

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of M. M. A.,
a Youth.

STATE OF OREGON,
Respondent,

v.

M. M. A.,
Appellant.

Washington County Circuit Court
J140225;
Petition Number 01J140225;
A158436

Michele C. Rini, Judge pro tempore.

Argued and submitted August 17, 2016.

Christa Obold Eshleman argued the cause and filed the brief for appellant.

Lauren P. Robertson, Assistant Attorney General, argued the cause for respondent. With her on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before DeVore, Presiding Judge, and Garrett, Judge, and James, Judge.*

GARRETT, J.

Affirmed.

* James, J., *vice* Duncan, J. pro tempore.

GARRETT, J.

As the result of a fight at school, youth was found to be within the jurisdiction of the juvenile court for acts that if committed by an adult would constitute second-degree disorderly conduct, ORS 166.025, and third-degree assault, ORS 163.165.¹ On appeal, youth seeks reversal of the third-degree assault adjudication, arguing that the court's jurisdictional finding on that allegation of the petition is not supported by sufficient evidence in light of the court's express findings of fact.² The issues on appeal principally concern whether the state adduced sufficient evidence that youth "caused" the victim's injuries, in a fight with multiple participants. We disagree with youth's arguments, and affirm.

Neither party has requested *de novo* review, and we decline to conduct such a review. ORS 19.415(3)(b). Accordingly, we review the juvenile court's legal conclusions for errors of law, and we are bound by its findings of historical fact as long as they are supported by evidence in the record. *State v. J. M. M.*, 268 Or App 699, 703-04, 342 P3d 1122 (2015). If the court did not make express findings on disputed issues of fact, and the evidence permits the dispute to be resolved in more than one way, we presume that the juvenile court decided the facts in a way that is consistent with its ultimate legal conclusion. *Ball v. Gladden*, 250 Or 485, 487-88, 443 P2d 621 (1968). We state the facts consistently with those principles.

The fight began when youth confronted the victim in the school cafeteria, yelling at her while standing very close. The victim was the first to make physical contact, when she pushed youth away. Youth then grabbed the victim's hair

¹ ORS 163.165 has been amended since the events in this case. Or Laws 2017, ch 658, § 1. Because the amendments do not affect the provisions at issue here, we cite the current version of the statute.

ORS 163.165 provides in part:

"(1) A person commits the crime of assault in the third degree if the person:

"(e) While being aided by another person actually present, intentionally or knowingly causes physical injury to another[.]"

² Youth does not challenge the court's disorderly conduct determination.

and began punching her. At some point, additional participants, including youth's friend, A, joined the fight, and at some point youth briefly moved away from the fight. Near the time that youth was moving away, A pulled the victim to the floor and was punching and kicking her. Youth returned to the fight and grabbed or held the victim while A continued to punch and kick her. Shortly after youth returned to the fight, it was broken up. The victim later received treatment for a concussion and neck and back injuries.

At the hearing, there were disputed issues concerning youth's and the victim's respective assertions of self-defense, the sequence in which various participants joined the fight, and the cause and timing of the victim's injuries. The evidence included a cell phone video of the final 10 seconds or so of the fight, ending just as the fight was broken up. Witnesses on both sides viewed the video and described, in sometimes conflicting ways, what it depicted.³

The state argued in closing that the victim had pushed youth in self-defense, that youth had inflicted the victim's head injury by grabbing the victim's hair and slamming her head into the floor after that initial push, and that youth had caused physical injuries by restraining the victim while A kicked and punched her. The state argued that youth had been aided by A from the outset.

In her closing argument, youth argued that she acted in self-defense after the victim pushed her; that youth initially fought with the victim but then disengaged; and that the evidence was insufficient to establish that the victim's injuries occurred because of youth's conduct as opposed to actions taken by A after youth had left the fight. Youth argued:

“[A]fter being physically attacked, [youth] defended herself. And as she was doing that, [the victim's friend] stepped in, pulled her hair. And that's when [youth] disengaged

³ Youth refers to the fight as having lasted one to two minutes. The juvenile court found, however, that the fight lasted about 20 seconds. Discussing the approximately 10-second video, the court stated, “the part we see, which is not the full piece—it's kind of the halfway point, probably. *** We know it doesn't have the front piece.” That finding is supported by the record. The testimony of some witnesses would allow the inference that the video captured most of the physical fight, with only the initial push and the next few seconds missing.

from the fray. [A] jumped in, took [the victim] to the ground where [she] probably suffered her injuries.

“And *** there is a—certainly adequate evidence that [the victim] suffered injuries in this incident. But the issue is, did [youth] cause those injuries?”

“*****

“And it’s on the ground during the fight where, if you listen to the evidence, that’s probably where the—the injuries were sustained, while [the victim] was on the ground.

“We have the video evidence. And it’s very clear. You can see [youth] walking away from the fray when the scrum is still taking place on the ground. She disengaged as soon as [the victim’s friend] started pulling her hair to pull her away from [the victim].”

Third-degree assault as it was alleged here requires proof that a person, “[w]hile being aided by another person actually present, intentionally or knowingly cause[d] physical injury to another[.]” ORS 163.165(1)(e). In *State v. Pine*, 336 Or 194, 201, 82 P3d 130 (2003), the Supreme Court observed that, to prove criminal liability as a principal under ORS 163.165(1)(e), the state is required to prove that the defendant *caused* physical injury to the victim. Construing the term “causes” as used in that statute, the court held that the state is required to prove that the defendant either directly inflicted physical injury, or that the defendant “engaged in conduct so extensively intertwined with infliction of the injury that such conduct can be found to have produced the injury.” *Id.* at 207.

Following *Pine*, we addressed the prospect of accomplice liability under ORS 163.165(1)(e) on an aid-and-abet theory. In *State v. Merida-Medina*, 221 Or App 614, 619-20, 191 P3d 708 (2008), *rev den*, 345 Or 690 (2009), we held that accomplice liability under ORS 161.155(2)(b) did not apply to third-degree assault as defined by ORS 163.165(1)(e) when only one other person is involved—that is, when the person being aided and abetted is also the other “person actually present.” Subsequently, in *State v. Ryder*, 267 Or App 150, 161-62, 340 P3d 663 (2014), *rev den*, 357 Or 143 (2015), we clarified that accomplice liability *can* apply when there are *two* or more other people involved—that is, two or

more participants in the third-degree assault, and a person who aids or abets that offense.

The juvenile court made factual findings on the record when it rendered its decision. The court found that youth approached the victim and there was a “face-to-face confrontation” involving loud voices, the victim standing up and pushing youth, “and then the hair pull and the punching.” Referring to conflicting testimony about whose friend joined in first, the court noted that there were witnesses supporting both parties’ versions. The court distinguished youth’s conduct at the initial stage of the fight from her conduct later, determining that youth was not culpable for actions at the beginning of the encounter, but was culpable based on her later actions.⁴

Beginning by describing what is depicted on the video as “that little tumultuous snippet of activity,” and noting that youth is the most easily discernible person in the video, the court explained its view of what occurred at the key point:

“And you can see, at one point in time, you move away and there’s the—as [youth’s counsel] keeps calling it, the scrum on the ground.

“But also, if you pull it back and you stop it, *you see where you come back and your arms go down and make contact*. And your arms are in there. That’s pretty clear.

“If that hadn’t been in there, I don’t think there’s an Assault III, because that first part, I can’t say who’s aided and abetted [*sic*] by anyone first. I can’t do that.

“And given the push first, it’s hard to say there was an Assault IV, at that point. But the video—and, again, I watched it probably 25 times. Stopping it, stopping it, stopping it, back, stopping it, stopping it.

⁴ Although the court did not state its reasons for declining to find youth culpable based on her initial actions, that determination could have been based on a finding that the state failed to disprove self-defense. The parties offer competing interpretations of the court’s explanation, and dispute whether we can consider, in a review of the sufficiency of the evidence, evidence of what occurred before the key moment that the court identified, when youth returned to make contact with the victim. Because we conclude, as we will explain, that there was sufficient evidence even after that moment, we need not resolve that dispute.

“And there’s a series there where you come back into the frame and you reach your arms in. And it’s really clear if you hit it in the right couple little spots there.

“And if not for that, you would not have been found within the jurisdiction of the Court. But because the tape, in that little snippet, shows you reaching your arms back in and making contact with the victim on the ground—and then this is right before it breaks up and she stands up—I would not have found you within the jurisdiction.

“But because the tape does show you actually coming back into the frame and reaching your arms into it—and it either looks like you’re holding her or grabbing hair or a sweater. I can’t tell. But your hands are there.

“I do find that there was an aid and abet and I do find that there was, in fact—and I don’t think it’s disputed—injury to [the victim]. And so, for that, I am finding [youth] within the jurisdiction on the Assault III charge.”

(Emphases added.)

The prosecutor asked the court to clarify whether it had found that youth caused physical injury to the victim by directly inflicting it, or whether, “per *Pine*,” causation was based on youth’s conduct being extensively intertwined with A’s actions. The court clarified that it was “more per *Pine*”:

“I can’t find that she’s the one who definitively caused the injury. But per *Pine* in the discussion of, if you’re aiding and abetting another who’s causing the injury. So per *Pine*.”

The prosecutor again asked for clarification:

“[Prosecutor]: Okay. That her conduct was extensively intertwined with—

“THE COURT: Yes.

“[Prosecutor]: [A]’s?

“THE COURT: By reaching in and either holding the victim or grabbing the victim—

“[Prosecutor]: Okay.

“THE COURT: —that she enabled that to occur.

“[Prosecutor]: Okay. Got it. Thank you.”

After that clarification, the court asked youth's counsel, "given that, is there anything you want to put on the record for the Court of Appeals?" Youth's counsel replied, "No, Judge."

On appeal, youth argues, in reliance on *Merida-Medina*, that the court erred in applying an aid-and-abet theory when there was only one other assailant. Youth also argues that, in light of the trial court's findings, the record does not contain sufficient evidence that she caused physical injury to the victim to establish liability as a principal under *Pine*. Specifically, she argues that there was insufficient evidence that her actions caused physical injury to the victim, or even that "any of the physical injury actually took place during the moment that *** youth's culpable conduct occurred."⁵ Youth also argues that, in light of the court's findings that she engaged in culpable conduct only in the final moments of the fight, the evidence must establish that she caused physical injury and received the aid of another person within that limited time.

The state argues in response that there is sufficient evidence to support the juvenile court's adjudication on either a principal liability theory or an aid-and-abet theory under *Ryder*, 267 Or App at 161-62. The state also disputes youth's contention that the review for sufficiency of the evidence is limited to what occurred in the final moments of the fight, although the state also argues that even under that constraint, there is still sufficient evidence.

As an initial matter, we do not understand the juvenile court to have relied on an aid-and-abet theory. The state did not charge, present, or argue the case to the juvenile court on that theory. The court did refer several times to "aid and abet," in its findings on the record, but—particularly in light of its clarifications referring to *Pine*—it appears that the court intended to refer to the "aided by

⁵ As part of that argument, youth argues that a factfinder could not reasonably find that the victim's injuries occurred during the last few seconds of the "one-to-two-minute fight." But, as noted earlier, youth's factual premise—that it was a one-to-two-minute fight—does not correctly account for the juvenile court's express findings, or what we must presume about its implicit findings. Thus, we reject youth's factual premise that the time during which the court found she engaged in culpable conduct was a tiny fraction of a much longer fight.

another person” element of ORS 163.165(1)(e), as opposed to an aid-and-abet theory under ORS 161.155. Because the record does not show that the juvenile court relied on an aid-and-abet theory at all, we reject without further discussion youth’s arguments that the juvenile court erred by relying on that theory.⁶

Accordingly, we turn to youth’s argument that there is not sufficient evidence that youth caused physical injury to the victim within the meaning of ORS 163.165(1)(e). As we have noted, the parties dispute whether our review is constrained to evidence of what occurred in the final moments of the fight—that is, the time period in which the court determined that youth engaged in culpable conduct. We conclude that, even assuming that our review is constrained to that period, the record contains sufficient evidence for the factfinder to find the elements of third-degree assault as alleged here.

In reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the state to determine whether a rational factfinder drawing reasonable inferences could find the elements constituting the offense beyond a reasonable doubt. *State v. J. N. S.*, 258 Or App 310, 320, 308 P3d 1112 (2013).

Based on the evidence in the record and reasonable inferences, a rational factfinder could find that physical injury to the victim occurred after youth returned to make contact with the victim, and that youth’s actions were so extensively intertwined with the infliction of physical injury to the victim that her conduct could be found to have produced the injury.

This case bears some similarities to *State ex rel Juv. Dept. v. K. C. W. R.*, 235 Or App 315, 230 P3d 973 (2010), in which we concluded that the evidence was sufficient to show that the youth’s conduct produced the victim’s injuries for purposes of ORS 163.165(1)(e), because his conduct was extensively intertwined with infliction of the injuries.

⁶ Youth’s arguments concerning the court’s references to aiding and abetting are also complicated by the fact that youth did not make those arguments to the juvenile court, nor did she seek to clarify the record, when invited to do so, concerning the court’s findings and explanation of its decision.

In that case, the victim's injuries were inflicted by blows from a baseball bat, which was not wielded by the youth. But, the evidence permitted findings that, when the youth attacked the victim, the victim was occupied with restraining him, and that, when the victim would release him, the youth would attack again, and those actions prevented the victim from being able to counter or retreat from the baseball-bat attacks. *Id.* at 319-20. *Cf. State v. Reynolds*, 250 Or App 516, 518, 518 n 3, 280 P3d 1046, *rev den*, 352 Or 666 (2012) (insufficient evidence that the defendant caused injuries inflicted by the defendant's boyfriend on the victim when the evidence was that the victim's girlfriend had the defendant "pretty much *** subdued").

The juvenile court found that youth's conduct in holding the victim in place enabled the infliction of physical injury by A, and there is evidence to support that finding. When asked about the cause of her neck pain, the victim attributed it to the fight, and did not identify any particular act or moment when it occurred. She attributed her back pain to "[p]robably being kicked and punched." She testified that, while A was punching her and trying to kick her, youth was pulling her hair. When asked what she was doing when she was on the floor, the victim replied, "[t]rying to get up." The victim explained that when she was on the floor, she was trying to get up, but she was not able to get up at all during the fight because she was being held down.

In addition, there was evidence that A's punching and kicking continued until the fight was broken up by a teacher pulling the victim away. There was testimony that, after the victim was on the floor, A was punching and kicking her, and youth was "pulling her hair around[,] [l]ike, making sure she doesn't do anything," and that the victim was "scrambling on the floor[,] *** just trying to get up, trying to *** not get hit." In addition, there was testimony that, after youth had moved away momentarily, she returned to pull the victim back while A was punching the victim in the head and kicking her. Another witness testified that he saw the victim get kicked by someone while she was bent over, having her hair pulled, and then, "about that moment, that was when, like, the teacher broke it up."

Thus, although the juvenile court found that youth engaged in culpable conduct only in the latter part of the fight, the record contains sufficient evidence that youth's conduct during that period was so "extensively intertwined" with A's punching and kicking as to have caused the victim's physical injuries.

As part of her argument that the record does not permit a finding that youth caused any injury, or that any injury actually occurred, during the final moments of the fight, youth contends that the video "does not show [A] doing any kicking or punching during that brief moment that youth put her hands in." But, the record does not consist only of the video, nor is the video the definitive evidence of what occurred. The record also includes the testimony of the victim and other witnesses, as described above. The court described the video as a "little tumultuous snippet of activity," noted that it does not show everything, and mentioned that it is difficult to identify people in the video, although youth was "the most easily discernible person." The court—echoing youth's counsel—referred to at least a portion of the fight depicted in the video as "a scrum."⁷ Based on all of the evidence in the record, a rational factfinder could find that youth caused physical injury to the victim during the time at issue, regardless of whether the video clearly shows "any kicking or punching" during that time.

Affirmed.

⁷ Having viewed the video, we note that a factfinder could find that the view of the "scrum" is frequently obscured by people standing or moving between the camera and the "scrum," that even a relatively clear shot of the "scrum" can be difficult to interpret, and that pausing the video results in a quite blurry, if not indiscernible, image in many instances.