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Jury Instruction

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Third party guilt: The crucial role of defense theory instructions

By Thomas Lundy

When the defense relies on a theory of third party guilt, the jury may improperly view the trial as a question of whether or not the third party has been proven guilty. Hence, it is crucial that the instructions caution the jurors against shifting the burden of proof to the defendant.



Right of the accused to rely on third party guilt as a defense theory and to present evidence of third party guilt

Evidence that another person committed the charged crime is “generally recognized as relevant evidence under fundamental standards.” *Larimore v. State*, 877 S.W.2d 570, 575 (Ariz. 1994) ; see also *United States v. Stevens*, 935 F.2d 1380, 1401-03 (3rd Cir. 1991); *United States v. Armstrong*, 621 F.2d 951, 953 (9th Cir. 1980); *U.S. v. Calle*, 822 F.2d 1016, 1021 (11th Cir. 1987) (third party guilt is substantive defense which cannot be limited by trial court pursuant to rules governing impeachment); *People v. Edelbacher*, 47 Cal.3d 983, 1017; 254 Cal.Rptr.586 (1989); *People v. Hall*, 41 Cal.3d 826, 833; 226 Cal.Rptr.112 (1986).

Some cases require the defense to show a “clear link” or “direct connection” between a third party and the crime in question. See e.g., *Chambers v. Mississippi*, 410 U.S. 284 (1973) (evidence of third party culpability “must do more than raise a mere suspicion that another person committed the crime; there must be a clear link between the third party and the crime in question”); *Smitart v Alaska*, 988 P.2d 583, 586 (Alaska 1999) (“direct connection”); *North Carolina v. Potts*, 433 S.E.2d 736, 741 (N.C. 1993) (“points directly”).

Such restrictions should be rejected. For example, in *People v. Primo*, 753 N.E.2d 164 (N.Y. 2001), the New York Court of Appeals rejected the “clear link” approach to admitting evidence of third party guilt: To the extent that the “clear link” standard implies no more than an abbreviation for the conventional balancing test, it presents no problem. A review of clear-link cases reveals that the courts would very likely have made the same ruling regardless of the nomenclature. “Clear link” and similar coinages, however, may be easily misread as suggesting that evidence of third-party culpability occupies a special or exotic category of proof. [¶] The better approach ... is to review the admissibility of third-party culpability evidence under the general balancing analysis that governs the admissibility of all evidence.

Primo, 753 N.E.2d at 168.

This view that no special evidentiary hurdles should be raised for third party guilt evidence has been recognized in other jurisdictions. See e.g. *People v. Hall*, 41 Cal.3d at 834 (noting that “courts should simply treat third-party culpability evidence like any other evidence”); *South Dakota v. Braddock*, 452 N.W.2d 785, 789-790 (S.D. 1990) (applying general evidentiary rules to determine admissibility of evidence of third-party culpability); *Winfield v. United States*, 676 A.2d 1, 11-12 (D.C. 1996) (same). On the other hand, extremely remote or fanciful third party guilt evidence is typically excluded. See e.g., *Wisconsin v. Sheidell*, 595 N.W.2d 661, 673 (Wis.

1999) (requiring that third party culpability evidence share “nearness in time, place, and circumstances to the alleged crime or to the fact or proposition sought to be proved”; *Minnesota v. Williams*, 593 N.W.2d 227, 233 (Minn. 1999) (defendant must prove “facts to connect (the third person) with the crime”; *State v. Sturdivant*, 155 A.2d 771, 778 (N.J. 1959) (searching for “some thread capable of inducing reasonable men to regard (third-party culpability evidence) as bearing on the State’s case”).

The right to defense theory instruction on third party guilt

Because the defendant has a right to an instruction on his or her theory of the case, see e.g., *Mathews v. United States*, 485 US 58, 63 (1988); *Whipple v. Duckworth*, 957 F.2d 418, 423 (7th Cir. 1992); *Conde v. Henry* 198 F.3d 734 (9th Cir. 1999); *U.S. v. Zuniga*, 6 F.3d 569, 571-72 (9th Cir. 1993), there should be a right to instruction on third party guilt when appropriate. See e.g., *People v. Hall*, 41 Cal.3d at 833; *Hill v. State*, 585 S.W.2d 713 (Tex. Crim. App.1979) (reversible error to refuse request for defense theory instruction informing jury to acquit if it had a reasonable doubt that defendant was the killer in light of the third party guilt evidence; see also McClung, & Carpenter, TEXAS CRIMINAL JURY CHARGES 12:410 (Cause Of Death-Third Person Causes Criminal Act) (James Publishing, 2000) (the defendant is entitled to a separate “defense of charge” on mistaken identity including third party guilt).

In light of these principles, a defendant who relies on the defense theory of third party culpability should be permitted to obtain instruction upon this theory notwithstanding the fact that it may be generally encompassed within the general instruction on the prosecution’s burden to prove guilt beyond a reasonable doubt. See e.g., *United States v. Regan* 937 F.2d 823, 826 (2nd Cir. 1991) (general mistake instruction not adequate substitute for specific mistake of law defense offered by the defendants); *United States v. Haddock*, 956 F.2d 1534, 1546 (10th Cir. 1992); *United States v. Morris*, 20 F.3d 1111, 1116 (11th Cir. 1994) (general instructions on “willfulness,” “knowledge” and “intent to defraud” not sufficient substitutes for specific instruction on defense theory of good faith); see also NCJIC 250.4.1 (Defense Theory: Not Included In General Burden Of Proof Instruction). Go to http://juryinstruction.com/featured_article.htm and click on link. “Jury instructions that merely set forth the elements of the offense and the burden of proof, without more, do not encompass a theory of defense.” *People v. Marquez-Lopez*, 952 P.2d 788, 792 (Colo. 1997); see also *People v. Adrian*, 135 Cal.App.3d 335, 342; 185 Cal.Rptr.506 (1982).

The importance of emphasizing the prosecution’s burden of disproving the third party guilt defense

The most important role of a third party guilt instruction is to assure the jurors understand that the defense has no burden to prove that the third party is guilty. The defendant’s third party evidence need not show “substantial proof of a probability that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant’s guilt.” *Hall*, 41 Cal.3d at 833; see also *People v. Madison*, 3 Cal.2d 668, 677 (46 P.2d 159) (Cal. 1935) (prosecution must present evidence that no other person committed the crime charged); *Mullis v. Commonwealth*, 351 S.E.2d 919, 926 (Va. 1987) (“... no burden on the defendant to produce any evidence and the defendant does not have to prove who killed her husband.”).

In this regard the function of the third party guilt instruction is analogous to an instruction on alibi – it must assure that the jurors do not place the burden on the defense to prove its theory of the case. See e.g., *Robertson v. State*, 685 A.2d 805, 815 (Md. 1996) (“a specific alibi instruction eliminates the possibility that the jury will place the burden of proof on the defense with respect to that issue”); see also *United States v. Burse*, 531 F.2d 1151, 1153 (2nd Cir. 1976) (“there exists the danger that the failure to prove [an alibi] that defense will be taken by the jury as a sign of the defendant’s guilt”).

Hence, the third party guilt instruction should avoid language which suggests that the defense has any burden of proving the defense. For example, the instruction should not suggest that the defense must “raise” or “create” a reasonable doubt. See e.g., *People v. Branch*, 637 N.Y.S.2d 892 (1996).

Sample Instructions

SAMPLE INSTRUCTION # 1:

You have heard evidence that [a person other than the defendant] [_____] [name of third party] committed the offense with which the defendant is charged. The defendant is not required to prove [the other person's] [_____] 's] guilt. It is the prosecution that has the burden of proving the defendant guilty beyond a reasonable doubt. Therefore, the defendant is entitled to an acquittal if you have a reasonable doubt as to the defendant's guilt. Evidence that [another person] [_____] committed the charged offense may by itself leave you with a reasonable doubt.

If after considering all of the evidence, including any evidence that another person committed the offense, you have a reasonable doubt that the defendant committed the offense, you must find the defendant not guilty.

[www.JuryInstruction.com NCJIC 251.9.1: Third Party Culpability As Defense Theory.]

SAMPLE INSTRUCTION # 2:

The defendant in this case contends that another person committed the charged crime and that [he] [she] had nothing to do with it. The law places no burden on the defendant to prove that someone else committed the crime. Thus, there is no burden upon [him] [her] to prove the other person's guilt. The burden is on the prosecution to prove beyond a reasonable doubt that the defendant was present at the scene and that [he] [she] committed the crime. The state must prove that allegation, along with all the other elements of the offense, beyond a reasonable doubt.

[See generally *State v. Mayfield*, 109 S.E.2d 716, 724 (S.C. 1959); cf. Ervin's South Carolina Criminal Jury Instructions 14-1 [Alibi] (South Carolina Bar 1995).]

SAMPLE INSTRUCTION # 3:

The defendant contends that another person committed the charged offense. The burden of proving that another person committed the charged offense does not rest upon the defendant. To establish the defendant's guilt the prosecution must prove beyond a reasonable doubt that the defendant was the person who committed the crime charged. The defendant's contention that [he] [she] did not participate in the crime and that another person committed it is simply a denial of facts essential to the state's case.

Therefore, upon considering all the evidence in the case, including the evidence with respect to another person committing the charged offense, if you have a reasonable doubt as to the defendant's participation in the crime charged, you must find [him] [her] not guilty.

[Cf. North Carolina Pattern Jury Instructions — Criminal, NCPI-Crim Append 301.10 [Alibi] p. 930 (TRCC, 1999).]

SAMPLE INSTRUCTION # 4:

The defendant has introduced evidence for the purpose of showing that another person committed the alleged offense for which [he] [she] is here on trial. If, after considering all the evidence, you have a reasonable doubt that the defendant committed the charged offense, you must find [him] [her] not guilty.

[Cf. Montana Criminal Jury Instructions, MCJI 1-022 [Alibi] [State Bar of Montana 1990]; see also California Jury Instructions — Criminal, CALJIC 4.50 [Alibi] p. 214 (West, 6th Ed. 1996).]

SAMPLE INSTRUCTION # 5:

The defendant has introduced evidence to show that another person committed the offense charged in the indictment. The prosecution has the burden of establishing beyond a reasonable doubt that it was the defendant who committed the charged offense.

If, after a consideration of all the evidence, you have a reasonable doubt that the defendant was the person who committed the charged offense, you must find the defendant not guilty.

[Cf. 9th Circuit Model Jury Instructions — Criminal 6.1 [Alibi] p. 94 (2000).]

SAMPLE INSTRUCTION # 6:

Evidence has been introduced that a person other than the defendant committed the crime charged. Consider all of the evidence bearing on this issue, whether introduced by the prosecution or the defendant. If, after careful consideration of all of the circumstances, you have a reasonable doubt as to whether the defendant committed the charged crime, if it was committed, then you must find the defendant not guilty.

[Cf. Oklahoma Uniform Jury Instructions — Criminal, OUJI-CR 8-57 (Defense of Alibi—Requirements] p. 490A (Oklahoma Center for Criminal Justice, 2nd ed. 1996).]

SAMPLE INSTRUCTION # 7:

The prosecution has the burden of proving beyond a reasonable doubt not only that the offense was committed but also that the defendant is the person who committed it. Unless all of the circumstances, including any evidence that a person other than the defendant committed the offense, convince you beyond a reasonable doubt that the defendant committed the offense, you must return a verdict of not guilty.

[Cf. South Dakota Pattern Jury Instructions — Criminal, SDCL 2-7-1 [Mistaken Identity] (State Bar of South Dakota 1997 rev.).]

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