

FILED: March 28, 2012

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

ANNA ELIZABETH ALONZO,
Defendant-Appellant.

Multnomah County Circuit Court
080833577

A143248

Janice R. Wilson, Judge.

Submitted on December 21, 2011.

Peter Gartlan, Chief Defender, Office of Public Defense Services, and Louis R. Miles, Deputy Public Defender, filed the brief for appellant.

John R. Kroger, Attorney General, Mary H. Williams, Solicitor General, and Tiffany Keast, Assistant Attorney General, filed the brief for respondent.

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

NAKAMOTO, J.

Affirmed.

1 NAKAMOTO, J.

2 Defendant appeals her convictions for unauthorized use of a vehicle, ORS
3 164.135, trafficking in stolen vehicles, ORS 819.310, two counts of first-degree theft,
4 ORS 164.055, first-degree forgery, ORS 165.013, possession of a stolen vehicle, ORS
5 819.300, and first-degree criminal mischief, ORS 164.365. She assigns error to the trial
6 court's instruction to the jury that one who aids or abets another in committing a crime is
7 criminally responsible for any acts or other crimes that were committed "as a natural and
8 probable consequence of the planning, preparation, or commission of the intended
9 crime." Because the claim of error was not preserved for our review as required by
10 ORCP 59 H, we affirm.

11 Defendant concedes that she did not object to or except to the "natural and
12 probable consequences" instruction the trial court delivered, but, in light of State v.
13 Lopez-Minjarez, 350 Or 576, 260 P3d 439 (2011), argues that the instruction provided an
14 incorrect statement of the law and requests that we review the claim of error as plain
15 error. *See* ORAP 5.45(1) ("No matter claimed as error will be considered on appeal
16 unless the claim of error was preserved in the lower court and is assigned as error * * *,
17 provided that the appellate court may consider an error of law apparent on the record.");
18 *Ailes v. Portland Meadows, Inc.*, 312 Or 376, 381-83, 823 P2d 956 (1991) (discussing the
19 court's discretion to reach plain error); *State v. Brown*, 310 Or 347, 355, 800 P2d 259
20 (1990) (describing the factors that appellate courts consider to review plain error).

21 Before reaching the plain error analysis, we must determine whether defendant complied
22 with ORCP 59 H(1), which applies to criminal trials through ORS 136.330(2). Rule 59

1 H(1) provides, in part:

2 "A party may not obtain review on appeal of an asserted error by a
3 trial court * * * in giving or refusing to give an instruction to a jury unless
4 the party who seeks to appeal identified the asserted error to the trial court
5 and made a notation of exception immediately after the court instructed the
6 jury."

7 The rule requires the party asserting an error to make an exception immediately after the
8 court instructs the jury. Failure to except to a jury instruction bars appellate review of an
9 unpreserved objection in two situations: (1) when the trial court delivers an instruction
10 that a party later contends was erroneous; and (2) when the trial court refuses to deliver
11 an instruction that a party requested. *State v. Guardipee*, 239 Or App 44, 48, 243 P3d
12 149 (2010); *State v. Toth*, 213 Or App 505, 509, 162 P3d 317 (2007).

13 Thus, notwithstanding ORAP 5.45(1), which gives appellate courts
14 discretion to consider an unpreserved error, ORCP 59 H precludes error in those two
15 circumstances. In *Guardipee*, the case fell within the second situation identified by
16 ORCP 59 H--when the trial court refused to deliver an instruction that the defendant had
17 requested. This court held that ORCP 59 H barred appellate review, precluding plain
18 error review. 239 Or App at 48. Here, the case falls under the first situation--the trial
19 court delivered an instruction that defendant now contends was erroneous, but defendant
20 did not except to it. Thus, although neither party addresses ORCP 59 H(1), we determine
21 that it applies and that defendant's assignment of error is unreviewable. See *State v.*
22 *Phillips*, 242 Or App 253, 258-59, 255 P3d 587 (2011), *rev allowed*, 351 Or 586 (2012)
23 (unpreserved challenge to accomplice liability instruction not subject to plain error
24 review where the defendant did not except to the giving of that instruction).

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Affirmed.