

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

MALCOLM MICHAEL GERLACH,
Defendant-Appellant.

Lane County Circuit Court
200901597

A144947

Debra K. Vogt, Judge.

Argued and submitted on April 30, 2012.

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.

Joanna L. Jenkins, Assistant Attorney General, argued the cause for respondent. With her on the brief were John R. Kroger, Attorney General, and Mary H. Williams, Solicitor General.

Before Armstrong, Presiding Judge, and Haselton, Chief Judge, and Duncan, Judge.

DUNCAN, J.

Convictions for first-degree kidnapping reversed and remanded with instructions to enter a single conviction for first-degree kidnapping and for resentencing; otherwise affirmed.

1 DUNCAN, J.

2 In this criminal case, defendant appeals from a judgment convicting him of
3 ten crimes, including two counts of first-degree kidnapping, ORS 163.235, arguing that
4 the trial court erred in holding that the antimerger statute, ORS 161.067(3), prevented the
5 two kidnapping counts from merging.¹ We review for errors of law, *State v. McConville*,
6 243 Or App 275, 277, 259 P3d 947 (2011), and conclude that that statute did not prevent
7 the two counts from merging, and, therefore, defendant could properly be convicted of
8 only one count of kidnapping. Accordingly, we reverse the two first-degree kidnapping
9 convictions and remand for entry of a single first-degree kidnapping conviction and for
10 resentencing.²

11 The relevant facts are as follows. Defendant, who was driving a stolen car,
12 intentionally hit the 10-year-old victim while she was riding her bicycle. Defendant
13 forced the victim into the car, drove her to a remote location, parked the car, and sexually
14 assaulted her in the back seat. Then he got back into the driver's seat and drove off, with
15 the victim still in the car, heading toward a forested, mountainous area. Police
16 intervened, knocking the car off the road, and the victim was rescued.

¹ Defendant was convicted of one count of unauthorized use of a vehicle, ORS 164.135, one count of possession of a stolen vehicle, ORS 819.300, one count of second-degree assault, ORS 163.175, two counts of first-degree kidnapping, ORS 163.235, one count of first-degree sodomy, ORS 163.405, one count of first-degree rape, ORS 163.375, one count of attempting to elude a police officer, ORS 811.540, one count of reckless driving, ORS 811.140, and one count of third-degree assault, ORS 163.165.

² Defendant also raises a second assignment of error, which we reject without discussion.

1 As relevant here, defendant was charged with two counts of first-degree
2 kidnapping.³ The prosecution's theory was that defendant's act of taking the victim from
3 where he hit her on her bicycle to the location of the sexual assault constituted one
4 kidnapping and that defendant's act of driving the victim from the location of the sexual
5 assault to the place where she was rescued by the police constituted a second kidnapping.

6 Defendant stipulated that he committed all of the acts alleged in the
7 indictment. He raised an insanity defense, which was heard by a jury. The jury found
8 defendant guilty.

9 At sentencing, defendant argued that the two kidnapping counts at issue
10 here should merge. Relying on the antimerger statute, ORS 161.067, the court held that
11 the two counts did not merge because they constituted "repeated violations" of the
12 kidnapping statute and were separated by a "sufficient pause in the defendant's criminal
13 conduct to afford the defendant an opportunity to renounce the criminal intent." ORS
14 161.067(3). It explained, "If [defendant] had time to pull up his pants, get out of the car,
15 get in the car and start driving, he also had sufficient pause to let [the victim] go."
16 Defendant appeals, arguing that ORS 161.067 does not prevent the two kidnapping
17 counts from merging, and, therefore, that he could be convicted of only one count.

³ Defendant was charged with 12 offenses, including a third count of first-degree kidnapping. The trial court concluded that the third kidnapping count merged into the first kidnapping count, and that conclusion is not at issue on appeal. *See, e.g., State v. Valladares-Juarez*, 219 Or App 561, 184 P3d 1131 (2008) (holding that two counts of first-degree kidnapping involving different aggravating factors under ORS 163.235(1) must merge; failure to merge was plain error).

1 Merger is governed by ORS 161.067, which provides:

2 "(1) When the same conduct or criminal episode violates two or
3 more statutory provisions and each provision requires proof of an element
4 that the others do not, there are as many separately punishable offenses as
5 there are separate statutory violations.

6 "(2) When the same conduct or criminal episode, though violating
7 only one statutory provision involves two or more victims, there are as
8 many separately punishable offenses as there are victims. * * *

9 "(3) When the same conduct or criminal episode violates only one
10 statutory provision and involves only one victim, but nevertheless involves
11 repeated violations of the same statutory provision against the same victim,
12 there are as many separately punishable offenses as there are violations,
13 except that each violation, to be separately punishable under this
14 subsection, must be separated from other such violations by a sufficient
15 pause in the defendant's criminal conduct to afford the defendant an
16 opportunity to renounce the criminal intent. Each method of engaging in
17 deviate sexual intercourse as defined in ORS 163.305, and each method of
18 engaging in unlawful sexual penetration as defined in ORS 163.408 and
19 163.411 shall constitute separate violations of their respective statutory
20 provisions for purposes of determining the number of statutory violations."

21 Defendant argues, the state concedes, and we agree, that neither ORS 161.067(1) nor
22 ORS 161.067(2) applies here. Consequently, the issue on appeal is whether ORS
23 161.067(3) prevented the two kidnapping counts from merging.

24 Defendant argues that he did not commit "repeated violations" of ORS
25 163.235, which defines first-degree kidnapping, and that, even assuming that there were
26 multiple violations, there was no sufficient pause between violations. A person violates
27 ORS 163.235--that is, commits first-degree kidnapping--by committing a violation of the
28 second-degree kidnapping statute, ORS 163.225, with any of certain enumerated

1 purposes, including causing physical injury to the victim and terrorizing the victim.⁴
2 Thus, in order to determine whether a defendant repeatedly violated ORS 163.235, we
3 must determine whether the defendant's conduct amounted to repeated violations of ORS
4 163.225, which provides:

5 "(1) A person commits the crime of kidnapping in the second degree
6 if, with intent to interfere substantially with another's personal liberty, and
7 without consent or legal authority, the person:

8 "(a) Takes the person from one place to another; or

9 "(b) Secretly confines the person in a place where the person is not
10 likely to be found."

11 The two first-degree kidnapping counts at issue on appeal alleged that defendant, "with

⁴ ORS 163.235 provides:

"(1) A person commits the crime of kidnapping in the first degree if the person violates ORS 163.225 with any of the following purposes:

"(a) To compel any person to pay or deliver money or property as ransom;

"(b) To hold the victim as a shield or hostage;

"(c) To cause physical injury to the victim;

"(d) To terrorize the victim or another person; or

"(e) To further the commission or attempted commission of any of the following crimes against the victim:

"(A) Rape in the first degree, as defined in ORS 163.375(1)(b);

"(B) Sodomy in the first degree, as defined in ORS 163.405(1)(b); or

"(C) Unlawful sexual penetration in the first degree, as defined in ORS 163.411(1)(b)."

1 the intent to interfere substantially with [the victim's] personal liberty, and without
2 consent or legal authority, did unlawfully take [the victim] from one place to another,
3 with the purpose of causing her physical injury[.]" Thus, we must determine whether
4 defendant repeatedly violated ORS 163.225.⁵

5 Defendant argues that he committed only one kidnapping because a
6 violation of the kidnapping statute lasts from the time that the victim is taken or confined
7 until the time that the victim escapes or is released--that is, when the victim's personal
8 liberty is restored.⁶ In support of his argument, defendant points out that, under ORS
9 161.067(3), to support separate convictions, "one crime must end before another begins."
10 *State v. Barnum*, 333 Or 297, 303, 39 P3d 178 (2002), *overruled on other grounds by*
11 *State v. White*, 341 Or 624, 147 P3d 313 (2006); *McConville*, 243 Or App at 281; *State v.*
12 *Watkins*, 236 Or App 339, 346, 236 P3d 770, *rev den*, 349 Or 480 (2010). Applying that
13 rule, he contends that he took the victim by forcing her into the car, and that her personal
14 liberty was not restored--and, consequently, the first kidnapping did not end--until she
15 was freed by the police.

16 The state remonstrates that defendant repeatedly violated ORS 163.225
17 because he took the victim "from one place to another," ORS 163.225(1)(a), more than

⁵ On appeal, defendant raises no argument regarding the mental state required to elevate second-degree kidnapping to first-degree kidnapping; nor could he, in light of his stipulation to the conduct alleged in the indictment.

⁶ We note that it is possible that a kidnapping victim's liberty may never be restored, as when a defendant kills the victim during the kidnapping. We need not, and, therefore, do not, express any opinion on the duration of a kidnapping in such a circumstance.

1 once. The Supreme Court has held that relatively minimal movement can satisfy that
2 statutory requirement. *See, e.g., State v. Walch*, 346 Or 463, 213 P3d 1201 (2009)
3 (holding that dragging the victim five to 15 feet and throwing her into the trunk of a car
4 satisfied the asportation requirement). Here, the state contends, each of the two takings
5 of the victim that it identifies easily satisfies the asportation element of the statute. The
6 state reasons that "defendant committed a number of acts, each of which alone would
7 constitute a violation of the statute. Therefore, defendant committed multiple violations
8 of the statute."⁷ (Footnote omitted.)

9 Thus, the parties' arguments reduce to a dispute over what is required for
10 one violation of ORS 163.225 to end and a new violation to begin. Defendant contends
11 that the violation--*i.e.*, the kidnapping--continues until the defendant ceases to interfere
12 with the victim's personal liberty; the state responds that a violation ends as soon as the
13 defendant has taken the victim "from one place to another," ORS 163.225(1)(a), and, at
14 that point, the only remaining question is whether there has been "a sufficient pause in
15 the defendant's criminal conduct to afford the defendant an opportunity to renounce the
16 criminal intent." ORS 161.067(3).

17 Defendant has the better argument. Kidnapping is, at its core, the

⁷ The state also argues that defendant's stipulation to the facts alleged in the indictment controls the question whether defendant's conduct amounted to repeated violations of ORS 163.225. As noted above, merger, including the scope and application of ORS 163.067, is a question of law that we review for errors of law. *See, e.g., Barnum*, 333 Or at 302; *McConville*, 243 Or App at 281. Therefore, defendant's stipulation is not relevant to the question on appeal.

1 abduction of a person. It requires the taking or confining of a person by force, threat, or
2 deception, with the intent to substantially interfere with the person's liberty, specifically,
3 the person's freedom of movement. ORS 163.225(1) (defining kidnapping); ORS
4 163.215(1) (defining "without consent" for the purpose of the kidnapping statute); *State*
5 *v. Wolleat*, 338 Or 469, 475, 111 P3d 1131 (2005) ("[T]he liberty interest that the
6 [kidnapping] statute protects from interference is the interest in freedom of movement.").
7 In other words, kidnapping is the unauthorized seizure of a person with the intent to
8 prevent the person's liberation, either by taking the person from one place to another or
9 secretly confining the person in a place where the person is not likely to be found. *See*,
10 *e.g.*, *State v. Murray*, 340 Or 599, 606, 136 P3d 10 (2006) (carjacker's act of pushing
11 driver onto passenger seat did not constitute kidnapping because, even assuming he had
12 moved the driver from one place to another, there was no evidence that he "tried to *keep*
13 [the driver] in the car" (emphasis in original)).

14 Because kidnapping is the seizure of a person for the purpose of
15 substantially interfering with the person's liberty, it is a continuing crime. It continues for
16 as long as the seizure continues. Therefore, if a defendant commits the crime of
17 kidnapping by taking a person from one place to a second place, the defendant does not
18 commit an additional kidnapping by moving the person from a second place to a third
19 place. The movement from the second place to the third place is not a second seizure; it
20 is a continuation of the original seizure.

21 Our cases concerning statutes of limitations confirm that understanding that

1 a new kidnapping offense cannot begin while the defendant remains in control of the
2 victim--that is, while the victim's personal liberty remains interfered with by the
3 defendant. In *State v. Rose*, 75 Or App 379, 706 P2d 583 (1985), *rev den*, 300 Or 477
4 (1986), we concluded that first-degree custodial interference, ORS 163.257, was a
5 continuing offense. In that case, the defendant was the father of the victim. In April
6 1975, the defendant picked up the victim, who was then five years old, from her mother
7 in Oregon pursuant to a custody order allowing visitation. *Rose*, 75 Or App at 381. He
8 did not return the victim to her mother; instead, he took her first to Illinois and then,
9 eventually, to California. He changed his name and told the victim that her mother was
10 dead. The defendant and the victim lived in California for approximately nine years,
11 until the defendant was arrested in May 1984. *Id.* at 382.

12 The defendant was charged with first-degree custodial interference. Like
13 the kidnapping statutes, the custodial interference statutes define the basic crime as a
14 second-degree offense, ORS 163.245, and elevate the crime to first-degree custodial
15 interference by proof of certain additional elements, ORS 163.257.⁸ The additional
16 element at issue in *Rose* was the defendant's act of removing the victim from the state.
17 ORS 163.257(1)(a) (1981); *Rose*, 75 Or App at 382.

18 ORS 163.245(1) (1981), defining second-degree custodial interference,

⁸ The basic structure of the custodial interference statutes remains the same as it was when *Rose* was decided. However, subsequent amendments have made some changes to the provisions. For clarity, in discussing *Rose*, we quote the statutes as they existed in 1985, when that case was decided.

1 provided:

2 "A person commits the crime of custodial interference in the second
3 degree if, knowing or having reason to know that the person has no legal
4 right to do so, the person takes, entices or keeps another person from the
5 other person's lawful custodian with intent to hold the other person
6 permanently or for a protracted period."

7 Thus, the elements of second-degree custodial interference were (1) taking, enticing, or
8 keeping another person from the other person's lawful custodian; (2) intent to hold the
9 other person permanently or for a protracted period; and (3) knowledge or reason to know
10 that the defendant has no legal right to do so.

11 The defendant argued that the trial court had erred in refusing to dismiss the
12 indictment or acquit him because the six-year statute of limitations had expired before the
13 prosecution was commenced.⁹ *Id.* at 382. He contended that his crime was complete
14 when he removed the victim from the state because, at that time, he had completed all of
15 the elements of the crime--that is, that in addition to removing the victim from the state,
16 he had (1) taken the victim from her lawful custodian (2) with the intent to hold her
17 permanently or for a prolonged period of time, (3) knowing that he had no legal right to
18 do so. Consequently, he argued, the six-year limitations period began to run on April 5,
19 1975, and it had expired by the time he was indicted in June 1984.

20 Thus, the defendant in *Rose* made the same argument that the state makes

⁹ The statute of limitations for custodial interference is, and, when *Rose* was decided, was, three years. ORS 131.125(6)(a). In *Rose*, the statute of limitations was tolled for an additional three years because the defendant was out of state. ORS 131.145(a); ORS 131.155.

1 in the present case: He pointed out that, as of April 5, 1975, he had committed all of the
2 elements of the crime. On that date, he could have been charged with custodial
3 interference. Consequently, he argued, his crime was complete on that date.

4 We disagreed. We explained:

5 "Although the time for prosecution runs from the day that an offense is
6 committed, custodial interference is a continuing offense. Removing the
7 child from the state is one of the factors which enhances the crime from
8 second to first degree, but it does not change the underlying offense into a
9 discrete act. *The offense continues as long as custody is withheld.* * * *

10 " * * * * *

11 "*The custodian's rights continue to be violated so long as the child is*
12 *kept from the custodian.* The period of limitations does not begin to run
13 until that interference ceases. Here, although defendant unlawfully kept his
14 daughter from her mother for over nine years, the indictment was brought
15 within a month after the custodial interference ceased."

16 *Id.* at 382-83 (citation omitted; emphases added).

17 The kidnapping statutes share the structure of the custodial interference
18 statutes. The elements of second-degree kidnapping by taking are that a defendant (1)
19 takes another person from one place to another (2) with intent to interfere substantially
20 with that person's personal liberty (3) without consent or legal authority. ORS
21 163.225(1)(a). As noted above, the additional element that raised the act at issue here to
22 first-degree kidnapping is that defendant had the purpose of causing physical injury to the
23 victim. ORS 163.235(1)(c).

24 The state points out that all four of those elements were satisfied as soon as
25 defendant forced the victim into the car. Like the defendant in *Rose*, the state argues that

1 the first kidnapping was complete at that time. As a result, the state contends, defendant
2 was able to begin a new kidnapping by beginning to move the victim again after the
3 sexual assault. We disagree. Just as, in *Rose*, the custodial interference continued as
4 long as custody was withheld, in this case, the kidnapping continued as long as the
5 victim's personal liberty was interfered with.

6 We again discussed the difference between continuing and discrete offenses
7 in *State v. Harelson*, 147 Or App 556, 938 P2d 763, *rev den*, 326 Or 58 (1997). In that
8 case, the defendant was convicted of a number of crimes arising from his looting of
9 ancient Native American archeological sites. *Id.* at 588. His acts included taking a large
10 number of artifacts from a site and keeping them in his home and disinterring the bodies
11 of two children, taking artifacts buried with them, and reburying the bodies in his
12 backyard. The defendant appealed, arguing that, as to three of his convictions--one for
13 first-degree theft, ORS 164.055, and two for abuse of a corpse, ORS 166.085--the statute
14 of limitations had expired before the prosecution commenced. *Harelson*, 147 Or App at
15 559. The state responded that the two crimes were continuing offenses and,
16 consequently, they ended, and the statute of limitations began to run, only after the
17 defendant had relinquished the stolen artifacts and the bodies to the police.

18 The court considered the statutes defining the two crimes and came to a
19 different conclusion about each. In doing so, it drew a distinction between continuing
20 and discrete offenses. The theft by receiving statute provides, "A person commits theft
21 by receiving if the person receives, *retains*, *conceals* or disposes of property of another

1 knowing or having good reason to know that the property was the subject of theft." *Id.* at
2 560 (quoting ORS 164.095(1)) (emphasis in *Harelson*). As to the defendant's theft
3 conviction, the court explained that the crime continued as long as the defendant retained
4 the stolen artifacts.

5 The state argued that abuse of a corpse was also a continuing offense. It
6 cited *Rose* in support of that argument. *Id.* at 563. In response to that comparison, we
7 explained the distinction between discrete and continuing offenses:

8 "The state fails to recognize that the statute defines abuse of a corpse
9 as the performance of specific actions at specific times. Disinterring,
10 removing, or carrying away a corpse are all discrete events that are
11 completed once they have occurred. Treating a corpse in a manner not
12 recognized by community standards can also be a discrete act that occurs at
13 a specific moment. In this case, once the bodies were buried, defendant
14 was no longer treating them in any way; his actions were completed.

15 "In contrast, a person who commits custodial interference retains
16 control of the child every day that the interference continues and thus
17 continually commits the crime, just as a person who retains stolen property
18 continually commits the crime of theft."

19 *Id.*

20 Under our reasoning in *Rose*, as further elaborated in *Harelson*, kidnapping
21 is a continuing offense; it is not a discrete act that is complete once a defendant has
22 committed all of the elements of the crime. Like custodial interference, which is
23 committed continually while the defendant retains control of the child, and theft by
24 receiving, which is committed continually while the defendant retains control of the
25 stolen property, kidnapping is committed continually while the defendant retains control
26 of the victim. In other words, kidnapping continues as long as the defendant deprives the

1 victim of his or her personal liberty. Because a single deprivation of the victim's personal
2 liberty is a single violation of ORS 163.225, and, consequently, a single violation of ORS
3 163.235, merger of defendant's kidnapping counts is not prevented by ORS 161.067(3).

4 Convictions for first-degree kidnapping reversed and remanded with
5 instructions to enter a single conviction for first-degree kidnapping and for resentencing;
6 otherwise affirmed.