IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
TRACEY CHRISTOPHER LOMAX,
Defendant-Appellant.
Multnomah County Circuit Court
120532226; A156389

Cheryl A. Albrecht, Judge.

Argued and submitted February 8, 2016.

Bear Wilner-Nugent argued the cause and filed the briefs for appellant.

Peenesh H. Shah, Assistant Attorney General, argued the cause for respondent. With him on the briefs were Ellen F. Rosenblum, Attorney General, and Anna M. Joyce, Solicitor General.

Before Armstrong, Presiding Judge, and Egan, Judge, and Shorr, Judge.

ARMSTRONG, P. J.

Conviction for murder reversed and remanded; otherwise affirmed.

ARMSTRONG, P. J.

Defendant appeals a judgment of conviction, entered after a combined trial with codefendants Allen and Riley, for one count of murder, ORS 163.115.[1] *See State v. Allen*, 288 Or App 244, ___ P3d ___ (2017); *State v. Riley*, 288 Or App 264, ___ P3d ___ (2017). Defendant assigns error to the trial court's denial of his request for a jury concurrence instruction with regard to principal or accomplice liability. For the reasons explained below, we conclude that the trial court erred in not giving the proposed concurrence instruction, in violation of Article I, section 11, of the Oregon Constitution. Accordingly, we reverse and remand defendant's conviction for murder.[2]

Defendant, Allen, and Riley, were each convicted of one count of murder for killing Henry, who was dealing marijuana from his home at a price considerably lower than that offered by gang-affiliated dealers and the rest of the illegal marijuana market; the state's theory at trial was that the killing was gang related. Because the jury found defendant guilty, we view the evidence presented at trial in the light most favorable to the state. *State v. Lotches*, 331 Or 455, 457, 17 P3d 1045 (2000), *cert den*, 534 US 833 (2001).

On May 9, 2012, Riley and his friend, Fair, were running errands to buy marijuana and snacks. They first went to a nearby convenience store, where they encountered defendant and Allen, who got into Fair's Buick Regal. Fair called her marijuana dealer but was unable get in touch with him, so she asked if anyone knew where to get marijuana. Allen made a phone call and then directed Fair to Henry's apartment; Fair stayed in the car while the men got out and walked toward the apartment.

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[1] Defendant was also indicted for unlawful use of a vehicle; however, that charge was dismissed before trial on the state's motion. We affirm that aspect of the judgment.

[2] Because we remand for a new trial, and the evidentiary record and legal arguments may develop differently on remand, we decline to address defendant's remaining assignments of error, which relate to the trial court's ruling admitting evidence of his gang affiliation as character evidence under OEC 404; the trial court's denial of his motions for mistrial when one of the state's witnesses gave inadmissible testimony and when the prosecutor argued that defendant and his codefendants are killers or Crip-killers; and the trial court's failure to instruct the jury that, as a matter of law, one of the state's witnesses was an accomplice.

Meanwhile, Henry was home with his domestic partner, Nettles, and their children. At around 11:30 p.m., Nettles heard somebody knocking on the front door, so she went to the door and looked through the peephole. She told Henry that someone was at the door, which seemed to confuse him. Henry opened the dining room window and began talking with the man at the door. The man said that his name was Jordon and that either "B" or "V" had sent him to get some "fire"; Henry and Nettles had friends who went by those initials, and they understood fire to mean marijuana.

Henry grabbed the keys to his truck, where he kept the marijuana that he sold, and went outside. Seconds later, Nettles heard someone shout Henry's name and the sound of gunfire. She ran to her children to make sure they were safe and then returned to the front door. Nettles heard Henry begging her to open the door, and, when she did, Henry fell inside the home, gravely injured. Nettles called 9-1-1 and attempted to perform CPR, but Henry died before emergency personnel arrived.

Fair was sitting in her car when she heard the gunfire. She then saw defendant, Riley, and Allen running toward her, and, after they got inside the car, Allen instructed Fair to "Go Go Go."

Several blocks away, Portland Police Officers Elias and Wullbrandt were in a parking lot training a police dog when they heard gunfire and a radio call announcing that someone had been shot. The officers saw Fair's Buick pull into the lot and park, with its lights off. Elias saw three people get out of the Buick; Wullbrandt saw three or four people emerge from the car. The officers shined their flashlights at the group of people, who turned to look at the officers and then disappeared around the corner of a building. Elias and Wullbrandt used their police dog to track the people to an apartment in a nearby building. More police officers arrived at the scene and surrounded the apartment.

Fair lived in that apartment with her children and her roommate, Watson, who was home when Fair and the codefendants arrived. Watson wanted to leave the apartment

to get some marijuana and go to a store, and Allen decided to join her. They opened the door and took a few steps outside, but then saw police surrounding the building and immediately returned inside the apartment. "[T]errified," Watson asked why the police were waiting outside. Defendant, Allen, and Riley became nervous, and someone turned off the lights inside the apartment.

At around 2:00 a.m., Fair called her mother, Jarrell, to ask if the police were allowed to enter her residence and told Jarrell, "I think something bad happened." Jarrell called the police and explained that she was Fair's mother and that she wanted to pick her daughter up from the apartment. Jarrell then helped to get Fair and Watson to leave the apartment safely.

At around 3:30 a.m., defendant, Riley, and Allen left the apartment and surrendered themselves to the police. Police then searched the apartment and found a .22-caliber revolver underneath a mattress and two semiautomatic handguns in a closet in one of the bedrooms. One of the guns contained traces of defendant's DNA. Police also found a gun holster, clothing that had been saturated with Pine-Sol, a mostly empty Pine-Sol bottle, a red baseball cap, and clothing containing defendant's DNA residue. An autopsy revealed that Henry had been shot nine times by three different calibers of bullets and that each of the gunshot wounds could have been fatal.

At the close of the evidence at trial, the court and the parties engaged in a colloquy about the proposed jury instructions. Defendant's attorney requested a special instruction on jury concurrence: "we are asking for the concurrence *** [i]nstructing the jury that they have to each find 12-0 as to the same theory. Either that they think someone's guilty by aiding and abetting or directly guilty for being the primary." The court noted that Allen's attorney had made an identical request in writing. During the colloquy, Allen's attorney alerted the court to our decision in *State v. Phillips*, 242 Or App 253, 255 P3d 587 (2011), *rev'd*, 354 Or 598, 317 P3d 236 (2013), which supported the state's argument that a concurrence instruction was not necessary,

but noted that the Supreme Court had allowed review in the case. Evidently, neither the parties nor the trial court realized that the Supreme Court had already issued an opinion reversing our decision in *Phillips*. In that opinion, the Supreme Court held that, when the state advances competing theories of liability based on a defendant's acts as a principal and as an aider or abettor, the jury must be instructed that they must agree on each legislatively defined element necessary to find the defendant liable under one theory or the other. *Phillips*, 354 Or at 606.

When given a chance to respond, the prosecutor told the court that the state was withdrawing its request for an aid-or-abet instruction, to which the court replied, "Then that takes care of that." After some further discussion on the law pertaining to jury concurrence, the trial court denied defendant's request for the instruction, mistakenly relying on our overturned decision in *Phillips*: "I'll read that as binding authority at this time."

The court then orally instructed the jury on the law applicable to the case and provided the jury with a written copy of the instructions. Among other things, the court instructed the jury that,

> "to establish the crime of Murder, the State must prove beyond a reasonable doubt the following three elements: One, the act occurred in Multnomah County, Oregon; two, the act occurred on or about May 9th, 2012; and three, [defendant] intentionally caused the death of [Henry], another human being."

Immediately after giving that instruction, and despite the state's withdrawal of its request for an aid-or-abet instruction, the court instructed the jury as follows:

> "There is another instruction that didn't get included in here that I'll be giving to you and I'll read it to you right now. You'll have a copy of it also with you in the—in the jury room for deliberations. ***
>
> "This instruction is entitled Aid or Abet. A person aids or abets another person in the commission of a crime if the person, with the intent to promote or make easier the

> commission of the crime, encourages, procures, advises or assists by act or advice the planning or commission of the crime."[3]

After the court concluded its instructions to the jury, defendant excepted to them on the basis that the court had failed to instruct the jury on concurrence with regard to principal or aider and abettor liability.

During deliberations, the jury sent two questions to the court: (1) "Do you have to pull [the] trigger to be guilty of murder?"; and (2) "If you are guilty of aiding and abetting a murder, is that grounds for a guilty verdict?" In response to those questions, and over defendant's objection, the court provided the jury with a written copy of the uniform instruction on the definition of aid-or-abet liability.

The jury found defendant and his codefendants each guilty of one count of intentional murder. Defendant appeals the resulting judgment of conviction, arguing, among other things, that the trial court erred in denying his request for a jury concurrence instruction. He argues that the proposed concurrence instruction was a correct statement of the law because, under Article I, section 11, the jury was required to agree on either principal or aider and abettor liability to convict him of murder. He asserts further that the concurrence instruction was supported by the evidence adduced at trial, which he claims "established, at best, that defendant was present at the scene of Henry's murder; that he accompanied Allen and Riley both to and from the scene; and that defendant's DNA was later found on one of the guns that was probably used to shoot Henry." Because the jury could have convicted him on the belief that he personally shot Henry, or could have convicted him on the belief that he aided and abetted Allen and Riley by, for instance, supplying one of the weapons used in the shooting, the requested instruction was necessary.

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[3] The court had earlier instructed the jury on the law concerning accomplice witnesses, specifically related to Fair and her involvement in the case. The aid-or-abet instruction was not given in conjunction with that aspect of the jury instructions. Rather, the aid-or-abet instruction was given directly after the court's instructions on the elements of murder and the charges pertaining to each of the codefendants. Further, no instruction limited the aid-or-abet instruction to the jury's consideration of whether Fair was an accomplice witness.

> "We review a trial court's failure to give a requested jury instruction for errors of law. Generally speaking, an instruction is appropriate if it correctly states the law and is supported by evidence in the record, when the evidence is viewed in the light most favorable to the party requesting the instruction."

State v. Ashkins, 357 Or 642, 648, 357 P3d 490 (2015) (footnote and internal citations omitted). Applying that standard of review, we agree with defendant that the trial court erred in failing to give the requested jury concurrence instruction.

We begin, however, with the state's preservation argument, which we find unpersuasive. The state contends that defendant failed to preserve his claim because, after the jury submitted its questions and the court gave the jury a written copy of the aid-or-abet instruction, defendant did not renew his request for a concurrence instruction. At that point in the trial, there had been extensive colloquy regarding defendant's request for a jury concurrence instruction. The court had already denied defendant's request on two bases: (1) the state's withdrawal of its request for an aid-or-abet instruction; and (2) the court's mistaken belief that our decision in *Phillips* was controlling. In light of the court's previous determination that our decision in *Phillips* was binding, it was not necessary for defendant to reiterate his request for the concurrence instruction after the court provided the jury with the written aid-or-abet instruction; the court had already ruled on the issue as a matter of law. *State v. Walker*, 350 Or 540, 550, 258 P3d 1228 (2011) ("Once a court has ruled, a party is generally not obligated to renew his or her contentions in order to preserve them for the purposes of appeal."); *State v. Barajas*, 247 Or App 247, 251, 268 P3d 732 (2011) ("Preservation does not require a party to continue making an argument that the trial court has already rejected.").

Moreover, the record shows that defendant *did* repeatedly object to the court's failure to give the concurrence instruction. After the court concluded its predeliberation instructions, Allen's attorney specifically excepted to them on the basis that the court had failed to instruct the jury on concurrence with regard to principal or accomplice

liability, once again alerting the court to the *Phillips* case; defendant's attorney then joined in that exception. Then, after the jury submitted its questions and the court proposed providing them with the written aid-or-abet instruction, defendant's attorney excepted "based on prior discussions on jury instructions." The court was well aware of defendant's position that a jury concurrence instruction was necessary. Thus, defendant's claim is preserved for appellate review.

Turning to the merits of that claim, we conclude that the trial court erred in failing to give defendant's proposed jury concurrence instruction. First, defendant's proffered instruction was a correct statement of the law. Although the law on the need for jury concurrence was settled at the time of defendant's trial, the parties and the trial court mistakenly believed that the Supreme Court was still reviewing the jury concurrence issue. Accordingly, the trial court mistakenly relied on our decision in *Phillips* to deny the requested jury instruction. 242 Or App 253. However, at the time of defendant's trial, the Supreme Court had already overturned our decision, holding that, where a defendant can be found guilty either as a principal or as an accomplice, a jury concurrence instruction is necessary to assure that the jury agrees on one theory of criminal liability. *Phillips*, 354 Or at 612-13.

Defendant's request that the jury be instructed that they must *unanimously* agree on a theory of either principal or accomplice liability was also a correct statement of the law. Article I, section 11, requires that "ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise." In 1934, when Article I, section 11, was amended to include that provision, first-degree murder "required proof of premeditation and malice." *State v. Wesley*, 254 Or App 697, 704, 295 P3d 1147, *rev den*, 354 Or 62 (2013). When the legislature adopted a new criminal code in 1971, including revised statutes defining criminal homicide and murder, it "abandoned the concepts of malice and premeditation with respect to homicide, as well as the distinctions between first-degree and second-degree murder." *Id.*

The 1971 legislative commentary to the revised murder statute indicates that, due to the state's abolition of the death penalty, the legislature believed that the distinction between first-degree and second-degree murder was no longer necessary. The commentary explained that first-degree murder

> "'had included three branches: any killing done "purposely and of deliberate and premeditated malice" ***; a killing arising in the course of committing rape, arson, robbery or burglary (the felony-murder doctrine) ***; the third branch is a killing of a police officer without justification when the officer is acting in the line of duty.'"

Id. at 705 (quoting Commentary to the Criminal Law Revision Commission Proposed Oregon Criminal Code, Final Draft and Report § 88 (July 1970)). The commentary also explained that the "concepts embodied in first-degree murder were reflected in the newly revised statute." *Id.* Although capital punishment was subsequently reinstated and the crime of aggravated murder enacted, the current statute defining intentional murder under ORS 163.115(1) is substantively similar to the 1971 murder statute, and continues to reflect the concepts embodied in the first-degree murder statute. Consequently, the trial court properly instructed the jury that,

> "This being a murder case, each and every juror must agree on the verdict of guilty for an individual defendant to return a verdict of guilty for that defendant.
>
> "10 or more jurors must agree on the verdict of not guilty for an individual defendant to return a verdict of not guilty for that defendant."

Because unanimity was required for the jury to convict defendant of murder, defendant's proffered concurrence instruction correctly required unanimity. *See, e.g.*, *Phillips*, 354 Or 598 (where guilty verdict required agreement of at least 10 jurors, the same number of jurors had to agree on either principal or accomplice liability).

Second, the evidence presented at trial, when viewed in the light most favorable to defendant, supported defendant's proposed jury concurrence instruction. Based on that

evidence, a reasonable juror could have determined that defendant was criminally liable as either a principal or as an aider and abettor. Fair testified that defendant, Allen, and Riley all got out of Fair's car when she drove to Henry's house. Testimony regarding Henry's autopsy revealed that he had been shot with three different caliber bullets, and that each of his nine gunshot wounds could have been fatal. And, when police found weapons in Fair and Watson's apartment, one of the guns contained traces of defendant's DNA. In light of that evidence, a reasonable juror could find that defendant possessed and used one of the guns to kill Henry, and thus find him guilty of murder as a principal actor. However, a reasonable juror could fail to be persuaded beyond a reasonable doubt that, if defendant shot Henry, the wounds inflicted by him were fatal, but such a juror could nonetheless find that defendant had aided or abetted his codefendants in killing Henry. Because reasonable jurors could disagree about the theory of criminal liability, the court was required to give the proffered concurrence instruction.

We are not persuaded by the state's argument that the concurrence instruction was unnecessary because the state had withdrawn its request for an aid-or-abet instruction. The record reveals that, despite the state's statement that it was withdrawing its request for the instruction, the court nevertheless instructed the jury on aid-or-abet liability. The state is incorrect in its assertion that the court gave the aid-or-abet instruction only after the jury began deliberating and had submitted questions to the court. The record reveals that the court instructed the jury on the definition of aid-or-abet liability both *before* and *after* deliberations had begun. Contrary to the state's assertion, the instruction was not "necessary only in the context of the standard accomplice witness instruction," which the court gave in relation to Fair's testimony. Indeed, the court did not specify that the aid-or-abet instruction pertained only to Fair, nor did it give the aid-or-abet instruction after it instructed the jury on the law pertaining to accomplice witness testimony. Rather, the court gave the aid-or-abet instruction immediately after instructing the jury on the elements required to convict each of the codefendants of murder.

In any event, it is clear from the jury's subsequent questions to the court that it was considering the aid-or-abet instruction in relation to its determination of the codefendants' guilt, and not as it pertained to Fair's testimony. In response to those questions, the court instructed the jury a second time on the definition of aid-or-abet liability, again without providing the requested concurrence instruction. So, although the state did not request the aid-or-abet instruction, the court's insistence on giving it to the jury necessitated that the court also give the concurrence instruction proposed by the defense. The court's failure to give the proffered instruction was, therefore, a violation of Article I, section 11.

Conviction for murder reversed and remanded; otherwise affirmed.