IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. RYLEY JEANNE MORGAN, Defendant-Appellant Petitioner on Review.	Josephine County Circuit Court Case No. 11CR0886 CA A152692 S063831

PETITIONER ON REVIEW'S BRIEF ON THE MERITS

Petition to review the decision of the Court of Appeals on an appeal
from a judgment of the Circuit Court for Josephine County
Honorable Thomas M. Hull, Judge

ERNEST G. LANNET #013248
Chief Defender
Criminal Appellate Section
MARC D. BROWN #030825
Chief Deputy Defender
Office of Public Defense Services
1175 Court Street NE
Salem, OR 97301
Marc.Brown@opds.state.or.us
Phone: (503) 378-3349
Attorneys for Petitioner on Review

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
GREGORY RIOS #064830
Assistant Attorney General
400 Justice Building
1162 Court Street NE
Salem, OR 97301
gregory.a.rios@doj.state.or.us
Phone: (503) 378-4402
Attorneys for Respondent on Review

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PETITIONER'S BRIEF ON THE MERITS

Question Presented and Proposed Rule of Law

Question Presented: A basic robbery becomes robbery in the second degree when the principle is "aided by another person actually present." Does that provision require the state to present sufficient evidence that the principle colluded with the other person to commit the robbery?

Proposed Rule of Law: Yes. ORS 164.405(1)(b) requires that the person commits a basic robbery and also enlists another individual to help plan and complete the theft by assisting in the theft and providing force or the threat of force.

Statement of the Case

A grand jury indicted defendant with several crimes, including robbery in the second degree, based on her participation in a shoplifting incident in Grants Pass. *See* indictment at ER 1-3..

Defendant waived jury and argued in closing that she could not be convicted of second-degree robbery because Jerry her boyfriend, did not aid her in committing the robbery. Tr. 589-92. The court found that did not know that defendant was committing theft but ultimately concluded that the evidence was sufficient to support a guilty verdict for robbery in the second degree, reasoning that "all I have to find is that [knew that [defendant] was being sought for something, it was

nefarious, criminal, and that he was aiding her to leave and get out of there." Tr. 634-35. A copy of the judgment is attached at ER 4-8.

On appeal, defendant argued that the evidence was insufficient to support a conviction for robbery in the second degree, because did not aid defendant in the theft of clothes from the store. The Court of Appeals disagreed:

> "the state presented sufficient evidence for a reasonable factfinder to conclude that aided defendant's theft. The text, context, and legislative history establish that ORS 164.405(1)(b) does not require 'another person actually present' who aids defendant to know that defendant is committing theft. Rather, another person actually present who aids defendant only needs to be in proximity to the victim to be an added threat."

State v. Morgan, 274 Or App 792, 801, 364 P3d 690 (2015).[1]

Statement of Facts

Defendant's boyfriend, Jerry left defendant and their three-month old child at the Grange Co-op in Grants Pass. Tr 194, 202, 260.

planned to obtain drugs while defendant shopped. Tr 202. did not tell defendant about the drugs. Tr 203.

Defendant entered The Grange and headed to the apparel section; she selected "high dollar" clothing. Tr 260. The Grange's loss-prevention officers,

[1] In her second assignment of error, defendant argued that the guilty verdicts for robbery in the second degree and robbery in the third degree should merge. The state conceded error, and the Court of Appeals accepted that concession. *Morgan*, 274 Or App at 802.

Michelle and Kevin watched defendant on the surveillance camera from the security office. Tr 260.

Defendant placed five items in a fitting room and continued shopping. Tr 262. counted five items in the dressing room. Defendant selected two more items and then went inside the dressing room. Tr 266. She was in the dressing room for approximately 10 minutes. Tr 266. After defendant left the fitting room, entered and found that defendant left five items in the room. Tr 267. At some point, defendant placed another pair of jeans in the dressing room. Tr 272.

Defendant sent a text message to and asked him to return to the store to get her. Tr 213. entered the store, found defendant, and held the baby while defendant tried on clothing. Tr 213. Defendant was in the fitting room for approximately three minutes. Tr 272-73. As she exited, defendant grabbed a pair of jeans from outside the fitting room, and tossed them into the room with her items. Tr 273.

found four items remaining in the dressing room not including the item defendant tossed in when she exited. Tr 273-75. concluded that two additional items were missing. Tr 275.

and waited for defendant and to "pass all the points of sale and exit the store" and then pursued defendant. Tr 276.

In the parking lot, defendant approached the passenger's side of vehicle, and followed. Tr 277. showed defendant his badge as she placed the child in the car seat. Tr 278. said, "Ma'am, I'm with store security and we need to talk about some merchandise that wasn't paid for." Tr 279-80. Defendant said, "You're not taking me to jail" and jumped into the passenger's side of the vehicle. Tr 282.

When defendant "entered the vehicle grabbed her right arm and told her to exit the vehicle." Tr 282. asked what was going on. Tr 283.

started the vehicle, and drove forward. Tr 284. He had drugs in his pocket and "took off" because he "panicked." Tr 224. knew that the individuals who had approached the car were loss prevention or store security. Tr 227-28. He did not know that defendant had committed theft while she was inside of the store. Tr 635.

When the car had moved a couple of feet, let go of defendant's arm. Tr 285. The assistant manager, Jim Ward, who was standing in front of the car, had to move to avoid being hit. Tr 288. Ward later told that the driver hit him in the knee with the car. Tr 289. drove the vehicle in an "erratic manner" at about 20 to 30 miles per hour in the parking lot. Tr 291.

Summary of Argument

Robbery in the third degree is elevated to robbery in the second degree when a person commits a basic robbery and "is aided by another person actually present." Under that provision, a person is liable for robbery in the second degree when that person commits a basic robbery and also enlists another individual to help plan and complete the theft by intentionally assisting in the theft and providing force or the threat of force.

The dictionary defines the verb "aid" to mean "to give help or support to." Additionally, because the legislature passed the statute at issue here and ORS 161.155 (aiding and abetting) as part of the same law, the court can assume that the drafters used the term "aid" in both statutes consistently. The Criminal Law Revision Commission ("the Commission") adopted the terms "aids" and "abets" previously put forth by this court, explaining that an "aider and abettor is one who advises, counsels, procures, or encourages another to commit a crime, though not personally present at the time and place of the commission of the offense." However, unlike aiding and abetting, the aider in ORS 164.405 must actually be present to render assistance to the principle. Requiring "presence" at the scene suggests the legislature envisioned an ongoing plan or intentional involvement by the aider.

Furthermore, the commentary to ORS 164.405 provides some insight into the legislature's intent. It emphasizes that, although there was some concern

over the fear to the victim when two or more individuals collude to commit a robbery, the main concern was the increased risk of danger and violence when the robbery is committed by two or more robbers. The commentary also provides that the aider must be aware that he is assisting in a robbery. In other words, the "aider" is not an innocent bystander but rather a "robber" who was involved with planning and completing the theft.

The legislative history of ORS 164.405 further supports those conclusions. The overarching concern was that two robbers were more dangerous than one.

Finally, omitting the requirement that the aider have some knowledge that he is aiding the principle to commit robbery leads to absurd results such as a person committing robbery in the third degree convicted of robbery in the second degree because someone held open a door while the perpetrator ran away from the pursing security officers.

Here, the record supports the trial court's finding that did not know that he was aiding defendant to commit robbery, defendant was improperly convicted of robbery in the second degree.

Argument

I. Robbery in the third degree is elevated to robbery in the second degree when the defendant is "aided by another person actually present."

ORS 164.405 provides:

> "(1) A person commits the crime of robbery in the second degree if the person violates ORS 164.395 and the person:
>
> "(a) Represents by word or conduct that the person is armed with what purports to be a dangerous or deadly weapon; or
>
> "(b) Is aided by another person actually present.
>
> "(2) Robbery in the second degree is a Class B felony."[2]

Previously, this court explained that ORS 164.405 is one of three statutes that, together, make up the statutory scheme respecting robbery. *State v. White*, 346 Or 275, 285, 211 P3d 248 (2009). Robbery in the third degree, ORS 164.395, "describes the basic crime of robbery: taking or attempting to take

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[2] Assault in the fourth degree is similarly elevated to assault in the third degree when a defendant "while being *aided by another person actually present*, intentionally or knowingly causes physical injury to another." ORS 163.165(1)(e) (emphasis added). That provision was not enacted as part of the 1971 criminal code revision. In *State v. Pine*, 336 Or 194, 82 P3d 130 (2003), this court interpreted that statute but focused on whether a person could be convicted of assault in the third degree when he aided his brother who had assaulted the victim but did not assault the victim himself. This court did observe, however, that "incorporation of the word 'aided' in the statute likely exposes a defendant who provides on-the-scene aid to *some* form of criminal liability" under ORS 161.155(2)(b), "it does not circumvent the requirement that a defendant must 'cause [ ] physical injury' to violate ORS 163.165(1)(e)." *Id*. at 201 (emphasis and brackets in original).

property from another, while preventing or overcoming the victim's resistance to giving up the property by using or threatening to use physical force."

The crimes of robbery in the second and first degree use the definition of robbery in the third degree as a foundation "and build on its elements by identifying additional elements that, if present, make the crime a more serious one." *Id*. at 285-86. Thus, robbery in the third degree becomes the more serious offense of robbery in the second degree when the state presents sufficient evidence that the defendant represented "by word or conduct that the person is armed with what purports to be a dangerous or deadly weapon" or that the defendant was "aided by another person actually present." ORS 164.405. "The legislature's creation of the crime of second-degree robbery thus reflects concern with the increased threat of violence from a purported weapon (even if it is a threat that the robber cannot make good on) and from the presence of an *accomplice* with the robber." *White*, 346 Or at 286 (emphasis added).[3]

This case focuses on the "aided by another person actually present" element of robbery in the second degree and whether the state must present evidence of some collusion between the principle and the other person actually

[3] Although this court in *White* was focused on a different issue than is presented here, it is noteworthy that this court appeared to equate the other person actually present to an accomplice. *Id*. at 291 ("The legislature determined that either a purported weapon or *the presence of an accomplice*, or both, would elevate the crime of third-degree robbery to the crime of second-degree robbery.") (emphasis added).

present. Such an inquiry turns on the intent of the legislature. In order to discern the legislative intent, this court begins with the text and context of the statute. If appropriate, this court also considers the statute's legislative history and, if the statute's meaning remains unclear, this court may resort to the general maxims of statutory construction. *See State v. Gaines*, 346 Or 160, 171-73, 206 P3d 1042 (2009) (explaining the methodology).

II. The text and context of ORS 164.405 illustrates that the legislature intended some level of collusion between the principle and the aider.

A. The text shows that the record must contain sufficient evidence of collusion between the principle and the other person actually present.

At issue is the meaning of the term "is aided by another actually present," and, for purposes of determining whether the legislature intended that the record show collusion between the principle and the other person actually present, the meaning of the word "aided." Because the legislature has not defined the term "aided" for purposes of the robbery statute, the court turns to the dictionary to determine the ordinary meaning of that term. *Jenkins v. Board of Parole and Post-Prison Supervision*, 356 Or 186, 194, 335 P3d 828 (2014) ("Because the legislature has not expressly defined the words in the disputed phrase, dictionary definitions * * * can be useful."). "Aid" in the verb form is defined as,

> "to give help or support to: FURTHER, FACILITATE, ASSIST <he ~*ed* the cause> <the … Committee ~*ed* veterans in their applications

> for pensions—*Current Biog.*>: contribute to <finances are ~*ed* by rummage sales> ~*vi*: to give assistance: be of use: HELP <he ~*ed* in the attempt> **syn** see HELP."

Webster's Third New Int'l Dictionary 44 (unabridged ed 2002). *See also Black's Law Dictionary* 68 (6th ed 1990) ("**Aid.** To support, help, assist, or strengthen. Act in cooperation with; supplement the efforts of others.").

As part of the textual analysis, this court also looks to the use of the same term in related statutory provisions.

Both ORS 164.405 (robbery in the second degree) and ORS 161.155 (criminal liability to the conduct of another) were enacted in 1971 as part of the revision of the criminal code. *See* Or Laws 1971, ch 743. Although ORS 161.155 does not provide a statutory definition for "aids" in the context of aiding and abetting another person in the planning or commission of a crime, the commentary to that provision refers to an earlier definition provided by this court:

> "The term "aids" and "abets" have been utilized in paragraph (b) without definition inasmuch as they have been interpreted in a number of Oregon cases. *State v. Rosser*, 162 Or 293, 344, 91 P2d 295 (1939), defined an 'aider and abettor' as 'one who advises, counsels, procures or encourages another to commit a crime, though not personally present at the time and place of the commission of the offense.'"

Commentary to Criminal Law Revision Commission Proposed Oregon Criminal Code, Final Draft and Report § 13 (July 1970).

Because both ORS 161.155 and ORS 164.405 were enacted by the same law and both use the term "aid" in the same context, this court can assume that the drafters used those terms consistently. *Tharp v. PSRB*, 338 Or 413, 422, 110 P3d 103 (2005) ("When the legislature uses the identical phrase in related statutory provisions that were enacted as part of the same law, we interpret the phrase to have the same meaning in both sections."); *State v. Cloutier*, 351 Or 68, 99, 261 P3d 1234 (2011) ("Although, in the abstract, there is nothing that precludes the legislature from defining the same terms to mean different things in the same or related statutes, in the absence of evidence to the contrary, we ordinarily assume that the legislature uses terms in related statutes consistently.").

What is clear from that commentary is that the drafters intended the aider to have some knowledge of the criminal activity. Nothing in the commentary to ORS 164.405 indicates any intent to provide a different definition for the same term as used in ORS 161.155.

The legislature, in enacting ORS 164.405, further cabined its use of "aided" only to those persons actually present. Without that limitation, a person could be guilty of robbery in the second degree in situations where the other person helped or assisted in the planning of the robbery or later helped hide or sell the stolen goods. By placing a limit on the term "is aided by another person," the legislature limited the factual scenarios under which a robbery in

the third degree is elevated to a robbery in the second degree. *Cf* ORS 161.155 (a person aids and abets criminal activity by aiding in the planning of the criminal activity). *See also White*, 346 Or at 286 ("The legislature's creation of the crime of second-degree robbery thus reflects a concern with the increased threat of violence from a purported weapon (even if it is a threat that the robber cannot make good on) and *from the presence of an accomplice with the robber*.") (emphasis added).

Although, as noted above, the commentary to ORS 164.405 does not provide any direct definition of "aided" as used in that statute, the commentary strongly indicates that the drafters assumed that the person aiding the defendant would have some knowledge that the defendant was committing robbery. The commentary to § 149 (later enacted as ORS 164.405) provides:

> "The primary rationale behind paragraph (b) of subsection (1) of § 149 is the increased danger of an assault on the victim when the robber is reinforced by another criminal who is actually present. Furthermore, when two or more persons commit the crime, it indicates greater planning and more likelihood that they are professional criminals."

Commentary to Criminal Law Revision Commission Proposed Oregon Criminal Code, Final Draft and Report §§ 148-50 (July 1970).

That commentary illustrates that the drafters intended that the record contain evidence of some collusion between the principle and the other person to commit a robbery. That is so because the commentary specifically notes that

having two or more people committing the crime indicates greater planning and greater planning between the involved parties implies that all the parties were aware of the criminal act. Additionally, that commentary notes that there is an increased danger of an assault on the victim "when the robber is reinforced by another criminal who is actually present." By referring to the aider as a "criminal," it is likely that the drafters believed that there would be a criminal conspiracy prior to the actual crime. In other words, if the factual basis for robbery in the second degree involved aid from a person who did not know that a theft was occurring, the aider would be a bystander and not a "criminal."

The commentary continues:

> "However, the Commission was of the opinion that the *accomplice* circumstances, while aggravating the crime, are less serious than those specified in §150 [robbery in the first degree]."

Id. (emphasis and brackets added).

Here, the drafters used the term "accomplice" as a synonym for the term "aided." The term "accomplice" means, "[o]ne who knowingly, voluntarily, and with common intent unites with the principal offender in the commission of a crime." *Black's Law Dictionary* 17 (6th ed 1990). Thus, the drafters used the term "accomplice" as a synonym for "aided" and expressly required that the other person, at a minimum, have colluded in the commission of a crime.[4]

[4] As noted above, this court similarly referred to the other person actually present as an "accomplice." *White*, 346 Or at 290-91.

The next portion of the commentary provides:

> "It is important to note, however, that inclusion of the factor of actual aid by another person does not affect the doctrine of vicarious responsibility of accomplices for the criminal acts of the principle. This matter is handled in the general provisions of the draft covering complicity."

Commentary to Criminal Law Revision Commission Proposed Oregon Criminal Code, Final Draft and Report §§ 148-50 (July 1970).

As the Court of Appeals observed in this case,

> "Contrary to defendant's interpretation, the Commentary states only that ORS 164.405 does not 'affect' ORS 161.155−the accomplice liability statute−and that ORS 164.405 pertains to another person actually present who is in sufficient proximity to the victim to assist the defendant in exerting force against the victim. The Commentary does not express a requirement that 'another person actually present' who aids defendant under ORS 164.405(1)(b) must also be criminally liable for the principal's conduct under ORS 161.155."

Morgan, 274 Or App at 799. Defendant does not disagree with the court's observations but notes that the court erroneously concluded from that portion of the commentary that the drafters did not intend for the aider to have colluded in the commission of the robbery. That portion of the commentary simply stands

for the proposition that a person who is the aider can also be held liable for the robbery under ORS 161.155.[5]

The commentary for § 149 concludes as follows:

> "The language employed is intended to include only those situations in which the accomplice is in such proximity to the victim that he is in a position to assist in exerting force upon the victim. This will be a question of fact to be determined from the total circumstances in each individual case. In most instances, the victim probably will know that more than one person is committing the crime. However, the victim's awareness of the presence of the other person is immaterial. The issue is whether the actor is *aided* by another person actually present and not the subjective effect of his presence on the victim."

Commentary to Criminal Law Revision Commission Proposed Oregon Criminal Code, Final Draft and Report §§ 148-50 (July 1970) (emphasis in original).

This final part of the commentary relates to the "actually present" portion of the statute. The first sentence of that portion of the commentary refers to the other person as an "accomplice" and specifies that "actually present" requires that the person be in a position to exert force upon the victim. For example, a person who is 200 yards from the victim will likely not be "actually present" for

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[5] Whether a person can aid another person in a robbery for purpose of robbery in the second degree and not be liable under ORS 161.155 is not at issue here. Such a scenario would arise in a situation where a defendant was convicted of robbery in the third degree under and aid and abet theory for knowingly assisting the principle in the robbery. Because did not know that defendant was committing robbery, he could not be convicted under an aid and abet theory of liability.

purposes of ORS 164.405.[6] The next sentence states that the determination of "actually present" depends on the totality of the circumstances. The final sentences explain that the victim's awareness of the other person is not material to the determination of whether that person was "actually present."

Taken as a whole, the commentary explains that two factors control whether the defendant was aided by another actually present. The first factor is whether the other person colluded with the defendant to commit the robbery and the second factor is whether, under a totality of the circumstances, the other person is in a position to exert force upon the victim.

Based on the text of the statute, the meaning of the term "is aided by another actually present" is that the defendant colluded with the other person in committing the robbery and is in a position to exert force upon the victim.

B. The context of the disputed term shows that the legislature intended that the principle colluded with the other person actually present in both the theft and the use of physical force.

Because robbery consists of both theft and the use of physical force, the record must contain evidence that the principle and the other person colluded in both the theft and the use of physical force. As this court explained, the basic act of robbery "requires that, in the course of committing or attempting to commit theft, a defendant use or threaten to use

[6] However, as the commentary notes, such a determination is based on a totality of the circumstances. If a person is 200 yards away but has a long-range rifle and is an expert marksman, he may be "actually present."

immediate physical force on another person with the intent of preventing or overcoming the resistance to the taking of property or compelling the person to deliver property." *State v. Hall*, 327 Or 568, 573-74, 966 P2d 208 (1998). Because the act of robbery consists of theft plus use of physical force and ORS 164.405 requires the aider to aid in the robbery, the accomplice and the principle must have colluded in both the theft and use of physical force. In other words, if the person aiding the defendant helps the defendant in the taking of property but not in the use of physical force or, conversely, the person helps the defendant in the assaultive part of robbery but not the theft part, then the person has not aided the defendant in the act of robbery (though he or she may be liable for either the theft or assault under an aid and abet theory).

In sum, the text and context of the term "is aided by another actually present" means to be helped or assisted in the theft and the use of physical force by another person who colluded with the defendant in committing robbery and is in a position to exert force upon the victim.

III. The legislative history is replete with references to some collusion between the principle and the aider.

As noted above, the current version of the robbery statutes were proposed as part of the 1971 revisions of the criminal code. In his opening comments to the subcommittee, Don Paillette, Project Director, explained that the primary

difference between the proposed statutes and the then current statutes was that the new version "shifted the focus of attention from the taking of property to the risk of injury and violence to the victim." He continued by noting that, "[i]mpliedly, the statute would say that what the law was concerned with was the use of force upon the victim." Minutes, Criminal Law Revision Commission, Subcommittee 1, June 22, 1968, 5. Although the legislative history contains concerns about the increased fear of the victim when more than one person is involved in the robbery, the primary concern of the drafters was the increased risk of violence when two or more perpetrators colluded in the robbery.[7]

As proposed, a robbery in which the principle was aided by another person actually present was classified as robbery in the first degree. Mr. Paillette explained that the intent was "to prevent the use of force or a show of force in the course of committing a theft and the crime would be more serious if any factor increased the danger to the victim." He continued:

> "Under subsection (4) [aided by another actually present], the *accomplice* would constitute additional force because the fact that the robber had someone present *to help him* was as great a threat to the victim as if the robber were armed with a club."

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[7] As noted above, the commentary specifies that "the victim's awareness of the presence of the other person is immaterial." Thus, although the minutes contain references to the increased fear of the victim when two or more robbers are present, those statements, read in context with the final commentary, show that the full commission did not share those concerns.

Id. at 7 (emphasis added).

Senator John Burns, Chairman, asked if a person driving a "get-away car" would be considered "actually present" under the proposed statute. Bruce Spaulding, a member of the subcommittee, responded that "he did not believe the man in the car would be considered 'actually present' because the two men would not be together to increase fear in the victim and the second man would not be on hand to constitute and additional show of force." *Id*. Mr. Paillette agreed. *Id*.

Later in that day's discussion, Mr. Spaulding asked if the text should be clarified to indicate that the fear of the victim was enhanced by the additional manpower present. Mr. Paillette, emphasizing that the focus was really on the increased danger of violence or force on the victim, explained that "the danger of violence or force to the victim was not lessened by the fact that he was unaware of the second person's presence." *Id*. at 9.

At a meeting of the Commission on July 19, 1968, Mr. Paillette explained that the "aggravating elements in section 2 [robbery in the first degree] were inserted with the thought that they increased the danger to the victim and the rationale for subsection (4) [is aided by another person actually present] was that having *two robbers* present increased the victim's peril." Minutes, Criminal Law Revision Commission, July 19, 1968, 15 (emphasis and

brackets added). Significantly, Mr. Paillette referred to "two robbers." Such a reference indicates some level of collusion between the two individuals. In other words, if one person was present but did not know that the other was engaged in a robbery, the second person would not be a "robber" without any knowledge or intent to commit the robbery.

Senator Yturri, Chairman of the Commission, reiterated that the driver of a "get-away car" would not be "actually present." *Id*. Senator Yturri further explained that whether a person who is a "look-out" is "actually present" turns on whether "the victim was aware of his presence and on the immediate availability of assistance to the robber." *Id*. The minutes from that meeting continue by noting that,

> "Mr. Paillette commented that it was not so much a question of the fear created in the mind of the victim as it was the danger to the victim. He said the controlling factor would not be whether or not the victim knew about the second man's presence because the danger would still exist regardless of the victim's awareness of that fact."

Id.

Senator Burns noted that the subcommittee decided "that if two men went in together and were unarmed, their act would create the same degree of danger to the victim as one man armed and the offenses would be the same. *Id*. at 16. Thus, the minutes re-emphasize that the concern is that two robbers increases the risk of danger to a situation and, more importantly, that the record contains evidence that the defendant and accomplice colluded in the

commission of the robbery. Implicit in Senator Burns' statement is that if two people went in to a store together but only one of them had planned a robbery, the degree of danger would not be as great as if there was some collusion between the two.

Most insightful, however, was the comment by University of Oregon School of Law Professor George Platt:

> "[I]f a single person planned a crime, he was more likely to withdraw or change his mind before the crime was actually committed than if he was part of a group where the likelihood of his changing his mind was much less because of the pressure he would be under from his cohorts. Whether or not they were both actually present * * * they were just as dangerous because the crime was more likely to be committed. This * * * was the basic philosophy behind the conspiracy statutes."

Id. Thus, according to Professor Platt, part of the concern with having the principle aided by another actually present was that when two or more individuals planned the crime, it was more likely that the robbery would be carried out because of the pressure when the principle's "cohorts." If the legislature did not intend some collusion between the principle and the other person actually present, Professor Platt's comment would not make sense. That is so because if the other person had not colluded with the principle, then the other person could not increase the pressure to complete the crime.

By August 3, 1968, the commission moved the basic definition of robbery to robbery in the third degree and created robbery in the second degree

to cover a situation in which the robber said he had a gun but did not actually have one. Minutes, Criminal Law Revision Commission, Subcommittee 1, August 9, 1968, 13 (comments by Don Paillette).

At the November 21, 1968, commission meeting, Mr. Paillette noted "that the rationale behind subsection (4) was that if an *accomplice* were there to enforce the robber, the situation was potentially as dangerous as if the robber was armed. Minutes, Criminal Law Revision Commission, November 21, 1968, 9 (emphasis added). Again, the use of the term "accomplice" indicates that the concern of the Commission was the increase in danger when there are two or more individuals colluding in the robbery. Furthermore, the consistent use of that term shows that the commission had accomplice liability concepts in mind when it used the term "aided by another actually present."

Ultimately, the commission approved the final text of the provision and voted to move it to subsection (2) (robbery in the second degree). *Id*. at 10.

Taken as a whole, the legislative history emphasizes two main points. First, the commission's primary concern was the increased risk of violence when two or more career robbers are involved and, secondarily, the commission was concerned about the increased fear of the victim. Second, the Commission was referring to individuals colluding to commit the robbery as illustrated by the use of the term "accomplice" and "robbers" in the comments.

IV. Omitting the requirement that the aider know he is aiding the principle in the robbery leads to absurd results.

Under *Gaines*, if the statute's meaning remains unclear, this court may resort to the general maxims of statutory construction. 346 Or at 171-73. Although the text, context, and legislative history of ORS 164.405 clearly shows that the legislature intended that the record contain evidence that the principle and the other person colluded in committing a robbery, defendant resorts to the general maxims of statutory construction merely to illustrate the absurd results that would flow from omitting that requirement. *McKean-Coffman v. Employment Division*, 312 Or 543, 549, 824 P2d 410 (1992) ("[i]n construing a statute, courts must refuse to give literal application to the language when to do so would produce an absurd result.").

Without the requirement of collusion between the principle and the other person actually present, a defendant who otherwise is committing robbery in the third degree faces a conviction of robbery in the second degree if, when she is leaving a store with stolen items after using some force to retain the items, a bystander opens the door for her. Likewise, if a person snatches a purse from a victim and, as the person tries to chase the defendant, a professional dog walker gets in her way, causing her to trip on the leashes, robbery in the third degree would become robbery in the second degree.

Again, defendant's position is that the text, context, and legislative history clearly show that the legislature intended some collusion between the principle and the other person. However, those examples merely illustrate the absurdity of removing that requirement.

V. Because the state failed to offer sufficient evidence of any collusion between defendant and to commit the robbery, the proper conviction is robbery in the third degree.

The trial court, in its role as fact finder, found that "[t]he one thing I can't find, and because there's been no proof of that, is that [knew that she had committed theft, or that she had things in her purse or that she was trying to complete her theft." Tr. 634. This court is "bound by the trial court's findings of historical fact if evidence in the record supports them." *State v. James*, 339 Or 476, 481, 123 P3d 251 (2005) (citing *Ball v. Gladden*, 250 Or 485, 487-88, 443 P2d 621 (1968)). The state has never challenged that finding, and the record supports it. In his testimony, explained that he left defendant and their child at The Grange and departed to obtain drugs. Tr. 202. He stayed at the location where he obtained drugs for 30 minutes to an hour. Tr. 209. At some point, defendant sent a text message to to return to the store. Tr. 213. When he returned to the store, went inside to find defendant. After he found defendant, he held their child while defendant entered the fitting room. Tr. 213. When defendant finished trying on the clothes, she and walked out of the store and to his car. Tr. 215. was aware

that the individuals who approached the car were security officers. Tr. 228. He was also aware that the store security approached them as a result of defendant's activities in the store. Tr. 229. explained that he drove away because he had drugs in his pocket and he panicked. Tr. 225.

Because the record supports the finding that did not know that defendant committed theft, this court is bound by that finding.[8] As explained above, the text, context, and legislative history of ORS 164.405 shows that the state must present sufficient evidence that defendant was aided by another actually present. That requires evidence of some level of collusion between defendant and At a minimum, the record must show that had colluded with defendant to commit robbery and that he was in a position to exert force on the store security officers. Although the record contains sufficient evidence to support a finding that was in a position to exert force on the store security officers, the record contains no evidence that he colluded with defendant to commit theft or robbery while in the store. Therefore, the state failed to prove that defendant was aided by another actually present.

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[8] The state may argue that knew that he was aiding defendant in the robbery when he sped away from the security officers. The record does not support a conclusion that defendant drove away to aid defendant. In fact, the record shows that panicked because he had drugs on him and sped away for that reason. In other words, the fact that drove away is not evidence of collusion to commit the robbery.

The proper remedy is to vacate defendant's conviction for robbery in the second degree, and remand for resentencing on the remaining counts.[9]

CONCLUSION

Based on the forgoing analysis, defendant ask this court to reverse the decision of the Court of Appeals and the trial court and remand to the trial court for a judgment of acquittal on robbery in the second degree, and resentencing.

Respectfully submitted,

ERNEST G. LANNET
CHIEF DEFENDER
CRIMINAL APPELLATE SECTION
OFFICE OF PUBLIC DEFENSE SERVICES

ESigned

MARC D. BROWN OSB #030825
CHIEF DEPUTY DEFENDER
Marc.Brown@opds.state.or.us
Attorneys for Defendant-Appellant
Ryley Jeanne Morgan

[9] The trial court also convicted defendant of robbery in the third degree for the same act. On appeal, the state conceded that the verdict for robbery in the third degree merged with the verdict for robbery in the second degree. Because, as argued above, the trial court erroneously convicted defendant of robbery in the second degree, no merger is required. The conviction for robbery in the third degree is the valid conviction.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 6, 483 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on July 1, 2016.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Petitioner's Brief on the Merits will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Benjamin Gutman #160599, Solicitor General, attorney for Respondent on Review.

Respectfully submitted,

ERNEST G. LANNET
CHIEF DEFENDER
CRIMINAL APPELLATE SECTION
OFFICE OF PUBLIC DEFENSE SERVICES

ESigned

_____

MARC D. BROWN OSB #030825
CHIEF DEPUTY DEFENDER
Marc.Brown@opds.state.or.us

Attorneys for Petitioner on Review
Ryley Jeanne Morgan