IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

EDDIE SILAS,
Defendant-Appellant.

Multnomah County Circuit Court
15CR16686; A160837

Cheryl A. Albrecht, Judge.

Submitted August 23, 2017.

Ernest G. Lannet, Chief Defender, Criminal Appellate Section, and Matthew Blythe, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Doug M. Petrina, Assistant Attorney General, filed the brief for respondent.

Before Lagesen, Presiding Judge, and DeVore, Judge, and James, Judge.

PER CURIAM

Affirmed.

PER CURIAM

Defendant was convicted in a bench trial of two counts of strangulation constituting domestic violence, ORS 163.187(4), among other offenses. At sentencing, defendant argued that the court was required to merge the guilty verdicts on the two counts of strangulation because the state had not given notice under ORS 136.765 that it intended to prove that the two violations of ORS 163.187(4) of which the trial court found defendant guilty were separated by a "sufficient pause" so as to allow for the entry of two separate convictions under ORS 161.067(3).[1] Defendant's theory was that whether there was a "sufficient pause" is a fact that the Sixth Amendment to the United States Constitution requires the state to plead and prove to the jury under the reasoning of *Apprendi v. New Jersey*, 530 US 466, 120 S Ct 2348, 147 L Ed 2d 435 (2000), and *Blakely v. Washington*, 542 US 296, 124 S Ct 2531, 159 L Ed 2d 403 (2004). Accordingly, defendant reasoned, the existence of a "sufficient pause" is an "enhancement fact" as defined by ORS 136.760(2), such that the state needed to give notice of its intent to rely on that fact under ORS 136.765, which requires notice of the state's intention to rely on an "enhancement fact." The trial court rejected defendant's argument and entered two separate convictions of strangulation.

On appeal, defendant assigns error to the trial court's failure to merge the verdicts on the strangulation counts, reiterating the argument he presented to the trial court. Whatever the merits of defendant's contention that the Sixth Amendment required the state to plead and prove to a jury the existence of a sufficient pause so as to preclude merger—a question we do not address—a fact that the state must prove to preclude merger under ORS 161.067

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[1] ORS 161.067(3) provides, in relevant part:

"When the same conduct or criminal episode violates only one statutory provision and involves only one victim, but nevertheless involves repeated violations of the same statutory provision against the same victim, there are as many separately punishable offenses as there are violations, except that each violation, to be separately punishable under this subsection, must be separated from other such violations by a sufficient pause in the defendant's criminal conduct to afford the defendant an opportunity to renounce the criminal intent."

is not an "enhancement fact" under ORS 136.760(2). Such a fact does not operate "to increase the sentence that may be imposed upon conviction of a crime," as it must to be an enhancement fact under ORS 136.760(2). Rather, it is a fact that, if proved, determines the number of convictions that may be entered for violations of the same statutory provision occurring during the same criminal episode. *See State v. White*, 341 Or 624, 627-36, 147 P3d 313 (2006) (explaining that ORS 161.067 addresses how many *convictions* may be entered for conduct occurring under specified circumstances and is not about sentencing).

Defendant also makes an unpreserved argument that the trial court erroneously found that the two strangulations occurred in separate criminal episodes and declined to merge the verdicts based on that erroneous finding. He requests plain error review. However, it is not apparent that the trial court made the finding that defendant challenges. The alleged error, then, is not plain, and does not provide a basis for reversal.

Affirmed.