

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

DONALD IRA WYTCHERLEY,
Defendant-Appellant.

Josephine County Circuit Court
10CR0659

A149051

Thomas M. Hull, Judge.

Submitted on March 01, 2013.

Rankin Johnson IV filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Anna M. Joyce, Solicitor General, and Janet A. Klapstein, Senior Assistant Attorney General, filed the brief for respondent.

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

PER CURIAM

Reversed and remanded with instructions to merge conviction for unlawful use of a weapon (Count 3) into conviction for assault in the second degree (Count 2) and for resentencing; otherwise affirmed.

1 PER CURIAM

2 A jury found defendant guilty of one count of second-degree assault and
3 one count of unlawful use of a weapon.¹ Both counts were based on a single incident in
4 which defendant shot his brother in the leg. The trial court entered two separate
5 convictions, and defendant appeals.

6 In a single assignment of error, defendant argues that the trial court plainly
7 erred in entering two separate convictions rather than merging the guilty verdicts into a
8 single conviction for second-degree assault. The state, for its part, concedes that the trial
9 court plainly erred in that regard. *See State v. Ryder*, 230 Or App 432, 216 P3d 895
10 (2009). We accept the state's concession and, for the reasons expressed in *Ryder*, 230 Or
11 App at 435, exercise our discretion to correct the error.

12 Reversed and remanded with instructions to merge conviction for unlawful
13 use of a weapon (Count 3) into conviction for assault in the second degree (Count 2) and
14 for resentencing; otherwise affirmed.

¹ Defendant was acquitted on a charge of attempted murder with a firearm.