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COMMENT

The Louisiana Criminal Code and Criminal Intent: Distinguishing Between Specific and General Intent

Under the Louisiana Criminal Code, most criminal conduct consists of "(a)n act or a failure to act that produces criminal consequences and which is combined with criminal intent."¹ The Code then further separates criminal intent into two levels:

(1) *Specific criminal intent* is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act.

(2) *General criminal intent* is present whenever there is specific intent, and also when the circumstances indicate that the offender in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act.²

As these articles demonstrate, the standard for specific intent is subjective in that the inquiry focuses on a particular offender's state of mind. General intent, in contrast, allows the use of the more objective "reasonable man" standard.³ Louisiana's differentiation between subjective and objective intent standards corresponds roughly with those articulated in the Model Penal Code.⁴

In recent years, the courts have displayed confusion in determining which level of intent applies with respect to particular crimes. This comment shall examine the recent jurisprudence and suggest an analysis consistent with the codal provisions.

The Criminal Code provides a functional, grammatical test to be used when determining which level of criminal intent is required in the statutory definition of a particular crime. Article 11 of the Code states:

1. La. R.S. 14:8 (1986). Other examples of criminal conduct are criminal negligence (La. R.S. 14:12 (1986)) and a form of criminal strict liability (La. R.S. 14:32.1 (1986)).

2. La. R.S. 14:10 (1986) (emphasis added).

3. For a particularly detailed application of these concepts see *State v. Elzie*, 343 So. 2d 712 (La. 1977). As this comment will demonstrate, the problem arises in the initial determination of which intent level is required for the substantive offense.

4. The MPC's approach is discussed at length *infra*.

The definition of some crimes requires a specific criminal intent, while in others no intent is required. Some crimes consist merely of criminal negligence that produces criminal consequences. However, *in the absence of qualifying provisions, the terms "intent" and "intentional" have reference to "general criminal intent."*⁵

The Reporter's comments to Article 11 amplify the proper use of the foregoing provision and include specific illustrative examples:

The definitions of the great bulk of the crimes in the Code . . . state that there must be an "intentional" production of certain prescribed consequences (for example, "Aggravated arson is the intentional damaging * * * or setting fire to any structure * * *"). However, in some crimes the production of certain consequences plus a specific intent to produce or accomplish some prescribed consequences is necessary (for example, "Forgery is the false making or altering with intent to defraud, of any signature * * *"). Such an intent is "specific intent."⁶

In the Louisiana Supreme Court decision of *State v. Daniels*,⁷ Justice Tate, writing for the majority on original hearing, set forth the level of criminal intent necessary to convict a person of public intimidation. This offense is statutorily defined as "the use of violence, force, or threats upon [specifically enumerated persons] *with the intent to influence his conduct in relation to his position, employment, or duty.*"⁸

The defendant, an inmate at Angola, was out of line on the way to the evening meal, and a correctional officer instructed him to go to the end of the line. When the defendant ignored the instruction, the officer grabbed the defendant; the defendant then struck the officer. This use of force upon the prison guard provided the basis for the charge of public intimidation.

Justice Tate rejected the State's argument that only general criminal intent was necessary to support a conviction. He focused upon the language of the definition of the crime (the "intent to . . ." formula), and found the requisite qualification of intent needed to support the conclusion that public intimidation is a specific intent crime.⁹ Justice

5. La. R.S. 14:11 (1986) (emphasis added).

6. Comments, La. R.S. 14:11 (1986).

7. 109 So. 2d 896 (La. 1958).

8. La. R.S. 14:22 (1986) (emphasis added).

9. "The statutory definition of the crime of public intimidation provides that it is the use of force upon a public employee 'with intent to influence his conduct in relation to his position, employment, or duty.' (italics ours) The italicized provisions ("to influence", etc.) qualify the intent statutorily required to commit the crime defined. The statutory crime is not the intentional use of force or threats upon a public employee, but rather the use of force or threats upon him with the specific intent to influence his conduct in relation to his duties." 109 So. 2d at 898.

Tate pointed out the similarity between the definition of "public intimidation" and the commission of an offense "with intent to defraud," used in the comments to Article 11 to illustrate criminal intent. Such an examination is narrow, easy to apply, and not subject to the less predictable results obtained in more recent decisions by the same court. A number of cases after *Daniels* also applied the tenets of Article 11 to glean the proper intent requirement for different crimes.¹⁰ It is also notable that professor Dale Bennett, the principal drafter of the Criminal Code, has embraced this approach on several occasions.¹¹

*State v. Fluker*¹² was the first of several decisions which strayed from this approach. Fluker was charged with violating one of the provisions of R.S. 14:95 concerning the illegal carrying of weapons. A police officer stopped Fluker on suspicion of drunken driving. Another officer noticed a small brown holster holding a pistol attached to the defendant's belt. The gun protruded from the holster enough to make it recognizable as a pistol. The State prosecuted Fluker for "[t]he intentional concealment of any firearm, or other instrumentality customarily used or intended for probable use as a weapon on one's person."¹³ In dictum, the court concluded that this crime is one which requires specific criminal intent:

Clearly, the present version of the statute differs from its predecessors by requiring intentional concealment. Thus, the old formula, which required that the weapon be carried in full open view, is obsolete. By making the offense of concealment a crime of specific intent, the legislature has abandoned the old rule that a partially hidden weapon is a concealed weapon in favor of a more realistic proscription that contemplates that a weapon, although not in "full, open view," is nonetheless not a "concealed" weapon if it is sufficiently exposed to reveal its identity.

10. See *State v. Fontenot*, 235 So. 2d 75, 77 (La. 1970) (obscenity); *State v. Lewis*, 288 So. 2d 348, 350 (La. 1974) (burglary); *State v. Elzie*, 343 So. 2d 712, 713 (La. 1977) (possession of cocaine with intent to distribute); *State v. Godeaux*, 378 So. 2d 941, 944 (La. 1979) (possession of a firearm by a convicted felon). See also *State v. Johnson*, 368 So. 2d 719, 721 (La. 1979) (armed robbery) and *State v. Duncan*, 390 So. 2d 859, 861 (La. 1980) (public bribery), both of which employ a similar analysis although without specific reference to Article 11.

11. See Bennett, *Work of the Appellate Courts, Criminal Law*, 22 La. L. Rev. 380 (1962) wherein the commentator noted: "In this regard it is significant that Article 11 of the Criminal Code expressly provides that in the definitions of crimes in the absence of qualifying provisions, the terms 'intent' and 'intentional' have reference to general criminal intent." (examination of an obscenity statute) See also Bennett, *Louisiana Criminal Code*, 5 La. L. Rev. 6 (1942) and Bennett, *Work of the Louisiana Appellate Courts, Criminal Law*, 34 La. L. Rev. 332, 340 (1974).

12. 311 So. 2d 863 (La. 1975).

13. La. R.S. 14:95(1) (1986).

If the weapon is carried in a manner that reveals its identity, its carrier cannot be presumed to have intended to conceal it and, accordingly, is not in violation of the statute.¹⁴

In a footnote the court quoted from a law review article which observed, in pertinent part:

The problem is whether there has been an intentional concealment. If a part of the weapon is openly displayed, such open display is hardly consistent with an intent to conceal. If a part is subject to view, not through an intention for it to be openly displayed but merely by virtue of sloppy concealment, then it seems there may be intentional concealment even though there is not full concealment.¹⁵

The court's repeated transformation of the statutory definition of "intentional concealment" to "intent to conceal" confuses, rather than clarifies, the analysis, since such a transformation in effect changes the intent from general to specific.¹⁶

In *State v. Dyer*,¹⁷ however, the court continued this transformation.¹⁸ Dyer was walking down a New Orleans street when a police officer noticed a weapon protruding from Dyer's right front pocket. After being convicted of an attempt to conceal a weapon, Dyer argued on appeal that the state failed to charge an offense which is punishable under a valid statute. The supreme court agreed, reasoning from its earlier opinion in *Fluker* that the crime in question was a specific intent crime.¹⁹ The court decided that because both an attempt to conceal a weapon and the crime itself require the same elements of proof, it was impossible for the attempt to be a "separate but lesser grade of the intended crime."²⁰ The court reasoned that because a defendant's guilt is based upon his intent to conceal and not the extent of his concealment, proof of the attempt would also constitute proof of the substantive offense.²¹

The court erred in stating that a defendant's guilt, when being prosecuted for illegal carrying of weapons, is based on his intent to

14. 311 So. 2d at 865-66.

15. *Id.* at 866, n.3, quoting from Ellis, Work of the Appellate Courts, Criminal, 32 La. L. Rev. 298, 305-06 (1972).

16. See La. R.S. 14:11 (1986) and accompanying comments.

17. 388 So. 2d 374 (La. 1980).

18. La. R.S. 14:95(1) (1986).

19. See text accompanying *supra* note 12.

20. La. R.S. 14:27(C) states: "An attempt is a separate but lesser grade of the intended crime; and any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was actually perpetrated by such person in pursuance of such attempt."

21. 388 So. 2d at 376.

conceal rather than the extent of his concealment. Both concealment and a general intent to conceal are necessary elements of the crime, notwithstanding *Fluker's* statements to the contrary. By misconstruing 14:95 as a specific intent crime and negating "concealment" as a necessary element for conviction, the court melded "attempt" with the actual commission of the crime, thereby setting the stage for the ultimate conclusion that the attempt cannot be a "lesser offense." A solution to the court's dilemma seems fairly obvious. First, had the court construed the intent requirement for illegal carrying of weapons as one of general criminal intent, the elements of proof between the attempt and the substantive crime would be different, the former requiring specific intent with the latter needing only general intent. Second, had the court reached the conclusion that the substantive crime in question is proved only by total concealment,²² perhaps it would have been successful in reconciling the proof requirements between the attempt and the substantive offense.²³

Following *Dyer*, the court held in *State v. Fuller*²⁴ that the crime of second degree battery is a specific intent crime. The court first looked to the definition of second degree battery, wherein the offender "intentionally" inflicts serious bodily harm to the victim.²⁵ Then, because the Code separately defines "battery,"²⁶ the court substituted that definition of "battery" into the definition of second degree battery. This substitution results in two references to intent in one statutory definition of a crime, making the crime one requiring specific intent.²⁷ Interestingly, the court never cited Article 11, relying instead upon the general rule of statutory construction contained in Article 3²⁸ and the court's own

22. Justice Lemmon, while sitting on the Louisiana Fourth Circuit Court of Appeals, faced more directly the problem of whether total concealment is required in *State v. Ogletree*, 244 So. 2d 288 (La. App. 4th Cir. 1971). For reasons stated in that opinion, he concluded that total concealment is required to commit the offense.

23. For an excellent discussion of why the court's reasoning is incorrect, see Hargrave, *Developments in the Law*, 42 La. L. Rev. 541, 549-51 (1982).

24. 414 So. 2d 306 (La. 1982).

25. La. R.S. 14:34.1 defines second degree battery as "a battery committed without the consent of the victim when the offender intentionally inflicts serious bodily injury."

26. "Battery is the intentional use of force or violence upon the person of another; or the intentional administration of a poison or noxious liquid or substance to another." La. R.S. 14:33 (1986).

27. The resulting combination would produce the following definition of second degree battery: "The intentional use of force or violence upon the person of another committed without the consent of the victim when the offender intentionally inflicts serious bodily injury."

28. "The articles of this Code cannot be extended by analogy so as to create crimes not provided for herein; however, in order to promote justice and to effect the objects of the law, all of its provisions shall be given a genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision."

sense of how "genuine construction"²⁹ allows the merging of separate Criminal Code articles into one definition of a crime.

Fuller was playing pool at a lounge and asked the victim, Brown, if he wanted to play a game for ten dollars. Brown agreed to the bet, lost the game, and paid the defendant. After a subsequent game, which Brown also lost, an argument ensued over the amount of the bet. Brown said he did not want to fight and handed the pool cue he was holding to Fuller, who promptly hit Brown in the face with his fist, knocking him over the pool table. Brown's vision was permanently impaired by the blow. Upon these facts, the court found that the defendant possessed the specific intent necessary for conviction, but the court did not inquire very deeply into the subjective state-of-mind of the offender.³⁰ By finding specific intent from these tenuous facts, the court may have dangerously watered down the specific intent requirement. In any event, the court's statements about intent may nonetheless be dictum, for the facts do support the existence of a general intent, and the conclusions can be justified on that ground, regardless of the statements as to the level of intent required.

*State v. Jackson*³¹ involved a defendant prosecuted as an accessory after the fact to a simple burglary.³² Here the court interpreted the statutory definition to require specific criminal intent. This interpretation is in accord with Article 11, although the court did not specifically refer to that article for support. The statutory definition of an "accessory after the fact" employs the familiar "intent to . . ." formula found in the comments to Article 11:

An accessory after the fact is any person who, after the commission of a felony, shall harbor, conceal, or aid the offender, knowing or having reasonable ground to believe that he has committed the felony, and with the intent that he may avoid or escape from arrest, trial, conviction, or punishment.³³

Finally, in *State v. Chism*,³⁴ the court overruled its earlier decision in *Jackson* and held that the crime of being an accessory after the fact is a general intent crime, thereby making the court's interpretations of intent consistently incorrect.³⁵ The court quoted the statutory defini-

29. 414 So. 2d at 310.

30. *Id.*

31. 344 So. 2d 961 (La. 1977).

32. La. R.S. 14:25 (1986).

33. *Id.*

34. 436 So. 2d 464 (La. 1983).

35. The facts in *Chism*, while not included in the text, should nonetheless be noted, if for no other reason than to illustrate the oft-noted truism that fact is stranger than fiction. *Chism* was impersonating a female one night and got into a car with Tony Duke,

tion³⁶ and concluded that the crime required only general criminal intent because the statute contains no provisions qualifying "intent":

This court has said that the statute requires that in order to convict an accused of being an accessory after the fact the state must prove that the accused acted with the specific intent to prevent the apprehension or punishment of a person he knows or has reason to believe has committed a felony. *State v. Jackson*, 344 So. 2d 961 (La. 1977). The statement in the Jackson opinion to the effect that being an accessory after the fact is a specific intent crime was erroneous and not necessary to the decision of that case. In the absence of qualifying provisions, the terms "intent" and "intentional" have reference to "general criminal intent." La. R.S. 14:11. The statute contains no provisions qualifying the term "intent," and we have no reason to believe that the legislative aim was to exclude from its ambit offenders who have a general criminal intent.³⁷

The court's interpretation of the statute is flawed. The statutory language requires that the crime be committed "with the intent that he may avoid or escape from arrest, trial, conviction, or punishment."³⁸ Perhaps the court will only accept qualifying language written in exact conformity with the example given in the comments to Article 11. In the absence of a policy reason which would support such a strict adherence to statutory construction, any grammatical qualification of intent should suffice.³⁹

who was unaware of Chism's true gender. The two stopped to get some beer and were joined by Chism's one-legged uncle, Ira Lloyd. As the merry threesome rode along drinking, Duke expressed a desire to have sex with Chism, prompting Lloyd to announce that he wanted to find his ex-wife Gloria for the same purpose. The trio eventually found Gloria in front of the St. Vincent Ave. Church of Christ and Lloyd left the car to persuade Gloria to join him. Chism and Duke remained in the car and started to hug and kiss. Lloyd and Gloria got into a fight; Lloyd stabbed her several times and then shoved the now dying woman into the front seat of the car. Duke and Chism removed Gloria's body from the car under Lloyd's direction and discarded Gloria in some tall grass on the side of the road. Lloyd was unable to help in the disposal because his wooden leg had come off. Neither Duke nor Chism resisted Lloyd's bidding in this matter, and there was no evidence that the two were threatened despite the fact that Lloyd was armed with a knife. Chism's actions on this evening formed the basis for the prosecution. *Id.* at 466.

36. La. R.S. 14:25 (1986).

37. 436 So. 2d at 467.

38. La. R.S. 14:25 (1986).

39. Since the "principal" article and the "accessory" article are derived from the same common law source, the two articles should be construed to require similar mental elements. To be a principal, Chism would have had to have the specific intent to kill. It therefore seems logical to require the same level of intent for being an accessory (helping after a crime has been committed as opposed to helping before the crime).

The Model Penal Code (MPC) separates culpability into three levels rather than the two levels adopted in Louisiana. This does not include criminal negligence, which both Codes adopt as an additional level of possible criminal intent. The three MPC levels of intent are "purposely," "knowingly," and "recklessly." Under the MPC, one acts "purposely" with respect to the nature of his conduct or a result thereof, when it is his "conscious object to engage in (certain) conduct or to cause such a result." As to the attendant circumstances, a person acts "purposely" when "he is aware of the existence of such circumstances or he believes or hopes that they exist."⁴⁰ On the other hand, a person acts "knowingly," with respect to either the nature of his conduct, a result thereof, or the attendant circumstances, when "he is aware that his conduct is of that nature or that such circumstances exist," or "he is aware that it is practically certain that his conduct will cause such a result."⁴¹ Finally, a person acts "recklessly" when "he consciously disregards a substantial and unjustifiable risk that [an offense] exists or will result from his conduct."⁴²

Louisiana's statutory scheme falls somewhere within this multi-tiered approach to culpability. Certainly, our definition of specific criminal intent roughly parallels that of "purposely" as used in the MPC. However, our definition of general criminal intent lies between the MPC's concepts of acting "knowingly" and acting "recklessly." The comments to Section 2.02 of the MPC make clear the purpose behind the drafters' choice in differentiating among these degrees of culpability:

The purpose of articulating these distinctions in detail is to advance the clarity of draftsmanship in the delineation of the definitions of specific crimes, to provide a distinct framework against which these definitions may be tested, and to dispel the obscurity with which the culpability requirement is often treated when such concepts as "general criminal intent" . . . and the like have been employed.

The Model Code's approach is based upon the view that clear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime.⁴³

40. Section 2.02 of the Model Penal Code.

41. *Id.*

42. *Id.* The definition also states that "[t]he risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."

43. Comments, Model Penal Code, Section 2.02, p. 230-31, American Law Institution.

Louisiana would not necessarily be aided in the adoption of additional intent levels to determine culpability. Tinkering with the current two-level system is only necessary should the Legislature determine that public policy considerations mandate such an addition. In other words, if the prevention and punishment of criminal conduct is adequately regulated by only delineating two levels of intent, no further differentiation is either required nor desirable.

Louisiana's present system is not flawed because of a shortage of possible intent levels or in the practical application of the concepts of general and specific intent with their accompanying proof requirements.⁴⁴ Rather, the inherent weakness in the current process is that it forces utilization of the qualification exercise articulated in Article 11. Louisiana defines the culpability requirements which attach to either specific or general criminal intent; however, unlike the MPC, Louisiana fails to clearly specify which level of intent is necessary for the commission of particular offenses. Inclusion of the culpability element in the definition of each crime without the need for translation would avoid the confusion demonstrated in the cases. The flip-flopping from article to article in search of guidance makes understandable the courts' difficulty in the consistent application of the legislatively mandated scheme.

One legislative solution to the inconsistencies presented in the jurisprudence would be to include the necessary intent element in the definition of each and every crime, thereby eliminating the need for Article 11. Another possibility would be for the Legislature to add another article to the Code, simply listing those crimes which require specific criminal intent as opposed to those which require only general intent.

In the absence of legislative action, the most viable solution is to simply abide by the directives articulated in Article 11. Article 11 provides that in the absence of qualifying provisions, the terms "intent" and "intentional" refer to general criminal intent. The court's inquiry should be limited to a straightforward analysis of grammatical structuring. The Comments to Article 11 suggest that this grammatical inquiry is the approach adopted by the Louisiana Criminal Code. *State v. Daniels* and the line of cases following that decision illustrate the simplicity and consistency available by applying Article 11. In the absence of a legislative revision, strict adherence to Article 11 is preferable to the vagaries demonstrated by the courts' willingness to second-guess legislative intent.

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44. See supra note 3.

