

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

MACIEL MUNOZ,
Defendant-Appellant.

Washington County Circuit Court
C092027CR

A147842

Gayle Ann Nachtigal, Judge.

Argued and submitted on February 19, 2013.

David O. Ferry, Deputy Public Defender, argued the cause for appellant. With him on the brief was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Pamela J. Walsh, Assistant Attorney General, argued the cause for respondent. With her on the brief were John R. Kroger, Attorney General, and Anna M. Joyce, Solicitor General.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Duncan, Judge.

PER CURIAM

Affirmed.

1 PER CURIAM

2 Defendant was convicted of murder after he, along with other gang
3 members, stabbed the victim to death. In a sole assignment of error, defendant argues
4 that the trial court erred in failing to instruct the jury that, to convict him of murder, at
5 least 10 jurors had to concur as to whether he was criminally liable as a principal or as an
6 accomplice. In *State v. Phillips*, 242 Or App 253, 255 P3d 587 (2011), *rev allowed*, 351
7 Or 586 (2012), we rejected a similar argument, explaining that a concurrence instruction
8 is necessary "to avoid the possibility that a jury could return a guilty verdict even though
9 the requisite number of jurors did not agree on which *crime*, if any, the defendant
10 committed," but that such an instruction is not required "to prevent a jury from deciding
11 that the defendant is guilty even if the requisite number of jurors did not agree on what
12 particular acts of the defendant constituted an element of a single crime." *Id.* at 261
13 (emphasis in original). In *Phillips*, a third-degree assault case, we concluded that,
14 regardless of possible juror disagreement as to whether the defendant was the assailant or
15 had aided the assailant, there was no risk that the jurors had not agreed on the crime that
16 the defendant committed:

17 "There is no danger that defendant was convicted without 10 jurors
18 agreeing that his conduct met all of the elements of the crime as that crime
19 was presented to the jury without objection. Some may have been
20 persuaded that he was the actually present aider, and others might have
21 been persuaded that he was the assailant, and others might have been
22 persuaded that he was both, but 10 believed that, in one manner or another,
23 he caused the victim's injury."

24 *Id.* at 263.

1 The same can be said in this case. Some jurors might have believed that
2 defendant was the principal during the stabbing, and others might have believed that he
3 was an accomplice to one of the other gang members who stabbed the victim, but the
4 requisite number of jurors agreed that defendant, either as principal or accomplice,
5 intentionally caused the victim's death. *See* ORS 161.150 ("A person is guilty of a crime
6 if it is committed by the person's own conduct or by the conduct of another for which the
7 person is criminally liable, or both."); *State v. Blake*, 348 Or 95, 101, 228 P3d 560 (2010)
8 ("[A]n accomplice theory of liability is not itself an independent offense."). There was
9 no danger that defendant would be convicted without juror agreement as to all of the
10 elements of the crime of murder, so the trial court did not err in refusing to give a
11 concurrence instruction.

12 Affirmed.