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The Criminal Defense of "Mere Presence"

by Jamison Koehler on February 13, 2012

Assuming you did nothing to encourage or instigate the activity, there is nothing illegal about being present during the commission of a crime. There is also no duty, upon coming across a crime in progress, to prevent that crime from occurring. This is true even if you are with people who are actually committing the crime.

These principles lay the basis for what has always been one of my favorite defenses: mere presence.

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In what is probably the most widely cited case on this defense in the District, *Acker v. United States*, 618 A.2d 688 (D.C. 1992), the complaining witness was standing outside a liquor using a pay telephone when the defendant and a number of other people drove up. The defendant – who knew the complaining witness from high school – commented on a gold chain the complaining witness was wearing: What’s up, Grooms, he said. Looks like you’re making some money.

At some point, depending on whose version of the story you believed, one of the defendant’s companions came up behind Grooms and “popped” the chain from Grooms’ neck. When Grooms attempted to get it back, the companion stuck a black object into his stomach and told him to go back to the phone. Grooms turned to the defendant: “Are you going to let this happen?” The defendant simply turned away, got back into the car, and drove off with the other men.

Overturning the defendant’s conviction, the D.C. Court of Appeals held that “mere presence at the scene of a crime committed by someone else, even with knowledge that an offense has been committed is insufficient to sustain a conviction as an aider or abettor.” The court reviewed another case in which the defendant was observed “gazing around the shop” as if acting as a lookout while a companion concealed merchandize. In this case, by contrast, there was not enough to suggest that the defendant’s greeting to

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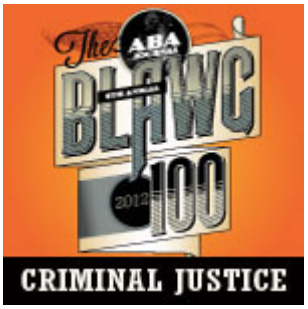

Grooms was anything more than a “jovial quip.” Even if the defendant did nothing to “frustrate” the robbery, “we know of no case . . . which imposes a duty of rescue upon an inadvertent witness to a crime, particularly when one of the criminals was apparently carrying a handgun.” Nor did the evidence suggest that the defendant “facilitated the getaway of the culprits” — one of the other men did the driving.

In another case, *In The Matter of L.A.V.,* 578 A.2d 708 (D.C. 1990), the juvenile defendant was with another man who, when approached by police, took out a handgun from his coat and attempted to hide it behind the wheel of a parked car. Presence is equated with aiding and abetting, the court pointed out, when “it is shown that it designedly encourages the perpetrator, facilitates the unlawful deed – as when the accused acts as a look-out – or where it stimulates others to render assistance to the criminal act.”

In reversing the defendant’s conviction in this case, the court held the defendant had neither actual nor constructive possession of the firearm. Given the positioning of the defendant’s body, he could not have been attempting to shield his companion’s actions from the view of the approaching officers. Finally, the defendant could not have been acting as a lookout since both he and the other man were already aware of the officers’ presence.

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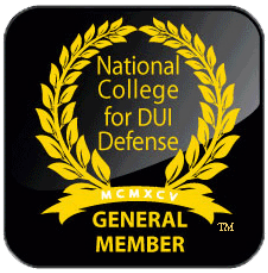

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