

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

KEVIN CHRISTOPHER KELLISON,
Defendant-Appellant.

Lincoln County Circuit Court
144322; A161038

Sheryl Bachart, Judge.

Argued and submitted September 29, 2017.

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

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Susan Yorke, Assistant Attorney General, filed the brief for respondent.

Before Armstrong, Presiding Judge, and Tookey, Judge, and Shorr, Judge.

PER CURIAM

Remanded for resentencing; otherwise affirmed.

PER CURIAM

Defendant appeals a judgment of conviction for first-degree sexual abuse. We write to address defendant's assignment of error to the trial court's imposition of a compensatory fine and reject his other assignments of error without written discussion.

The trial court imposed a \$1,000 fine for defendant's felony conviction as well as a \$5,000 compensatory fine to be paid to the victim, based on counseling services received by the victim. The court based the compensatory fine on a letter written by the victim's mother. The portion of that letter that referred to counseling stated:

"[The victim] does have some relief knowing that [defendant] will be locked up for what he did to her, but what does she have to look forward to after what [defendant] did to her? Not being able to sleep at night. Sleeping too much. Missing school. Missing times with her friends. Relationship problems. Being in therapy. A problem of running into your family, [defendant's father], or your Aunt Erin in our small town. A constant reminder of that night."

Defendant argues that the trial court erred in imposing the compensatory fine because the victim's mother's letter referred only to counseling for the victim in the future, and not to counseling that the victim had already received. Defendant also argues that the court plainly erred in imposing the compensatory fine as an additional fine to the \$1,000 punitive fine on his conviction. The state concedes that "the record lacked sufficient evidence to establish that the victim had incurred pecuniary harm."

We do not accept the state's concession. The trial court found that the victim had incurred economic damages for counseling, and the victim's mother's letter is sufficient evidence to support the trial court's finding. That letter refers to the victim as "being in therapy"—*viz.*, that she is currently in therapy—it is not a reference to speculative future counseling.¹ In addition, if a victim has incurred

¹ Moreover, the other adverse effects identified in the mother's letter appear to be effects that the victim had suffered, and would continue to suffer, as a result of the abuse, which had occurred roughly a year before the court sentenced

economic damages, the court may order that any portion of the fine imposed be shared with the victim, even if there is no evidence of the specific amount of economic damages incurred. See *State v. Grismore*, 283 Or App 71, 75-76, 388 P3d 1144 (2016).

We conclude, however, that the court plainly erred when it imposed the compensatory fine in addition to the punitive fine. When a court imposes a fine as a penalty, ORS 137.101(1) authorizes the court to order the defendant to pay “any portion of the fine” to the victim. *State v. Moore*, 239 Or App 30, 34, 243 P3d 151 (2010). However, there is no statutory authority for a court to impose a compensatory fine in addition to a punitive fine. Here, the court plainly erred in imposing the \$5,000 compensatory fine in addition to the \$1,000 punitive fine, and, for the same reasons articulated in *State v. Nichols*, 281 Or App 658, 660, 383 P3d 988 (2016), we exercise our discretion to correct the error. We conclude that the appropriate remedy is to remand the entire case for resentencing for the court to reconsider the total fine to impose as a penalty and then to consider whether to order that all or a portion of the fine be paid to the victim under ORS 137.101(1).

Remanded for resentencing; otherwise affirmed.

defendant. That bolsters the trial court’s finding that the counseling also had begun before and would continue after the court sentenced defendant.