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CRIMINAL LAW—CONVICTION OF LESSER CRIME UNDER INDICTMENT FOR A GREATER—Defendant below was indicted on a charge of rape of a female under the age of sixteen, and was convicted of the crime of encouraging the delinquency of a female under eighteen. The case was appealed on the question of whether the crime charged so included the one of which defendant was convicted as to permit conviction of the lesser under an indictment on the greater. The court held such conviction contrary to law, and reasoned as follows: The crime of which defendant is found guilty must be a degree of the crime as charged, or must be necessarily included in the offense charged; otherwise there can be no conviction of the lesser crime.

(1) Since rape was not divided into degrees at the time of defendant's trial, conviction under the first requirement was impossible. (2) As to the alternative requirement, contributing to delinquency is not necessarily included in the offense charged. For it may be accomplished without a touching, whereas rape cannot be; and it may be committed without assault, assault and battery, or intent to commit rape, but merely with the intent to encourage the girl to submit to commission of the act by a third person. This is not rape. *Gouchenour v. State*, Sup. Ct. of Ind., Oct. 29, 1930; 173 N. E. 191.

The case was obviously decided according to the weight of authority. *Watson v. State*, 116 Ga. 607, 43 S. E. 32; *Reynolds v. People*, 83 Ill. 479,

25 Am. Rep. 410; *Commonwealth v. Roby*, 12 Pick. (Miss.) 496; *Diaz v. United States*, 223 U. S. 442, Ann. Cas. 1913 C, 1138. In *Haverstick v. State*, 147 N. E. 625, 196 Ind. 145 (1925), the court said that the misdemeanor of transporting liquor by horseback, or on foot, or other than by such means as will constitute a felony under the provisions of the statutes relating to transportation by automobile, is not a degree of that statutory felony, but a distinct and separate offense; to carry liquor on horseback and to carry it by automobile are wholly different acts, and one offense does not necessarily include the other. And in *People v. Santoro* (1920), 229 N. Y. 277, 128 N. E. 234, it was held that the defendant, charged with first degree manslaughter under an indictment alleging that he assaulted "without a design to effect the death" of deceased, could not be convicted thereunder of first degree assault, the *absence* of intent to effect death being by statute an essential element of manslaughter, and the *presence* of such intent being by statute a requisite element of the crime of first degree assault. Said the court in its majority opinion, "The people cannot indict a citizen for a crime unless the ingredients of the latter are *fully embraced* in the former or necessarily averred in the indictment for the crime charged and proven upon the trial of the indictment (*Italics mine*)."

"A person cannot be convicted of an entirely different offense from that contained in the indictment. To test the question whether an indictment for one offense includes another, it has been said that where the offenses are both of the same general character, the indictment for the one offense must contain all the essential elements of the other, otherwise the prosecution for the latter cannot be maintained." 14 R. C. L. 210-211.

The general rule, then, appears to be that *where a person is charged with one offense, he can be convicted thereunder for only those other offenses whose elements all are necessarily included in the elements of the offense charged.*

So far as it concerns only cases where the lesser crime contains essential ingredients *necessarily outside* the elements of the greater crime charged, the operation of the rule is indubitably just. But the principal case raises an important question not touched upon by the court in its decision: What of the case in which the elements *may* but do not necessarily come without those of the crime charged? What of such a case as the instant one, in which the actual offense defendant was found to have committed might include a touching but could have been accomplished, as explained by the court, without any physical contact? Suppose the defendant had not been found guilty of rape, but had been found to have had actual physical contact—a necessary element of the rape charge—in bringing about her delinquency. Could it logically be said that he was surprised by proof of that contact? The writer thinks not, maugre the possibility of surprising him by establishing the lesser crime through proof of lack of physical contact. In short, although he might have been surprised by proof of his mere verbal persuasion of her to have illicit intercourse with a third person, he could not have been surprised if the offense of which he was convicted were established by proof that he actually did have physical contact with her resulting in that same crime of encouraging delinquency; for the indictment of rape necessarily informed him that the essential element of a physical touching would be part of the prosecution's case. Yet

the rule in its language and function makes no provision for such cases as the one hypothesized. It is submitted that in such a case, easily conceivable as it is, rigid application of the general rule would set free a person who was actually and fairly convicted of a lesser crime. Since this conclusion has apparently no authority or precedent in the cases to bolster it, and since recognition of it logically leads to a modification of the general rule stated, it is necessary to support the proposition by a discussion and analysis of the rule in the light of the possible situation suggested.

Back of the rule lies a well established principle of jurisprudence. One purpose of indictments and criminal pleading is to give the defendant ample notice of what he is accused of having done, and to afford him an opportunity to prepare a defense against the charge and everything it may legally include; that is, against every lesser crime embraced within it according to the rule.* Application of the rule protects the defendant from an unjust surprise by introduction of evidence not pertinent to the crime charged and of facts supporting an element not included in the essential ingredients of that crime. In legal contemplation, it is impossible for a defendant to be surprised by proof of an element necessarily a component part of the crime for which he is being tried, because he is presumed to have anticipated all these elements and to have prepared his defense thereto; yet he will, by the same presumption, be surprised by proof of elements not coming within those of the crime charged and therefore not anticipated. So the law will not permit such extraneous elements to be introduced in the trial. Considering the obvious impolicy of allowing a defendant to be surprised at his trial by introduction of evidence tending to establish an entirely different offense from the one he has prepared to defend himself against in accordance with the notice given by the indictment, one must concede the wisdom of the general rule.

If, however, the reason for the rule is simply to give the defendant notice of what he is charged with, so that he may prepare a defense to the charge, and to protect him from surprise by introduction of elements of which he presumably knows nothing and which he cannot anticipate, can it be said that he will be surprised by proof of what he actually did, though the element containing that act may be established by proof of acts not included in the original charge—if as a matter of fact the act is found in the particular case to be so included in the elements of both the crime charged and the one of which he is convicted? Should such a conviction be held illegal on the ground of surprise by proof of what the defendant actually did and knew he did, when that act was really included in the elements of both offenses and therefore in the indictment, though the necessary element of the lesser might also be sustained by proof of the act not embraced in the greater? Reflection compels one to answer in the negative. It seems an inescapable conclusion that a defendant cannot be surprised either by proof of the necessary elements of the offense charged or by proof of the very acts he did, where that act does fall within the elements of the crime charged. He cannot reasonably be held to be ignorant of

* This note is restricted to the problem of surprise. There is also a possible complication involving double jeopardy which is beyond the scope of this discussion.

that which he has actually done. He knows from the indictment the particular transaction it involves; he knows equally well just what part he played therein; and he knows precisely what elements he must prepare to go to trial on under the indictment. How, then, can there be surprise by the introduction at the trial of those very facts which defendant has sufficient knowledge of either through the indictment of his own acts? The mere possibility of proving the requisite element of the lesser offense by an act which would not sustain the necessary elements of the greater should patently not control the legality of the conviction actually based on a finding of an act that proves an element of both crimes—in one of which it is necessary; in the other, not necessary, but nevertheless sufficient as an alternative to another kind of act not essential for conviction of the greater. And to set aside a conviction simply because of that possibility, if it never materialized in the trial, would not be to conform to the purpose and principle of the general rule; such a decision would hardly be colorable in the light of the reason for the rule.

So the better rule would seem to be that *where a defendant is charged with one crime and convicted of a lesser, the elements of which do not necessarily, but may, fall within the elements essential to the greater, and where the facts developed at the trial do actually place the elements of the particular crime that he is convicted of within the elements of the greater crime charged, then a conviction of the lesser crime is lawful*. For defendant, by virtue of the notice contained in the indictment or charge, cannot be surprised as to any element coming within the offense charged; therefore he cannot be surprised by proof of the very thing he did, if it is found both in the elements of the greater crime and in his own proved conduct in issue. Such a modification of the rule would give it a desirable degree of flexibility, so that it would more nearly bear out its purpose, and the ends of justice would thereby be more consistently attained.