hit man did not actually attempt to kill his wife that appellant cannot be found guilty of the attempt. Appellant relies on *Hicks v. Commonwealth*, 86 Va. 223, 9 S.E. 1024 (1889), in making this assertion.

In *Hicks*, the defendant was found guilty of attempting to administer poison with the intent to kill or injure another person. *Id.* at 224, 9 S.E. at 1024. The defendant spoke to Laura Long and asked her to poison the victim. *Id.* The defendant told her he was going to buy the poison and arranged a meeting with Long later that night. *Id.* at 224-25, 9 S.E. 1024, 9 S.E. at 1025. That night, the defendant's co-conspirator met Long and handed her the poison. *Id.* at 225, 9 S.E. at 1025. The co-conspirator directed Long to put the poison in the victim's coffee and to raise the alarm when the victim died. *Id.* She also offered to reward Long. *Id.* At that point, Long signaled to men in hiding and the co-conspirator fled. *Id.* Long "testified that she never agreed to administer the poison." *Id.*

In reversing the conviction, the Supreme Court determined that the defendant's actions were mere preparation, and explained, "as the party to whom the poison was delivered refused to administer it, *or to do any act in furtherance* of the design, there has been no direct act done

towards the commission of the offense, and, consequently, no attempt." *Id.* at 229, 9 S.E. at 1026 (emphasis added).

Hicks is distinguishable from the facts of the instant case. The defendant in *Hicks* was convicted of attempting to administer poison, a different substantive offense than attempting to commit murder for hire. *Id.* at 224, 9 S.E. at 1024. Soliciting an accomplice is not an element of poisoning whereas hiring a hit man is an overt act in furtherance of murder for hire, and it is an essential element of the offense.

Other courts addressing attempted murder for hire have reasoned that where a defendant has done everything possible to effectuate the murder, the hired killer's inaction is no bar to a conviction. The Supreme Court of Alaska opined "when the one hiring another to commit a crime has done everything he can to accomplish the criminal act through the hand of another and his conduct is no longer equivocal ... then he (the employer) has committed the crime of attempt." *Braham v. State*, 571 P.2d 631, 637 (Alaska 1977). Other courts have similarly upheld attempt convictions: "[w]e can envision nothing else the appellant could possibly have done to effect what he believed would be his wife's murder, short of committing the act himself (which is precisely what he did not want to do)." *United States v. Church*, 29 M.J. 679, 688 (A.C.M.R.1989). *See also State v. Mandel*, 78 Ariz. 226, 278 P.2d 413, 416 (1954) (defendant guilty of attempt where she "did everything she was supposed to do to accomplish the purpose [and] had it not been for the subterfuge, the intended victim would have been murdered"); *Stokes v. State*, 92 Miss. 415, 46 So. 627, 628-29 (1908) (same); *State v. Gay*, 4 Wash.App. 834, 486 P.2d 341, 346 (1971) (defendant guilty of attempt where "she had done everything that was to be done by her to accomplish the murder").

In the instant case, appellant had done much more than mere preparation. He requested two different people to kill his wife. He formulated diagrams of his wife's house and workplace, detailed when she would be at home and when the children would be away, and completed the payment of two thousand dollars to the hit man for the murder. As the trial judge noted and counsel for appellant admitted, appellant did everything within his power to have his wife murdered and completed all actions necessary to employ one for a "murder for hire." Consequently, the actions taken by appellant were sufficient to support a conviction of attempted capital murder for hire, and the law does not require the hit man to perform the useless act of pretending to actually shoot appellant's wife. To hold otherwise would be to render the offense "attempted murder for hire" a nullity. Because appellant had both the intent to commit murder for hire and completed a direct step in the commission of murder for hire, the trial court did not err in allowing the charge of attempt to go to the jury and in upholding the jury's verdict.

For the foregoing reasons, we affirm the judgment of the trial court.

Critical Thinking Question(s): Is this really a case of vicarious liability or is the defendant a principle in the first degree, in fact? If the maps, illustrations, and picture of the wife were discarded from evidence, would the defendant still be convicted of attempted murder or just solicitation? Why would the court not make actual "agreement" between the parties – the person solicited actually intends to carry out the crime – a requisite element for conviction in such a case? Is there a greater law enforcement interest at stake?

V. Corporate Liability:

Section Introduction: As the law views corporations as distinct entities in and of themselves, it is possible for a corporation to be held criminally accountable for the actions of its employees. Consider the following statute regarding solicitation.

Virginia Code § 18.2-425.1. Certain solicitation calls prohibited; penalties.
A. Any person who uses recorded solicitation calls for initial sales contacts shall be guilty of a Class 4 misdemeanor.
B. Any person who uses recorded solicitation calls which do not disengage or terminate when the party called attempts to terminate the call by any method which is in accordance with normal operating procedures of his receiver shall be guilty of a Class 3 misdemeanor.
C. Nothing contained herein shall be construed to permit any fine or penalty against any employee or agent who has been caused, directed or authorized by his employer to violate the provisions of this section. In such cases, the employer shall be subject to the sanctions prescribed in this section.

VI. Traffic Tickets and Vicarious Liability:

Section Introduction: Vicarious liability can sometimes also be extended to the owner of a vehicle in which another individual obtains a traffic ticket. The following Virginia case expresses this concept.

***James v. Commonwealth*, 178 Va. 28, 16 S.E.2d 296 (1941)**

Procedural History: The case is before this court on a writ of error to three final judgments, whereby England James, the accused, was convicted of aiding and abetting the commission of the offense of 'hit and run' on three separate indictments, and sentenced to be confined in the penitentiary for the terms of one year for each offense.

Issue(s): Was the evidence sufficient for the defendant to be convicted of aiding and abetting the commission of the offense of 'hit and run' on three separate indictments, and sentenced to be confined in the penitentiary for the terms of one year for each offense.

Facts: On April 27, 1940, England James invited Bertha May Smith to take a drive in his automobile. The accused, with her as his guest, drove to several places in Pittsylvania county and in North Carolina. Both of them drank wine and beer rather freely and frequently. About eight o'clock that night the accused permitted Bertha May Smith to drive while he sat to her right on the front seat. As she approached the city of Danville, the car struck and killed three pedestrians - Melvin Carter, Ernest Canady and Delbert Cope. Bertha May Smith, without stopping at the scene of the accident, drove the automobile to her home in Danville. There she got out of the car; the accused took the wheel and drove to his home in another part of the city. He parked the car at the back of his house, went to bed and there remained until after 10:00 p.m. He then arose, went to police headquarters and inquired about a wreck. When questioned by the police officer, he denied that he owned an automobile. A police officer was sent to the home of the accused, where

he found an automobile that showed physical evidence of having been in a collision. When accused was confronted with these facts, he gave an account of the accident and admitted that he was in the car at the time.

Holding: *Reversed and remanded.*

Opinion: HUDGINS, Justice.

An aider and abettor is defined by Mr. Chief Justice Campbell in *Stone v. Commonwealth*, 176 Va. 570, 11 S.E.(2d) 728. Numerous cases are cited to support the rule that, in order to constitute an aider and abettor, the accused must be guilty of some overt act or must share the criminal intent of the principal or the party who commits the crime. Mere presence, without more, does not constitute one an aider and abettor.

Judge Kelly, in *Brown v. Commonwealth*, 130 Va. 733, 107 S.E. 809, 16 A.L.R. 1039, quoting Minor's Synopsis Crim. Law, p. 11, says: 'A principal in the second degree is one not the perpetrator, but present, aiding and abetting the act done, or keeping watch or guard at some convenient distance. * * *. Every person who is present at the commission of a trespass, encouraging or inciting the same by words, gestures, looks or signs, or who in any way, or by any means, countenances or approves the same, is, in law, assumed to be an aider and abettor, and is liable as principal.'

The agreed statement of facts reveals that Bertha May Smith was so drunk at the time of the accidents that she 'did not know whether she was driving the car or not and had no recollection of the accident.' The owner of the car, knowing her condition, permitted her to drive. He claims that he was asleep at the time of the first collision, and that he was awakened by a jar, and glass cutting him in the face. Bertha May Smith remarked to him at the time, 'I believe I killed a damn man back there.' After being aroused from his slumber and apparently after Bertha May Smith made the above remark, he saw the car strike another man. He permitted Bertha May Smith to continue driving along the highway until she reached her home some distance from the scene of the accident. He then took the wheel and drove his car into the back yard of his home.

In *Story v. United States*, 16 F.(2d) 342, 53 A.L.R. 246, it is said: 'If the owner of a dangerous instrumentality like an automobile knowingly puts that instrumentality in the immediate control of a careless and reckless driver, sits by his side, and permits him without protest so recklessly and negligently to operate the car as to cause the death of another, he is as much responsible as the man at the wheel.'

None of the crimes charged is manslaughter. The offense is the failure to stop the automobile involved at the scene of the accidents, to furnish the information required and to render assistance to the parties injured. This statutory offense is a felony. The acts constituting the offense do not commence until after the injury or damages has been inflicted. *Henson v. Commonwealth*, 165 Va. 829, 183 S.E. 438. The accused was not drunk. He knew that Bertha May Smith was drunk. Nevertheless, he permitted her to drive, sat by her side, actually saw his automobile strike a man, and, in silence, allowed the driver to take him in his own automobile from the scene of the accident.

The accused contends that this evidence proves that the crimes were committed in his presence and nothing more. The fallacy of this contention is that it ignores the fact that the owner of the automobile is entitled to control its operation. Such owner, riding with a driver to whom he has temporarily surrendered the operation of the car, may or may not be criminally responsible for a single act of recklessness resulting in injury or death to a third party. An accident may happen in a split second, too quickly for the owner to exercise this right of control. The offenses in question were committed after the injuries had been inflicted upon the pedestrians. The accused, with full knowledge of at least two collisions, permitted the driver to leave the scene without protest. It was his duty to control the operation of the car. Failure to perform this duty made the owner a participant in the offenses proven to have been committed.

The Supreme Judicial Court of Massachusetts held, in *Commonwealth v. Sherman*, 191 Mass. 439, 78 N.E. 98, that the owner of an automobile was criminally responsible where the evidence showed that he was riding in the car and knew that it was being operated by another at an illegal rate of speed. The same court held, in *Commonwealth v. Saltman*, 289 Mass. 554, 194 N.E. 703, that the owner retained control of the operation of an automobile, notwithstanding the fact that his chauffeur was the medium through which that control was exercised. When such owner was seated beside the driver, failure to exercise such control and prevent, so far as he was able, any conduct of his driver in violation of the criminal laws made him criminally responsible.

In *People v. Odom* (Cal. App.), 66 P.(2d) 206, this is said: 'The offense of failing to stop an automobile which has struck and injured a person and to render assistance to the victim of the accident, * * *, applies with equal force to the owner of the machine who is riding therein at the time of the accident with full authority to direct and control the operation as it does to the person who is actually driving the vehicle. The term 'driver of the vehicle,' as it is used in the statute, includes the owner of the machine who is present and has the control of its operation.'

In *Goodman v. State,* 20 Ala.App. 392, 102 So. 486, it is said: 'In law the owner of an automobile is liable if the vehicle is being operated by such owner or under his control, and in all cases where the owner is present he is liable for a noncompliance with a statute, unless the operator disobeys his instructions, as the owner is in control of the vehicle.' See *People v. Rallo,* 119 Cal.App. 393, 6 P.(2d) 516; *People v. Steele,* 100 Cal.App. 639, 280 P. 999; *People v. Hoaglin,* 262 Mich. 162, 247 N.W. 141.

Trial court committed no error in holding the accused guilty as a principal in the second degree.

Critical Thinking Question(s): In this case, the owner of the vehicle was in the car at the time of the accidents and leaving the scene. Would he be guilty of the offenses if he stayed at the original residence, yet knowingly permitted the drunk driver to operate his vehicle? Would the defendant have any criminal culpability for manslaughter if any of the victims were killed?

VII. Parents and Vicarious Liability:

Section Introduction: Parents may sometimes be held accountable for the actions committed by their children. Consider to what degree parents should be liable for their children's behavior.