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 No. 11CR0886 CA A152692 SC S063831

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Josephine County
Honorable THOMAS M. HULL, Judge

Opinion Filed: November 12, 2015
Author of Opinion: Egan, J.
Before: Armstrong, Presiding Judge; Egan, Judge;
and Edmonds, Senior Judge.

Continued…

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BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

INTRODUCTION

ORS 164.405(1)(b) provides that a person commits the crime of robbery in the second degree if he or she commits robbery while "aided by another person actually present." The narrow issue in this case is what the word "aided" means in that statute—specifically, whether it imposes a requirement that the "other person" act with the intent to promote or facilitate the defendant's crime.

As explained below, it does not. Nothing in the statute's text, context, or legislative history indicates that the drafters of the statute intended to require that the person who provides "aid" share the defendant's culpable mental state, or otherwise intend to facilitate commission of the robbery. In short, the person who provides aid need not be liable for the crime as an accomplice. The only person whose mental state is at issue in a case of second-degree robbery is the defendant.

QUESTION PRESENTED

Does the requirement in the second-degree robbery statute, ORS 164.405(1)(b), that the defendant be "aided by another person actually present" require proof that the "other person" acted with an intent to facilitate the defendant's commission of the robbery?

PROPOSED RULE OF LAW

No. The state need not prove that the "other person" who "aided" the defendant did so with the intent to promote or facilitate the robbery. It need only prove that the person, while "actually present," performed an act that aided defendant in committing the crime.

SUMMARY OF ARGUMENT

Nothing in the text, context, or legislative history of the second-degree robbery statute indicates that the legislature intended to require proof that a person who "aids" another in committing second-degree robbery shared the defendant's criminal intent. Although statute's drafters expressed concern about the risks to the victim when "two robbers" commit a robbery, they did not limit the statute's application to that scenario. Accordingly, the state need not prove that the person who provided aid to the defendant did so with any particular mental state.

FACTUAL AND PROCEDURAL BACKGROUND

A. The trial court found defendant guilty of second-degree robbery, ORS 164.405(1)(b)—robbery "aided by another person actually present."

Defendant left a store, along with her boyfriend, and their three-month-old child. Because she had taken merchandise without paying, store security officers followed her outside, where a confrontation ensued:

> In the parking lot, as defendant placed her child in a car seat, one of the security officers showed defendant his badge and said,

> "Ma'am I'm with store security and we need to talk about some merchandise that wasn't paid for." Defendant responded, "You're not taking me to jail." She jumped in the passenger side of the car. At that point, the security officer grabbed defendant's right arm and told her to exit the vehicle. Defendant pulled her arm back. asked what was going on, started the car, and began to rev the engine while the security officer still had hold of defendant's arm.
>
> began to drive forward with defendant's door still open, and the security officer let go of defendant's arm. By that time, the assistant manager was standing in front of the car. The manager attempted to jump out of the way as the car moved forward. sped out of the parking lot, driving in an "erratic manner," and ran a red light.

State v. Morgan, 274 Or App 792, 795, 364 P3d 690 (2015), *rev allowed*, __ Or __ (2016). testified at trial that he knew that the men who approached defendant were store security officers. *Id*.

In closing argument to the trial court, defendant argued that she was entitled to acquittal because the state failed to prove that knew that he had aided her in committing the robbery. The trial court disagreed:

> [A]ll I have to find is that [knew that she was being sought for something, it was nefarious, criminal, and that he was aiding [defendant] to leave and get out of there.

Id. at 796 (brackets in original). It then found defendant guilty of second-degree robbery. *Id.*

B. The Court of Appeals held that ORS 164.405(1)(b) does not require proof that the person who provided aid met the requirements for accomplice liability.

On appeal, defendant argued that the person who "aids" another in the commission of a robbery must meet the requirements for accomplice liability in ORS 161.155, including the requirement that the "aider" act with the specific intent to promote or facilitate the robbery. *Morgan*, 274 Or App at 797. The Court of Appeals rejected that argument, concluding that nothing in the text of the second-degree robbery statute, its context, or its legislative history indicated that the legislature intended for the statute to apply only when the person providing aid to the defendant did so with a culpable mental state. *Id.* at 799-801. Instead, the only person whose mental state is at issue is the defendant. *Id.* at 801 n 3.[1]

ARGUMENT

This case presents a narrow question of statutory interpretation: whether the second-degree robbery statute, ORS 164.405(1), requires the state to prove that the person who "aided" in a robbery while actually present did so with a culpable mental state. ORS 164.405(1) provides:

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[1] Defendant also argued that the trial court plainly erred by failing to merge the verdicts for second- and third-degree robbery. The state conceded the error, and the Court of Appeals accepted that concession. *Id.* at 802.

> A person commits the crime of robbery in the second degree if the person [commits third-degree robbery[2]] and the person:
>
> * * * * *
>
> (b) Is aided by another person actually present.

According to defendant, the mental-state requirement for the "other person" inheres in the word "aided." In other words, in defendant's view, "aided" is shorthand for accomplice liability, which requires proof of shared criminal intent. (Pet Br 13). But, as explained below, defendant loads the word "aided" with more weight than it can logically bear.

Because this case turns on the meaning of the word "aided," this court's task is to determine what the legislature intended that word to mean in the context of the second-degree robbery statute. Because the legislature did not define the term, this court determines the legislature's intent by considering the

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[2] The third-degree robbery statute, ORS 164.395(1), provides:

> A person commits the crime of robbery in the third degree if in the course of committing or attempting to commit theft or unauthorized use of a vehicle as defined in ORS 164.135 the person uses or threatens the immediate use of physical force upon another person with the intent of:
>
> (a) Preventing or overcoming resistance to the taking of the property or to retention thereof immediately after the taking; or
>
> (b) Compelling the owner of such property or another person to deliver the property or to engage in other conduct which might aid in the commission of the theft or unauthorized use of a vehicle.

text of the statute, its statutory context, and, where appropriate, by reviewing legislative history offered by the parties. *See State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009).

A. The word "aided" does not imply a mental-state requirement.

Nothing in the plain meaning of the word "aid" necessarily implies that the person who provides aid must intend to facilitate a particular result—and defendant does not appear to argue otherwise. When the second-degree robbery statute was drafted,[3] *Webster's* defined "aid" as "to give help or support to," or "contribute to." *Webster's Third New Int'l Dictionary* 44 (unabridged ed 1961).[4] The legal dictionary definition was effectively the same. *See Black's Law Dictionary* 91 (rev 4th ed 1968) (defining "aid" as "[t]o support, help, assist or strengthen," "[a]ct in cooperation with," and "[s]upplement the efforts of another"). The text of the statute, then, suggests that a defendant is "aided by another person" if that person helps the defendant commit the crime, regardless of the person's mental state.

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[3] ORS 164.405(1)(b) was enacted as part of the 1971 Criminal Code Revision. Or Laws 1971, ch 743, § 148.

[4] Because the second-degree robbery statute was enacted as part of the 1971 Criminal Code Revision, the state cites to the dictionary definitions that existed when the statute was drafted. *See Comcast Corp. v. Dept. of Revenue*, 356 Or 282, 296 n 7, 337 P3d 768 (2014) ("In consulting dictionaries, * * * it is important to use sources contemporaneous with the enactment of the statute.").

B. The accomplice-liability statute provides contextual support for interpreting the word "aided" not to require proof of a culpable mental state.

Defendant presumes that the legislature must have intended the word "aid" in ORS 164.405(1)(b) to have the same meaning as it does in the accomplice liability statute, ORS 161.155, because the two statutes were "enacted by the same law"—the 1971 Criminal Code Revision. (Pet Br 11). But defendant compares apples to oranges. The accomplice-liability statute does not use the word "aid" alone:

> A person is criminally liable for the conduct of another person constituting a crime if:
>
> * * * * *
>
> (2) With the intent to promote or facilitate the commission of the crime the person:
>
> * * * * *
>
> (b) *Aids or abets* or agrees or attempts to *aid or abet* such other person in planning or committing the crime[.]

ORS 161.155 (emphasis added). The difference between "aid" and "aid or abet" is significant, because the term "aid or abet" has a well-established legal meaning that connotes shared criminal intent. *See Dept. of Transportation v. Stallcup*, 341 Or 93, 99, 138 P3d 93 (2006) ("[W]e give words that have well-defined legal meanings those meanings."). When the second-degree robbery statute was drafted, *Black's* defined the term "aid and abet" as follows:

> **AID AND ABET.** Help, assist, or facilitate the commission of a crime, promote the accomplishment thereof, help in advancing or bringing it about, or encourage, counsel, or incite as to its commission. * * *
>
> Implies knowledge. * * *
>
> At common law it consisted in being present at the time and place, and doing some act to render aid to the actual perpetrator of the crime, though without taking a direct share in its commission. * * *
>
> It comprehends all assistance rendered by words, acts, encouragement, support, or presence, actual or constructive, to render assistance if necessary. * * * But it is not sufficient that there is a mere negative acquiescence not in any way made known to the principal malefactor. * * * See Accessory; Abettor; Aider and Abettor.[5]

Black's Law Dictionary 91 (rev 4th ed 1968) (case citations omitted).

Bryan Garner defines "aid and abet" similarly, and notes that the term has had a well-known legal meaning for centuries:

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[5] Although *Black's* defines the term "aid *and* abet," not aid *or* abet, the two phrases mean the same thing and are commonly used interchangeably. The current edition of *Black's* recognizes as much. *See Black's Law Dictionary* 84 (10th ed 2014) (noting that "aid and abet" is "also termed '*aid or abet*'"). *Compare State v. Phillips*, 354 Or 598, 600, 317 P3d 236 (2013) ("the jurors had to agree on which role he played in the assault: Did he hit the victim or did he *aid and abet* the person who did?" (emphasis added)) *with State v. Blake*, 348 Or 95, 101, 228 P3d 560 (2010) ("accomplice liability makes a person who *aids or abets* a crime liable for that crime even though the accomplice may not have committed any of the acts that the crime entails") (emphasis added). *See also State v. Everett*, 249 Or App 139, 144, 274 P3d 297 (2012), *aff'd*, 355 Or 670 (2014) ("when an intermediary knows that the message or documents he is delivering to a third party will further a crime, the intermediary *aids and abets* that crime. An intermediary who *aids or abets* a crime becomes criminally liable for the crime") (emphasis added).

> **aid and abet** = "to assist the perpetrator of the crime while sharing in the requisite intent." *U.S. v. Martinez*, 555 F.2d 1269, 1271 (5th Cir. 1977). This phrase is a well-known legal DOUBLET that, like most other doublets, has come down to us from the Middle Ages and Renaissance, when embellishing terms with synonyms was common. Singly, *aid* is the more general term, *abet* generally appearing only in contexts involving criminal intent.

Bryan Garner, *A Dictionary of Legal Usage* 40 (3d ed 2011) (underlined emphasis added). And the Criminal Law Revision Commission, in its commentary to the proposed accomplice-liability statutes, recognized that the phrase had a well-established meaning under Oregon law:

> The terms "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." *State v. Start*, 65 Or 178, 182, 132 P 12 (1913), defined "abet" as meaning "to countenance, assist, give aid" and to include "knowledge of the wrongful purpose of the perpetrator and counsel and encouragement in the crime." Accord, *State v. Wedemeyer*, 65 Or 198, 132 P 518 (1913).

Commentary to Criminal Law Revision Commission Proposed Oregon Criminal Code, Final Draft and Report § 14, 13.

Thus, the legislature's use of the word "aid" in the second-degree robbery statute, when it used the term "aid or abet" in the accomplice-liability statute, indicates that the two statutes—enacted at the same time—were *not* referring to

the same thing. "Aid or abet" is a legal term of art that refers to shared criminal intent; "aid," alone, is not.

Moreover, not even the accomplice liability statute relies solely on the plain meaning of the term "aid or abet" to require proof of criminal intent. That statute contains a separate element that requires proof of criminal intent. As noted, ORS 161.155 provides that a person is liable for the conduct of another if, "[w]ith the intent to promote or facilitate the commission of the crime," the person aids or abets in its planning or commission. The legislature did not presume, then, that simply using the phrase "aid or abet" was sufficient to establish that the aider-abettor must share the principal's criminal intent. Thus, it must not have intended the term "aid" in the second-degree robbery statute to impose that requirement either.

C. Although the legislature may have envisioned the "other person" who aids a robbery as "another criminal" or an "accomplice," it did not limit the scope of the second-degree robbery statute to such individuals.

As noted earlier, ORS 164.405(1)(b) was enacted as part of the 1971 Criminal Code Revision. Or Laws 1971, ch 743, § 148. Defendant relies heavily on the Commentary to the Law Revision Commission's Proposed Criminal Code, and the Commission's minutes, arguing from their several references to "accomplices" and multiple "criminals" that "the drafters used the term 'accomplice' as a synonym for the term 'aided.'" (Pet Br 13). In addition

to being grammatically implausible—because the two words represent different parts of speech—that argument erroneously elevates legislative history over the broader wording that the drafters ultimately chose.

Although a particular issue or problem may spark legislative action, the legislature's "chosen solution may not always be narrowly confined to the precise problem. The legislature can and often does choose broader language that applies to a wider range of circumstances than the precise problem that triggered legislative attention." *South Beach Marina, Inc. v. Dept. of Revenue*, 301 Or 524, 531, 724 P2d 788 (1986).

That is what happened here. The Commission expressed particular concern with robberies that involved an "accomplice," or "another criminal," because that scenario increased the danger to the victim. *See, e.g.*, Commentary to Criminal Law Revision Commission Proposed Oregon Criminal Code, Final Draft and Report § 149, 155; *see also State v. White*, 346 Or 275, 288, 211 P3d 248 (2009) (noting, in case addressing whether the two variants of second-degree robbery are "separate statutory provisions" for merger purposes, that the Commentary "focuses on the degree of perceived or actual threat to the victim * * * which increases the likelihood that the victim will comply with the robber's demands").

But although the "two robbers" scenario provided the impetus for the legislation, the drafters did not limit the statute's application to that situation. It

would have been easy for the drafters to limit the statute to a robbery committed with "an *accomplice* actually present," for example.[6] In fact, a member of the Commission suggested that the wording be changed to refer to the defendant "*acting in concert* with one or more other persons," in the course of discussing whether to define the term "actually present." Minutes, Criminal Law Revision Commission, Nov 21, 1968, 10 (emphasis added). But the Commission rejected that change. Instead, it settled on the generic term "person" and the general term "aided." This court should respect that legislative choice. *See*

[6] Indeed, that is how the crime was initially defined in New York's Penal Law § 160.10, the law on which Oregon's second-degree robbery statute was modeled. *See* Commentary to Law Revision Commission Proposed Oregon Criminal Code, Final Draft and Report § 149, 154 (noting that section "(1)(b) is derived from New York Revised Penal Law § 160.10"). "Until the Penal Law was revised in 1965, the provision corresponding to 'aided by another person actually present' was 'aided by an *accomplice* actually present' (Penal Law of 1909 former § 2124(2) [emphasis supplied])." *People v. Green*, 126 AD2d 105, 108 (New York Sup Ct, App Div 1987) (brackets and emphasis in original) (holding that "one may aid in the commission of a crime without having the mental culpability necessary to be guilty of that crime as an accomplice"). Thus, New York's statute was amended to change "accomplice" to "another person" only two years before Oregon's Law Revision Commission began its work. *See* sos.oregon.gov/archives/Pages/records/criminal-law.aspx (last accessed Aug 11, 2016) (noting that the Criminal Law Revision Commission was established in 1967 and began its work that year).

At least one member of the Commission was familiar with New York's legislative change: Donald Paillette "informed the Commission that in New York prior to 1965 *robbery with an accomplice* was a first degree offense but in their revised code it had been dropped to second degree." Minutes, Criminal Law Revision Commission, Nov 21, 1968, 10 (emphasis added). But the minutes do not indicate that the Commission specifically discussed the New York legislature's substitution of "another person" for "accomplice."

State v. Walker, 356 Or 4, 22, 333 P3d 316 (2014) ("For us to interpret the [ORICO] statute more restrictively than it was consciously drafted would require us to draw a line that the legislature itself declined to draw.").

D. Defendant's argument that the "other person" must aid a defendant with respect to both the theft and physical-force elements is unpreserved and undeveloped, and this court need not address it to decide this case.

In addition to arguing that the second-degree robbery statute requires a person who provides "aid" to share defendant's criminal intent, defendant argues summarily that the person must provide aid with respect to both the theft and physical-force elements of the crime of robbery. (App Br 16-17). This court should not address that issue, because defendant failed to raise it in either the trial court or the Court of Appeals—or even in her petition for review. *See State v. Clemente-Perez*, 357 Or 745, 752, 359 P3d 232 (2015) (noting that generally "appellate courts will not consider claims of error that were not raised in the trial court," and that the preservation rule ensures that a trial court has the opportunity "to consider a contention and correct any error, to allow the opposing party an opportunity to respond to a contention, and to foster a full development of the record").

Moreover, this court should decline to address the scope of the term "aid" because defendant has not developed her argument, and because resolving it is not necessary to answer the question that led this court to grant review. In any

event, nothing in the text of ORS 164.405(1)(b) suggests that "aid" must extend to all elements of second-degree robbery, and no case holds as much.

E. The state presented sufficient evidence that while "actually present," aided the defendant in committing robbery.

The evidence in this case supported the trial court's finding that defendant was guilty of second-degree robbery. She was aided by who—when defendant was about to be apprehended with stolen merchandise—drove forward, forcing the loss-prevention officer to release his grip on defendant's arm. He then drove at the store's assistant manager, who had to move out of the car's path to avoid being hit. Whether or not knew that defendant had committed theft, he provided aid to defendant in committing robbery; therefore, as the trial court found, defendant committed robbery while "aided by another person actually present."

CONCLUSION

This court should affirm the opinion of the Court of Appeals and the judgment of the trial court.

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on August 11, 2016, I directed the original Brief on the Merits of Respondent on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Marc D. Brown, attorneys for appellant, by using the court's electronic filing system.

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

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 3,514 words. I further 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(2)(b).

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