TITLE D2 SUBSTANTIVE OFFENSES

Chapter 26 Burglary and Related Offenses

Section 1. Aggravated Burglary

1. A person is guilty of aggravated burglary if he enters or remains in a dwelling place, knowing that he is not licensed or privileged to do so, with the intent to commit a crime against a person or property therein.

2. As used in this section, "dwelling place" means any building, structure, vehicle, boat or other place adapted for overnight accommodation of persons, or sections of any place similarly adapted. It is immaterial whether a person is actually present.

3. Burglary and Criminal Trespass are offenses included in Aggravated Burglary.

4. Aggravated Burglary is a class A crime if the state proves beyond a reasonable doubt that the defendant either

A. is armed with a deadly weapon, or knows that an accomplice is so armed; or

B. intentionally or recklessly inflicts or attempts to inflict bodily injury on anyone during the commission of the aggravated burglary, or an attempt to commit such burglary, or in immediate flight after such commission or attempt.

C. All other aggravated burglary is a class B crime.

5. A person may be convicted both of aggravated burglary and of the crime which he commits or attempts to commit after entering or remaining in the dwelling place, but sentencing for both crimes shall be governed by the provisions of chapter 31, section 5.

Comment

Source: This section combines portions of the New Hampshire Criminal Code, section 635:1, the Revised Washington Criminal Code, section 9A.52.010, and the Proposed Massachusetts Criminal Code, chapter 266, section 1.

Current Maine Law: There are separate Maine statutes in Title 17 dealing with burglary in the daytime and in the nighttime:

> §751. Whoever breaks and enters in the nighttime with intent to commit a felony or any larceny, or, having entered with such intent, breaks in the nighttime a dwelling house, any person being then lawfully therein, is guilty of burglary. Whether he is, before or after entering, armed with a dangerous weapon, or whether he assaults any person lawfully therein or has any confederate present aiding or abetting or not, in either case he shall be punished by imprisonment for any term of years. All burglars' tools or implements prepared or designed for committing burglary shall be dealt with as provided in section 1813. [Section 1813 relates to seizure and forfeiture of these things.]
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> §754. Whoever, with intent to commit a felony or any larceny, breaks and enters in the daytime or enters without breaking in the nighttime any dwelling house, or breaks and enters any office, bank, shop, store, warehouse, vessel, railroad car of any kind, motor vehicle, aircraft, house trailer, or building in which valuable things are kept, any person being lawfully therein and put in fear, shall be punished by imprisonment for not more than 10 years; but if no person was lawfully therein and put in fear, by imprisonment for not more than 5 years or by a fine of not more than $500.

As used in these sections, the term "dwelling house" is defined in §755 to mean "Any permanent building or edifice, usually occupied by any person by lodging therein at night, is a dwelling house, although such occupant is absent for a time, leaving furniture or goods therein, with an intention to return; but no building shall be deemed a dwelling house or part of it, unless connected with or occupied as part of the dwelling house."

Related statutes are §752 defining burglary with explosives; and §751-A setting forth armed burglary. Assault with intent to commit burglary is included in Title 17 under §753.

These statutes are centrally concerned with "breaking", "entering" and "dwelling house", all of which terms have been the subject of judicial interpretation.

The requirement to prove the element of breaking in a conviction for burglary under Maine law was relaxed considerably in State v. Mower, 275 A.2d. 584 (1971) by the dictum that a break occurred where entrance to a building was gained by "moving to a material degree something that barred the way, i.e., either a closed door or a closed window." This represents a considerable departure from the gist of State v. Newbegin, 25 Me. 500 (1846), where the court declared that to sustain conviction there had to be "an actual break or its equivalent", relying on English authority that: ". . . an entrance through a window left a little open, by pushing it wide open, was not a breaking." The response to this is: "We now think otherwise". In this particular instance, defendant was arrested inside a building which in testimony had been secured; therefore he had to have moved something to gain access.

Though the Mower ruling cited State v. Newbegin in arriving at its conclusion, the circumstances in Newbegin were extenuating in that the essence of the appeal lay in the fact that the charge of breaking could not apply where defendant entered a store open to the public during regular business hours, where clerks were present.

In State v. Cookson, 293 A.2d. 780 (Me.1972), the Maine court found itself confronted for the first time with the need to interpret from §751 the words ". . . or, having entered with such intent, breaks in the nighttime a dwelling house . . ." and found that a break can occur just as substantially within a dwelling if an obstruction is moved to a material degree.

The proof of entry in a burglary charge is in the intrusion into the building of some part of the body, or of an instrument utilized in such a way that its use goes beyond a means to accomplish a break. State v. Liberty Me. 280 A.2d. 805.

The phrase "in which valuable things are kept" from §754 has been the basis for several appeals. In State v. Neddo, 92 Me. 71 (1899) it was noted that when a dwelling house was the object of breaking and entering, whether or not valuable things were kept there was immaterial; but where other than a dwelling was broken and entered, then it was necessary to prove that the structure contained something of value. This dictum was disapproved,

however, in State v. Smith, 268 A.2d. 625 (Me. 1970) which held that there need be no obligation or proof concerning "valuable things", when the place is any one of those listed in rection 754.

The definition of "dwelling house" in section 755 incorporates the common law conception. Marshall v. Wheeler, 124 Me. 324 (1925) (shed is part of dwelling house). As to ownership, the state must prove an actual or constructive possession by the person alleged to be the owners. State v. Small, 267 A.?d 912 (1970).

The Draft: This section is the most serious of the unauthorized entry type offenses encompassed in this chapter. It is aggravated in that the location named in this section is a place where people live, and it is an offense which includes the design to commit a crime against people in the house, or against their property. It is these factors which appear to constitute a great source of public anxiety in regard to crime.

Subsection 1 abandons the common law and statutory requirement of a breaking as being of no criminological significance. The crime is as serious if the homeowner inadvertently leaves a door open as when he remembers to lock everything securely.

The offense is limited to activity in contemplation of a crime against persons or property in subsection 1, on the ground that there is a significant difference between an unauthorized entry in order to pass of a forged document, and one to commit an assault or theft; the difference appearing both in terms of the danger presented by the defendant in each case, and as a matter of general apprehension by potential victims.

Subsection 2 is designed to provide a comprehensive definition of the sorts of places which are protected from intrusion.

The fourth subsection is an effort to provide some inducement for the commission of burglary with a lesser, rather than a greater, amount of danger to persons in the dwelling.

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 26 Burglary and Related Offenses

Section 2. Burglary

1. A person is guilty of burglary if he enters or remains in a dwelling place or other building, structure, or place of business, knowing that he is not licensed or privileged to do so, with the intent to commit a crime therein.

2. "Dwelling place" has the same meaning as in section 1.

3. Criminal Trespass is an offense included in burglary.

4. Burglary is a class C crime.

5. A person may be convicted both of burglary and of the crime which he commits or attempts to commit after entering or remaining in the place, but sentencing for both crimes shall be governed by the provisions of chapter 31, section 5.

Comment

Source: This section is patterned on the Revised Washington Criminal Code, section 9A.52.020.

Current Maine Law: See Comment to section 1.

The Draft: This section defines a crime of burglary which is less serious than that set out in the preceding section by virtue of a number of factors. The crime contemplated by the actor may be any crime - it need not be one against a person or property. In addition, this section may be violated by an unauthorized entry into any place - it need not be a dwelling.

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 26 Burglary and Related Offenses

Section 3. Criminal Trespass

1. A person is guilty of criminal trespass if, knowing that he is not licensed or privileged to do so,

A. he enters in any secured premises; or

B. he remains in any place in defiance of an order to leave which was personally communicated to him by the owner or other authorized person; or

C. he parks any motor vehicle in a private drive or way in a manner to block the same, or on a public highway in such a manner as to block the entrance to a private driveway, gate or barway.

2. As used in this section, "secured premises" means any place which is posted in a manner prescribed by law or in a manner reasonably likely to come to the attention of intruders, or which is fenced or otherwise enclosed in a manner designed to exclude intruders.

3. Criminal trespass is a class D crime.

4. The owner or other person in lawful possession of the place wherein the criminal trespass is committed may arrest any person violating this section in his presence.

Comment

Source: Most of this section is taken from the New Hampshire Criminal Code, section 635:2. Subsection 1C is taken from Maine RSA Title 17, section 3853; subsection 4 is taken from section 3855 of Title 17.

Current Maine Law: Chapter 127 of Title 17 contains 10 separate sections dealing with Trespass. Nine of these define criminal offenses while the tenth (section 3857) provides for a four year statute of limitations.

The offenses defined by chapter 127 differ from each other mainly in their descriptions of the types of property which are protected. Section 3851, for example, relates to state property; section 3853 extends to commercial or residential property; wildlife preserves are the subject of section 3859.

Section 3856, on the other hand, appears designed to prevent theft of real property (earth, sand, stone) or of things growing on real estate (grass, corn, fruit, hay or other vegetables). Also different from the others is section 3858 which proscribes interfering with a nest or colony of wild bees.

The Draft: This section is designed to provide general coverage for all criminal trespass. Three separate sorts of conduct are forbidden. Subsection 1 A deals with entries to places which the owner has taken some trouble to keep free from intruders by bringing it within the definition of secured premises provided in subsection 2. It is not an offense merely to make an unauthorized entry into a place which does not meet the requirements of that definition. Subsection 1 B is not restricted to secured premises, but creates an offense when the intruder refuses to comply with a lawful request to leave. Subsection 1 C is taken from current Maine law and is designed to deal with a problem that most would regard as a serious interference with the rights of others.

Subsection 4 is also taken from Maine law and appears to be necessary in order to avoid leaving the owner in the frustrated position of not being able to enforce, or have enforced, the law that is designed for his benefit.

[Quere: Is there need for including a provision relating to trespasses by animals whose owners are reckless about keeping them off other people's property?]

Sub C 14

June 1, 1973
June 18, 1973 meeting

TITLE D1 GENERAL PRINCIPLES

Chapter 12 Criminal Liability

Section 3. Criminal Liability for Conduct of Another; Accomplices

1. A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both.

2. A person is legally accountable for the conduct of another person when:

A. acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct; or

B. he is made accountable for the conduct of such other person by the law defining the offense; or

C. he is an accomplice of such other person in the commission of the offense.

3. A person is an accomplice of another person in the commission of an offense if:

A. with the intent of promoting or facilitating the commission of the offense, he solicits such other person to commit it, or aids or agrees to aid or attempts to aid such other person in planning or committing it; or

B. his conduct is expressly declared by law to establish his complicity.

4. When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense, if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.

5. A person who is legally incapable of committing a particular offense himself may be guilty thereof if it is committed by the conduct of another person for which he is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his incapacity.

6. Unless otherwise provided, a person is not an accomplice in an offense committed by another person if:

A. he is the victim of that offense; or

B. the offense is so defined that his conduct is inevitably incident to its commission; or

C. he terminates his complicity prior to the commission of the offense and wholly deprives it of effectiveness in the commission of the offense or gives timely warning to the law enforcement authorities or otherwise makes proper effort to prevent the commission of the offense.

7. An accomplice may be convicted on proof of the commission of the offense and of his complicity therein, though the person claimed to have committed the offense has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity to prosecution or conviction or has been acquitted.

Comment

Source: This section is taken from the New Hampshire Criminal Code section 626:8. It is based on the Model Penal Code, section 2.06. Other jurisdictions have also followed the Model Penal Code pattern, see e.g., Pennsylvania Crimes Code section 306; Revised Washington Criminal Code, section 9A.08.060.

Current Maine Law: The basic statute is in Title 15, section 341.

> Whoever aids in the commission of a felony, or is accessory thereto before the fact, by counseling, hiring or otherwise procuring the same shall be punished in the manner prescribed for the punishment of the principal felon. Such accessory, when a felony is committed within or without the State by his procurement in the State, may be indicted and convicted as an accessory with the principal or after his conviction; or he may be indicted for and convicted of a substantive felony, whether the principal is convicted or is amenable to justice or not, and shall be punished as aforesaid. Whoever is accessory after the fact to a felony may be indicted, tried and sentenced, whether his principal has or has not been convicted.
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> Every accessory, before or after the fact, may be tried in the county having jurisdiction of the principal offense, although the accessory offense was committed on the high seas or without the State. If the principal offense was committed in one county and the accessory offense in another, the latter may be tried in either.

The rules are different for felonies from what they are regarding misdemeanors. Persons actually or constructively present at the place of the crime and are either aiding, abetting, assisting or advising in its commission are principals and are equally guilty with the perpetrator of the felony, State v. Berube, 158 Me. 433 (1962), State v. Burbank, 156 Me. 269 (1960), although they are considered principals in the second degree. Berube, supra. See State v. Dupuis, 188 A.2d 688 (Me. 1963).

In the commission of a misdemeanor, however, all who knowingly participate in the commission of the offense are deemed principals, State v. Vicniere, 128 A. 2d 851 (Me. 1957). Presence is not a necessary element.

A. Presence: Mere presence at the scene of the crime cannot justify conviction for aiding and abetting. State v. Berube, supra. On the other hand, "constructive presence is sufficient to satisfy the element of 'presence' in a charge of aiding and abetting constituting one a principal." Burbank supra at 279. See also State v. Saba, 139 Me. 153 (1942).

In State v. Rainey, 149 Me. 92 (1953), liability was found in the case of a man who was told by the perpetrator of the robbery and murder to stand outside of the restaurant and hold a gun while the restaurant was being robbed. In State v. Burbank, a woman who had just given birth in her bedroom and did not leave the room, was nevertheless constructively present in an adjoining room where the baby was killed by her father. If one is not "present", he is only an accessory. State v. Saba (accessory to B & E & Larceny).

B. Proof of aiding and abetting: In State v. Berube, presence plus the following circumstances were said to have been sufficient for a jury to convict for aiding and abetting: failure of a friend (with the perpetrator before, during and after crime) to prevent commission of the crime; the fact that he was a friend of the perpetrator; testimony of person assaulted and robbed that the defendant and the perpetrator were engaged in whispered conversation while he was out of the room of his own apartment, the conversation coming shortly before he reentered and was assaulted. The jury was permitted to consider failure to prevent the assault by a friend as showing that the friend had assented to the crime and had lent his countenance and approval. In State v. Burbank, passionate incitement and stimulation were found indicating that one affected by provocation and passion could incite manslaughter and become a principal in the second degree.

Other statutes also use aiding and abetting language, e.g., Title 17, section 751 (burglary). The word "aids" is used in §859 (aiding, causing, inducing, abetting, encouraging, contributing or tending to cause, induce, etc., the waywardness or delinquency of a child under age 17); §3651 (aiding the overthrow of a government); §3553 (aiding in concealing stolen property, knowing it to be stolen).

State v. Berube indicates two other tests for determining liability for aiding and abetting: (1) presence for the purpose of aiding, with the knowledge of the perpetrator; or (2) actual or constructive presence and concerted participation in a general felonious plan. In both cases there is no actual act of aiding and abetting, rather the "necessary intent must be inferred from the circumstances". Mere presence plus agreement become elements.

A. Present for the purpose of aiding with knowledge of perpetrator. Both Berube and Burbank cite State v. Holland, 234 N.C. 354, 67 SE 2d 272-274, as authority for the use of such test but do not employ the test themselves.

B. Present and in a concerted participation of a general felonious plan. In State v. Simpson, 276 A.2d 292 (Me. 1972), the defendant, the perpetrator and others were riding around together and decided to "pull a job" at Hider's Store. They drove to the store. The perpetrator went in and the defendant stood outside, at one time turning his head to conceal his identity according to a bystander-witness. Simpson admitted that he knew of the plan but said he went along to prevent any harm from occuring to the proprietor. The perpetrator took the stand and contradicted him by saying that Simpson never made any effort to discourage him and, further, that he interpreted the defendant's remarks while outside: "Let's go, let's go", as encouragement. After the holdup, Simpson was followed shortly by the perpetrator and all four drove together to the shore to dump the gun. Simpson alleged that he had withdrawn from the common design by leaving the scene and returning to the car. The Court responded: "A person who encourages (Berube type encouragement plus words) the commission of an unlawful act cannot escape responsibility by quietly withdrawing from the scene. The influence and effect of his encouragement continue until he renounces the common purpose and makes it plain to others that he has done so and does not intend to participate further". At 294. Simple aiding and abetting without talk of conspiracy could have been found. Perhaps because a murder occurred during perpetration of the robbery, the Court felt it had a stronger ground, since there was evidence of a common design. This is indicated by the following: "A person who engages with others in the commission of an unlawful act is criminally responsible for everything done by his confederates which follows incidentally in the execution of the common design as one of its probable and natural consequences". At 294 citing State v. Cummings, 49 Haw. 522, 423 P. 2d 438 (1967). Such a rule was also applied to the accomplice

in State v. Rainey, where the restaurant proprietor was killed during the course of the robbery. Constructive presence found in Burbank and State v. Dupuis, 159 Me. 201 (1963) could require proof of a common design especially if there was no proof of actual encouragement. Burbank found such incitement but also referred to a general plan formulated by the woman and her father to do away with the baby when it was born if it was not "normal". In Dupuis, the defendant did no actual work in preparing or cashing the forged check, and was not in the room where the check was being prepared. Evidence did show that he participated in the initial plan, entered into a common agreement to change the plan, that he supplied the cashier of the check with identification to aid in uttering it and that after the check was cashed, he received a share of the spoils.

Title 17, section 341 also defines an accessory before the fact as one "counseling, hiring or otherwise procuring" the commission of a felony. Such a person may, according to this statute, be punished as a principal. If a person causes a crime to be committed through the instrumentality of an innocent agent, he is the principal in the crime although he was not actually or constructively present at the time and place of the offense. State v. Morey, 126 Me. 323 (1927).

An accessory to a felony can be prosecuted without reference to the conviction of the principal in the particular crime. This provision represents a distinct change from the common law rule which authorized prosecution of an accessory to a felony only after, or in connection with, the conviction of the principal. State v. Saba, 139 Me. 153. See State v. Ricker, 29 Me. 84 (1848) which upheld this deviation from common law, although the guilt of the principal must be shown in the evidence.

The Draft: This section provides for no difference between principals and accessories; nor does it contain any distinction based upon the seriousness of the basic crime.

Subsection 1 provides the general rule that criminal liability can be based on the conduct of another person, as well as upon the conduct of the actor. The former takes place when the perpetrator of the crime is either an accomplice, as defined in subsection 3, or is a person for whose conduct the defendant is responsible pursuant to the provisions of subsection 2.

Subsection 2 A relates to cases where the defendant might use a small child to steal for him. So long as the defendant has the "intent to deprive" required by the theft law, he is responsible for the property taken by the child. Subsection 2 B reserves the opportunity to have the law outside of this section make rules for vicarious liability. The third heading of vicarious liability provided for here is in the case of an accomplice, defined in subsection 3.

Subsection 3 A creates liability for the commission of an offense which the actor solicited the commission of, or which he assists in the planning or commission of, provided in both cases that he had the intent set forth. The liability of conspirators will be determined by this subsection. Subsection 3 B, like 2 B, serves to create a blank space which can be filled in by other provisions of law.

Subsection 4 simply creates a rule for answering the question of what state of mind is required of an accomplice when the definition of the offense actually committed by the other person includes causing a particular result, e.g., the homicide crimes.

Subsection 5 preserves the liability of a female for rape of another female; of a person who is not the parent of a child for the failure of the parent to care for the child, etc. In all such cases, of course, the requirements for liability otherwise imposed by this section must be met.

In subsection 6 exceptions to the general rules are provided. The exception for the victim would encompass such cases as the person who yields to an extortion demand and might be liable for the extortion as an accomplice. The second exception is closely related and is designed to provide an exemption to the unmarried party to a bigamous marriage or to the person who gives the requested amount to a bribe-taker. Such cases as these might well result in criminal liability, as a matter of sound policy. It is the function of this subsection to insure that the policy is made in regard to each type of criminal conduct and not as a result of general rules which might not contemplate all the cases where the issue might arise. The last part of subsection 6 sets forth the way that the defendant can avoid liability which would otherwise attach from his conduct.

The final subsection of this section is aimed at assuring that each defendant is judged solely on the basis of his contribution to the crime.