IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
BRITTENY RACHAEL CHISHOLM,
aka Brittney Chisholm,
aka Brittney Rachael Chisholm,
aka Brittany Rachel Chisolm,
Defendant-Appellant.

Curry County Circuit Court
16CR07240; A162041

Jesse C. Margolis, Judge.

Submitted January 9, 2018.

Ernest G. Lannet, Chief Defender, Criminal Appellate Section, and Zachary Lovett Mazur, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Greg Rios, Assistant Attorney General, filed the brief for respondent.

Before Hadlock, Presiding Judge, and DeHoog, Judge, and Aoyagi, Judge.

DEHOOG, J.

Conviction for assault in the third degree reversed; remanded for resentencing; otherwise affirmed.

DEHOOG, J.,

As defendant waited nearby in a designated getaway truck, her three coconspirators drove to a Fred Meyer store and carried out their plan to rob an armored vehicle driver conducting a routine banking run. As a result of her involvement in that criminal episode, defendant was convicted of second-degree robbery, first-degree aggravated theft, and third-degree assault. ORS 164.405; ORS 164.057; ORS 163.165. On appeal, defendant does not challenge her robbery or theft convictions; she does, however, assign error to the trial court's denial of her motion for judgment of acquittal on the charge of assault. Defendant argues that the evidence presented at trial was insufficient to support the necessary inference that she had intended to aid and abet an assault that one of her codefendants committed in the course of the robbery. She contends that she therefore cannot be held liable as an accomplice for that offense. In defendant's view, convicting her of assault in this case would be akin to imposing accomplice liability on the grounds that the assault was a natural and probable consequence of the planned robbery, which has been held to be an impermissible application of the accomplice statute. *See, e.g.*, *State v. Lopez-Minjarez*, 350 Or 576, 583, 260 P3d 439 (2011) (rejecting natural and probable consequences theory of accomplice liability). We agree with defendant that the evidence was insufficient to permit a reasonable factfinder to find, beyond a reasonable doubt, that she had the requisite intent to aid and abet in the commission of the assault for which she was convicted. We therefore reverse her conviction for third-degree assault and otherwise affirm.

In a challenge to a trial court's denial of a motion for judgment of acquittal, we review the evidence "in the light most favorable to the state to determine whether a rational trier of fact, making reasonable inferences, could have found the essential elements of the crime proved beyond a reasonable doubt." *State v. Hall*, 327 Or 568, 570, 966 P2d 208 (1998) (citing *State v. Cunningham*, 320 Or 47, 63, 880 P2d 431 (1994); *see also State v. Allison*, 325 Or 585, 587-88, 941 P2d 1017 (1997) (applying that standard of review following

a bench trial). We recite the facts as presented at trial with that standard in mind.

Defendant and three men—Wright, Goff, and Griffith (defendant's romantic partner)—planned and executed a robbery at a Fred Meyer store in Brookings. Their target was a security guard who worked for an armored car company and regularly collected and delivered the store's bank deposits. In furtherance of their plan, the group drove from Gold Beach to Brookings in two pickup trucks. Defendant drove alone in a white GMC, while Griffith drove a white Ford with Wright and Goff as his passengers. Shortly before reaching Brookings, the two trucks separated; Griffith drove the Ford to Fred Meyer with the other two men, while defendant drove the GMC to wait for the men in a nearby church parking lot.

Upon arriving at Fred Meyer, Goff waited in the driver's seat of the Ford while Wright and Griffith went into the store.[1] When their intended victim walked out of the store carrying the bank deposits, he noticed the men's pickup truck parked where his partner would normally be waiting with the armored car. As the victim walked towards that area, one of the men who had entered the store grabbed the money bag and pulled it from his hand while the other man pepper sprayed him across the face. The victim testified that the pepper spray had caused significant pain; on a scale of one to 10, he rated his pain at that moment as having been "about 18." The two men then jumped into the Ford pickup truck, and all three men drove to the church parking lot where defendant had been waiting. When they reached the church, the three men joined defendant in the GMC and Griffith took over as the driver. A church employee saw the group hastily changing vehicles, and, suspecting that they were involved in a crime, called 9-1-1.

As the GMC pulled away from the church, Curry County Sherriff John Ward saw the truck and, recognizing that it matched the description given by the church employee, began to follow. When Ward activated his overhead lights,

[1] In his testimony, Griffith claimed to have been the one behind the wheel of the Ford while Wright and Goff attacked the victim. That discrepancy in the testimony has no bearing on defendant's appeal.

the GMC pulled off of the road and drove over an embankment into an area of heavy brush, where it eventually became high-centered on a boulder. All four occupants climbed out of the truck and ran. Officers quickly found defendant and Goff who had been hiding in the brush nearby. Goff later stated that, while they had been hiding, defendant had told him not to say anything to the police without an attorney present. Officers apprehended Wright and Griffith shortly thereafter.

According to Griffith, he had told defendant that his plan was to siphon gas from a nearby sawmill and that she should wait at the church because he did not want to involve her in that crime. Griffith testified that defendant had not known that the men planned a robbery at Fred Meyer. According to Griffith, only he and Goff had participated in planning that crime.

While in jail following her arrest, defendant called a friend. In that phone call, which was recorded and later played at trial, defendant told her friend that she was "in trouble," and that both she and Griffith were "mother fucked." She went on to say, "I'll be okay. I'm a big girl. I did it to myself." The state argued at trial that those statements showed that defendant had been a participant in the robbery, and not merely someone who had been caught up in a crime entirely planned by others, as Griffith had suggested.

Defendant waived her right to a jury and tried her case to the court. At the close of the state's case-in-chief, defendant moved for judgment of acquittal as to all of the then remaining counts, contending that the evidence was insufficient to establish that she had aided and abetted the criminal activities of the three men.[2] The court denied defendant's motion and, based on the state's accomplice liability theory, ultimately found defendant guilty of second-degree robbery, first-degree aggravated theft, and third-degree assault.

[2] The trial court granted a motion by the state to dismiss two counts for conspiracy to commit first-degree aggravated theft, ORS 161.450 and ORS 164.057, and unauthorized use of a motor vehicle, ORS 164.135.

On appeal, defendant no longer disputes that the evidence presented at trial was sufficient to support a reasonable inference that she had intended to promote or facilitate the men's commission of robbery and theft; accordingly, she does not challenge the trial court's finding that she was guilty of those offenses. Rather, defendant focuses her argument on the trial court's denial of her motion for judgment of acquittal on the assault charge. As to that charge, defendant reprises the argument that she made at trial, contending that the evidence was not sufficient to allow that charge to go to the factfinder because the state presented no evidence that she had intended to promote or facilitate any offense involving physical injury. Defendant reasons that, although the use or threatened use of physical *force* in the commission of a theft was an element of the robbery allegation,[3] physical *injury*—an essential element of the assault charge—is *not* an element (or even an inevitable consequence) of robbery. And here, defendant notes, no evidence at trial suggested that she had even known that one of the men was *armed* with the pepper spray that caused the victim's injury, much less that one of the men would physically assault him with that pepper spray. Without that evidence, defendant argues, the state could not—and did not—show that she had intended to aid or abet in causing the victim physical injury, as alleged in the assault charge.[4] As a result, she contends, the trial court erred in denying her motion for judgment of acquittal as to that charge.

In response, the state argues that defendant's concession that the evidence was sufficient to support the finding that she had intended to aid and abet in the robbery

[3] *See* ORS 164.395(1)(a) (a person commits third-degree robbery "if in the course of committing or attempting to commit a theft *** the person uses or threatens the immediate use of physical force upon another person with the intent of: (a) Preventing or overcoming resistance ***"); ORS 164.405(1)(b) (a person commits second-degree robbery if the person violates ORS 164.395 and is "aided by another person actually present").

[4] In addition to his testimony about the pepper spray, the victim also testified that "somewhere along the line they hit [him] in the head with something[.]" He further said that the attack had resulted in a "knot" on the side of his head, as well as pain in his neck, shoulder, and elbow that started a few days after the attack and remained two months later, at the time of trial. Nonetheless, at trial, the state relied primarily on the use of pepper spray as the basis of defendant's assault charge, and the state does not contend on appeal that the victim's testimony that he was hit on the head has any bearing here.

necessarily encompasses a concession that she also intended to aid and abet in the assault. Specifically, the state suggests, because the robbery charge included an allegation that defendant had used force "by grabbing [the victim] and using pepper spray,"[5] her concession that the evidence was sufficient to support her conviction for that offense is, in effect, a concession that the evidence was sufficient to support a conviction arising from that use of force, namely, third-degree assault. In any event, the state reasons, a rational factfinder could infer that assaulting the victim with pepper spray was a key aspect of the planned robbery, which required subduing an armed security guard, and that defendant therefore necessarily intended to aid and abet that assault as a component of the robbery.

As framed by the parties and the evidence at trial, this case presents the issue of whether evidence that defendant aided and abetted a robbery and theft by, at a minimum, planning those crimes with her codefendants, accompanying them to a location near the crime scene, and standing by with a getaway vehicle while the others committed those offenses, is sufficient to support a finding, beyond a reasonable doubt, that she also intended to promote or facilitate a physical assault that one of her accomplices committed in the course of committing the other crimes. For the reasons that follow, we agree with defendant that the evidence was insufficient to prove that she had intended to assist anyone in committing an assault. As a result, the trial court erred in denying defendant's motion for judgment of acquittal as to that offense.

We begin our analysis with a brief review of the applicable substantive law. A grand jury charged defendant, along with her three codefendants, with assault in the third degree, ORS 163.165, as follows:

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[5] In its entirety, the robbery count of the indictment alleged as follows:

"The said defendant, on or about February 5, 2016, in the County of Curry and the State of Oregon, did unlawfully and knowingly use physical force upon [the victim] by grabbing him and using pepper spray, the said defendant being aided by another person actually present, while in the course of committing theft of property, to-wit: cash, the property of Fred Meyer, with the intent of overcoming resistance to the said defendant's taking of said property."

> "The said defendant, on or about February 5, 2016, in the County of Curry and the State of Oregon, did unlawfully and knowingly, while being aided by another person actually present, cause physical injury to [the victim]."

As charged in this case, a person commits the crime of third-degree assault if the person, "[w]hile being aided by another person actually present, intentionally or knowingly causes physical injury to another[.]" ORS 163.165(1)(e).[6] Thus, as alleged here, third-degree assault includes, as an essential element, actual physical injury to another person, which must knowingly be caused.

Given defendant's apparent role in the criminal episode, the state's theory was not that she had directly engaged in the commission of any offense, but that she was vicariously liable for her codefendants' conduct as an accomplice. ORS 161.155, which governs accomplice liability, states, in relevant part:

> "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[.]"

The statute requires a specific intent; that is, to be liable as an accomplice for another person's commission of a crime, a person must specifically intend to promote or facilitate the commission of *that* crime. *Lopez-Minjarez*, 350 Or at 582 (ORS 161.155 "requires a specific intent: the intent to promote or facilitate the commission of the crime committed by another"). And, as used in ORS 161.155(2)(b), "[w]ith [the] intent" means "that a person acts with a conscious objective to cause the result or to engage in the conduct so described."

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[6] ORS 163.165 has been amended twice since the events of this case. *See* Or Laws 2019, ch 213, § 119; Or Laws 2017, ch 658, § 1. None of the amendments affect the provision at issue in this case. We therefore cite the most recent version of ORS 163.165.

ORS 161.085(7). Thus, in this case, to prove defendant guilty of third-degree assault, the state needed to establish that defendant had acted with a conscious objective of promoting or facilitating the commission of that offense, *i.e.*, knowingly causing the victim physical injury.

Turning to the arguments of the parties, we first reject, for two reasons, the state's argument that defendant's concession that there was sufficient evidence to support an inference that she intended to aid and abet in the robbery is effectively a concession that she intended to aid and abet in the assault; more specifically, we reject the state's suggestion that evidence sufficient to establish an intentional use of force for purposes of defendant's robbery charge is necessarily sufficient to establish defendant's intent to cause physical injury for purposes of her third-degree assault charge. The first reason for rejecting that argument is that, as charged, defendant could have been convicted of robbery on the basis of her codefendant pulling or "grabbing" the victim's arm. *See, e.g.*, *State v. Leachman*, 285 Or App 756, 759, 398 P3d 919, *rev den*, 361 Or 886 (2017) ("[T]he state generally can plead alternative factual theories in a charging instrument and prove all or only one of those theories at trial."). As a result, her concession that the evidence was sufficient to convict her of robbery may not have implicated the use of pepper spray at all, much less its use for purposes of causing the victim physical injury.

The second reason we reject that argument is that, even if defendant had conceded that the evidence was sufficient to show that she had been aware that one of her codefendants would in some way "use" pepper spray in the course of robbing the victim—whether by threatening the victim with it or otherwise—that would still fall short of showing that she had intended that the pepper spray would be used to injure him. As defendant acknowledges, "the use of force to commit theft [may] create[] a *risk* of causing physical injury to the victim," but, as defendant also correctly observes, to extend liability to the realization of such a risk would be akin to imposing liability for offenses that are the natural and probable consequences of other crimes to which a defendant is an accomplice, which would be an impermissible application of ORS 161.155. Specifically, as

the Supreme Court explained in *Lopez-Minjarez*, accomplice liability under the statute exists only for the crime that a defendant intended to promote or facilitate, and not for any additional crimes that may have resulted as the natural and probable consequence of that crime. 350 Or at 583. And here, finding defendant guilty of third-degree assault based upon the risk that her codefendant's use of pepper spray could—or likely *would*—result in injury is not materially different from applying the "natural and probable consequences" theory that the court rejected in *Lopez-Minjarez*.

Recognizing that limitation, the state does not expressly argue that defendant can be found liable for the natural and probable consequences of whatever use of force her codefendants chose to employ. Rather, in addition to arguing that the use of pepper spray would have been a key component of the group's plan to rob an armed guard in front of a Fred Meyer in broad daylight, the state reasons that the plan would necessarily have included "some method of thwarting potential resistance to the robbery by an armed guard." That may well be true. The group's plan to rob the victim—an armed security guard—likely included the intent to use some degree of force to subdue the victim, dispossess him of the money bag, and effect an escape. But the degree of force that the group's original plan contemplated is not apparent from the record. And, as we have recognized, the degree of force necessary to constitute robbery can be established without showing that a victim suffered physical injury as a result of that use of force. *See, e.g.*, *State v. Johnson*, 215 Or App 1, 6, 168 P3d 312, *rev den*, 343 Or 366 (2007) (use of force shown where victim did not feel defendant grab her purse from her shoulder). Thus, although there is certainly evidence in the record that the group's plan contemplated a use of force—a point that defendant's concession establishes, since force was an element of her robbery charge—the state produced no evidence to support the further inference that causing the victim physical injury was also a part of that plan.

In summary, the trial court—as the trier of fact—could reasonably have inferred that there was *a* plan to rob the victim and that defendant took part in that plan. There is not, however, sufficient evidence in the record to support

the further inference that the group's plan contemplated that any of the co-conspirators would use pepper spray to physically injure the victim. Nor did the state produce any evidence to support an inference that defendant intended to cause physical injury to the victim by any other means. *See State v. Lopez-Medina*, 143 Or App 195, 200, 923 P2d 1240 (1996) ("An inferred fact must be one that the jury is convinced follows beyond a reasonable doubt from the underlying facts."). And, because intent to cause physical injury is an essential element of third-degree assault, the trial court erred in denying defendant's motion for judgment of acquittal as to that offense. *See Hall*, 327 Or at 570 (stating standard of review applicable to denial of motion for judgment of acquittal).

Conviction for assault in the third degree reversed; remanded for resentencing; otherwise affirmed.