

**FILED: October 30, 2013**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,  
Plaintiff-Respondent,

v.

ADAM TROY STELTZ,  
Defendant-Appellant.

Marion County Circuit Court  
10C46694

A149320

Claudia M. Burton, Judge.

Argued and submitted on May 16, 2013.

Zachary Lovett Mazer, Deputy Public Defender, argued the cause for appellant. With him on the brief was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Erin C. Lagesen, Assistant Attorney General, argued the cause for respondent. With her on the brief were Ellen F. Rosenblum, Attorney General, and Anna M. Joyce, Solicitor General.

Before Ortega, Presiding Judge, and Sercombe, Judge, and Hadlock, Judge.

HADLOCK, J.

Reversed and remanded with instructions to merge defendant's conviction on Count 6 into his conviction on Count 4 and to merge defendant's conviction on Count 7 into his conviction on Count 5 and for resentencing; otherwise affirmed.

1 HADLOCK, J.

2 Defendant appeals a judgment of conviction for three counts of first-degree  
3 sodomy (Counts 1, 4, and 5), ORS 163.405, one count of first-degree unlawful sexual  
4 penetration (Count 2), ORS 163.411, one count of first-degree sexual abuse (Count 3),  
5 ORS 163.427, and two counts of second-degree sexual abuse (Counts 6 and 7), ORS  
6 163.425. He raises five assignments of error. We reject defendant's first and second  
7 assignments of error without discussion. In his third assignment of error, defendant  
8 contends that, by requiring him to wear a stun belt, the trial court violated his right to be  
9 free from physical restraints during his trial. As explained below, we reject the  
10 arguments that defendant raises in conjunction with that assignment of error, which are  
11 not preserved for appeal. In his fourth and fifth assignments of error, defendant argues  
12 that the trial court erred when it failed to merge the convictions for Counts 6 and 7 into  
13 the convictions for Counts 4 and 5. As to those assignments of error, we agree with  
14 defendant and, therefore, remand with instructions.

15 Defendant was an inmate at Oregon State Penitentiary and Oregon State  
16 Correctional Institute when he was accused of sodomizing and sexually abusing two  
17 other inmates. At his trial, the court required defendant to wear a Remote Activated  
18 Custody Control Belt (stun belt). The court explained its reasoning as follows:

19 "THE COURT: \* \* \* [A]s Counsel are aware, pursuant to the  
20 request of the sheriff's office, I, yesterday, entered a formal order submitted  
21 by the sheriff's department permitting the use of the [stun] belt on  
22 [defendant] in the courtroom. And [defense counsel], anything that you  
23 wanted to say about that for the record?"

1                    "[DEFENSE COUNSEL]: Yes, Your Honor. We do object to the  
2 use of the belt; however, when given the alternative of the shackles, since  
3 this is a jury trial, we will acquiesce to the belt.

4                    "\* \* \* \* \*

5                    "THE COURT: And so I will just state for the record, and Counsel,  
6 I'm sure, are both aware of this, that my understanding from the sheriff's  
7 department was that [defendant] had some behavior issues such that they  
8 were concerned about his ability to, essentially, control his behavior in a  
9 courtroom.

10                    "The [stun] belt is not visible to the jury. He is \* \* \* dressed in  
11 civilian clothing, and so that's a mechanism to ensure that we don't have  
12 any outbursts or disruptions that is not visible to the jury, and therefore  
13 nothing that is going to prejudice the jurors by having them draw any  
14 conclusions about [defendant] based on that. So on that basis the Court did  
15 allow it."

16                    On appeal, defendant contends that the trial court violated his right to be  
17 free from physical restraints during trial. Specifically, defendant argues that the trial  
18 court erroneously deferred to the sheriff's office when determining whether defendant  
19 should be required to wear a stun belt. Defendant also contends that the court  
20 impermissibly failed to "make a record of why the stun belt was necessary." Defendant  
21 asserts that the court's erroneous requirement that he wear a stun belt prejudiced him at  
22 trial by influencing his decision not to testify. The state responds that, among other  
23 things, defendant's arguments are unpreserved. We agree with the state.

24                    Oregon has long recognized the "right of an accused to be free from  
25 physical restraint during a criminal trial." *State v. Wall*, 252 Or App 435, 437, 287 P3d  
26 1250 (2012), *rev den*, 353 Or 280 (2013). That right "has common-law and constitutional  
27 underpinnings." *Id.* "Specifically, physically restraining a defendant implicates Article I,

1 section 11, of the Oregon Constitution and the Due Process Clause of the Fourteenth  
2 Amendment to the United States Constitution." *Id.* Nevertheless, a trial court has  
3 discretion to order a defendant to wear shackles or a stun belt if there is evidence of an  
4 "immediate and serious risk of dangerous or disruptive behavior." *Id.* at 439 (internal  
5 quotation marks omitted); *see also id.* at 442 (concluding that there is no difference  
6 between visible and nonvisible restraints "for purposes of the threshold showing that is  
7 required before restraints may be lawfully imposed"). In *Wall*, we emphasized two  
8 aspects of the trial court's task in exercising that discretion. First, the trial court should  
9 make a record of the relevant information it has received and evaluated. *Id.* at 439.  
10 Second, the court may not simply defer to others' opinions of the risk that the defendant  
11 may pose; rather, the information before the court must provide it with a basis "to make  
12 an independent assessment of the risk." *Id.* (citation omitted).

13           As noted, defendant argues on appeal that the trial court did not perform  
14 either of those tasks; that is, defendant contends that the court impermissibly deferred to  
15 the sheriff's risk assessment and failed to make a record of its reasons for requiring  
16 restraints. But the record does not indicate that defendant made either of those arguments  
17 to the trial court. As far as we can discern from the record, the restraint issue first arose  
18 when, on the day before trial, the trial court entered an order authorizing the use of a stun  
19 belt on defendant during trial. The next day, the court gave defendant an opportunity to  
20 comment on the record about that order. Defense counsel responded, "We do object to  
21 the use of the belt; however, when given the alternative of the shackles, since this is a

1 jury trial, we will acquiesce to the belt." That brief and general objection was not  
2 sufficient to preserve the arguments that defendant raises on appeal, as it did not alert the  
3 trial court either to the need to make findings or to defendant's contention that the court  
4 impermissibly was deferring to the sheriff. Moreover, the absence of more specific  
5 arguments prevented development of the record. That is, had defendant asserted below  
6 that the trial court could not defer to the sheriff and needed to explicitly detail its own  
7 reasons for requiring restraints, the trial court could have done so. For both of those  
8 reasons, defendant's general objection did not adequately preserve his current arguments  
9 for appeal. *See Peebles v. Lampert*, 345 Or 209, 219-20, 191 P3d 637 (2008)  
10 ("preservation fosters full development of the record, which aids the trial court in making  
11 a decision and the appellate court in reviewing it"); *State v. Wyatt*, 331 Or 335, 343, 15  
12 P3d 22 (2000) (to preserve a claim of error for appeal, a party must "provide the trial  
13 court with an explanation of his or her objection that is specific enough to ensure that the  
14 court can identify its alleged error with enough clarity to permit it to consider and correct  
15 the error immediately, if correction is warranted"); *see also Peebles*, 345 Or at 221-23  
16 (preservation principles apply even when the trial court is required to make particularized  
17 findings on the record).

18           We turn to defendant's contention that the trial court erred in failing to  
19 merge certain of his convictions. Defendant was convicted of, among other things, two  
20 counts of first-degree sodomy (Counts 4 and 5) and two counts of second-degree sexual  
21 abuse (Counts 6 and 7), all relating to the same victim. It is undisputed that the

1 indictment charged Counts 4 through 7 as separate incidents; it also is undisputed that the  
2 record contains sufficient evidence to support four separate convictions. In his fourth and  
3 fifth assignments of error, defendant contends that the trial court nonetheless erred by  
4 failing to merge his convictions on Counts 6 and 7 into his convictions on Counts 4 and  
5 5. In support of his argument, defendant asserts that the state, in closing argument,  
6 treated the second-degree sexual abuse counts (Counts 6 and 7) as lesser-included  
7 offenses of the sodomy counts (Counts 4 and 5). In other words, defendant argues that  
8 the state elected to prosecute Counts 4 through 7 as relating to only two episodes of  
9 criminal conduct, not four. Defendant concedes that he did not preserve that argument in  
10 the trial court, and he asks us to address the issue as plain error under ORAP 5.45(1).  
11 The state argues that the indictment and evidence, not the prosecutor's closing argument,  
12 should control, and that the court did not plainly err by failing to merge the convictions.

13           As explained below, we conclude that the trial court's failure to merge four  
14 of defendant's convictions into two convictions constitutes an error of law apparent on the  
15 face of the record, warranting the affirmative exercise of our discretion under *Ailes v.*  
16 *Portland Meadows, Inc.*, 312 Or 376, 382 n 6, 823 P2d 956 (1991). Accordingly, we  
17 reverse and remand with instructions.

18           Analysis of unpreserved error under ORAP 5.45(1) involves a two-step  
19 process. First, we consider three "plain error" criteria: (1) whether the claimed error is  
20 one of law; (2) whether it is obvious and not reasonably in dispute; and (3) whether it  
21 appears on the face of the record without requiring the court to go outside the record or

1 choose between competing inferences. *State v. Brown*, 310 Or 347, 355, 800 P2d 259  
2 (1990). Second, if those criteria are met, we must determine whether to exercise our  
3 discretion to correct the error. *Ailes*, 312 Or at 382 n 6.

4           Whether convictions should merge is a legal question that is governed by  
5 the "anti-merger" rule in ORS 161.067(1):

6           "When the same conduct or criminal episode violates two or more statutory  
7 provisions and each provision requires proof of an element that the others  
8 do not, there are as many separately punishable offenses as there are  
9 separate statutory violations."

10 Under that statute, merger would be appropriate in this case if Counts 4 through 7  
11 involved two, as opposed to four, incidents of "conduct or criminal episode[s]," and if the  
12 second-degree sexual abuse charges are lesser-included offenses of first-degree sodomy.  
13 *State v. Sanders*, 189 Or App 107, 110, 74 P3d 1105 (2003), *rev den*, 336 Or 657 (2004)  
14 (merger of convictions required where the offenses involved the same act of violence  
15 against a single victim and the merged conviction is a lesser-included offense of the more  
16 serious offense). The state argues only that the jury could have found that defendant  
17 engaged in four separate criminal episodes as charged in Counts 4 through 7; it does not  
18 dispute that, as charged in this case, second-degree sexual abuse is a lesser-included  
19 offense of first-degree sodomy. Accordingly, we confine our analysis to determining  
20 whether the number of episodes at issue is "not reasonably in dispute." *Brown*, 310 Or at  
21 355.

22           The state elected, during both closing argument and sentencing, to  
23 prosecute Counts 4 through 7 as presenting alternative theories of guilt for only two

1 criminal acts. In closing argument, the prosecutor, describing the two second-degree  
2 sodomy charges (Counts 4 and 5), explained that:

3 "One count is for having oral sex with [victim] forcibly. One count is  
4 having anal sex forcibly with [victim]. Like I've already argued to you, it's  
5 not the State's argument that [those incidents] happened just once, \* \* \* but  
6 they at least happened orally and anally one time."

7 The prosecutor also described the two second-degree sexual abuse charges (Counts 6 and  
8 7) as lesser-included offenses of first-degree sodomy ("sex abuse two is a lesser included,  
9 essentially, of sodomy in the first [degree]"). Explaining the difference between the  
10 sexual abuse charges and the sodomy charges, the prosecutor told the jury that

11 "the distinction is really easy, it's just that sodomy requires forcible  
12 compulsion, sex abuse in the second degree only requires non consensual  
13 sex. Meaning that he just didn't say yes to him. He wasn't on board with it,  
14 and it happened anyway.

15 " \* \* \* \* \*

16 "And I would argue to you that something illegal happened. You  
17 may find it was sodomy in the first degree, and that it was forcible, and you  
18 may say it was just consensual, but something wasn't right in there. \* \* \*

19 "So in conclusion, I'm going to ask you to find him guilty of those  
20 counts as well."

21 At sentencing, the state acknowledged that the record included evidence to  
22 support four separate convictions. The state reiterated, however, that it had presented  
23 Counts 6 and 7 to the jury as alternatives to Counts 4 and 5. Accordingly, the state  
24 asserted that the sentence on Count 6 should run concurrently to the sentence on Count 4,  
25 and that the sentences on Counts 7 and 5 also should run concurrently:

26 "[PROSECUTOR]: Finally, in [counts six and seven,] sex abuse  
27 two, as I stated on the record, I believe they are indicted as separate

1 criminal episodes, so Your Honor can find, based on the jury's verdict, that  
2 those can run consecutive. \* \* \*

3 "But \* \* \* the State will point to Your Honor that the State argued  
4 those as an either/or. That you could find something was forcible, or you  
5 could find that it \* \* \* was not consensual, but *I think my argument was*  
6 *please find that it was one or the other. And so the State is not asking for*  
7 *consecutive times on count six and seven. We're asking for those to run*  
8 *concurrent.*

9 " \* \* \* \* \*

10 "THE COURT: And counts six and seven you are asking to run  
11 concurrent with four, concurrent with five, six concurrent with four, and  
12 seven concurrent with five?

13 "[PROSECUTOR]: Correct to all."

14 (Emphasis added.) The court expressly adopted the state's recommendations:

15 "[THE COURT]: In counts four and five it is appropriate that those  
16 counts run consecutively to each other, because they are not all the same  
17 criminal episode. The evidence was clear that this victim was assaulted  
18 sexually on multiple different occasions. \* \* \* [A]s to the remaining counts  
19 [six and seven], I will adopt the State's recommendations."

20 (Emphasis added.) Accordingly, the court entered a judgment ordering the sentence on  
21 Count 6 to run concurrently to the sentence on Count 4 (as well as concurrently to certain  
22 other sentences) and the sentence on Count 7 to run concurrently to the sentence on  
23 Count 5 (and to the sentences on all other counts).

24 Thus, the state conceded at sentencing that Counts 6 and 7 had been  
25 prosecuted as presenting alternative theories of guilt for the same incidents that formed  
26 the basis for the convictions on Counts 4 and 5. Moreover, the trial court accepted that  
27 representation when it ordered the sentences on Counts 6 and 7 to run concurrently to  
28 those on Counts 4 and 5. The difficulty is that--given the state's acknowledgement that

1 (1) it had chosen to prosecute Counts 4 through 7 as involving only two episodes of  
2 criminal conduct, and (2) the acts of sexual abuse as charged in Counts 6 and 7 were  
3 lesser-included offenses of the sodomy charged in Counts 4 and 5--the trial court should  
4 have merged the pairs of convictions, not merely ordered the sentences to run  
5 concurrently. Given the state's unambiguous acknowledgement that it prosecuted Counts  
6 6 and 7 as presenting only alternative theories of criminal liability, not independent  
7 offenses, the trial court plainly erred by not merging the convictions as defendant argues  
8 it should have.

9           We conclude that it is appropriate to exercise our discretion under *Ailes* to  
10 correct that error. First, the error in this case is grave. The presence of two additional  
11 second-degree sexual abuse convictions on defendant's criminal record misstates the  
12 nature and extent of the conduct for which the state chose to prosecute him. *See State v.*  
13 *Valladares-Juarez*, 219 Or App 561, 564, 184 P3d 1131 (2008) (considering that factor in  
14 assessing whether to address a failure to merge convictions as plain error). Second,  
15 although the state may have an interest in avoiding unnecessary proceedings on remand,  
16 it has no interest in convicting a defendant twice for the same crime. *Id.* Therefore, the  
17 competing interests of the parties weigh in favor of exercising our discretion to correct  
18 the error. Finally, we cannot identify any strategic reason that defendant may have had  
19 for not objecting to the trial court's failure to merge the convictions. *Id.* at 564-65.  
20 Accordingly, we reverse and remand the case to the trial court with instructions to merge  
21 defendant's conviction on Count 6 into his conviction on Count 4 and to merge

1 defendant's conviction on Count 7 into his conviction on Count 5 and for resentencing,  
2 but otherwise affirm. *See Sanders*, 189 Or App at 111-12 (remanding entire case for  
3 resentencing when trial court erred by not merging convictions).

4           Reversed and remanded with instructions to merge defendant's conviction  
5 on Count 6 into his conviction on Count 4 and to merge defendant's conviction on Count  
6 7 into his conviction on Count 5 and for resentencing; otherwise affirmed.