

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

GABREIAL NORMAN RUSSELL,
Defendant-Appellant.

Deschutes County Circuit Court
15CR25536, 14FE1321;
A161119 (Control), A161122

Wells B. Ashby, Judge.

Submitted August 23, 2017.

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

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Timothy A. Sylwester, Assistant Attorney General, filed the brief for respondent.

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

PER CURIAM

In Case No. A161119, reversed and remanded with instructions to merge the guilty verdicts on Count 1 and Count 2 into a single conviction for felon in possession of a firearm and for resentencing; otherwise affirmed. In Case No. A161122, affirmed.

PER CURIAM

Defendant appeals a judgment convicting him on two counts of felon in possession of a firearm, ORS 166.270(1), and one count of felon in possession of body armor, ORS 166.642.¹ On appeal, defendant argues that the trial court plainly erred by entering separate convictions on the counts of felon in possession of a firearm, because the counts were based on his simultaneous possession of two firearms—conduct that violated a single statute, involved the same victim, and was not separated by any pause. The state concedes that the trial court erred in failing to merge the guilty verdicts on those counts, and we accept that concession. See *State v. Ferguson*, 276 Or App 267, 274, 367 P3d 551 (2016) (“Here, the two felon-in-possession counts were both based on ORS 166.270(1), there was only one victim, the public, and the record indicates that defendant came into possession of the two firearms at the same time and his possession was a continuing crime; therefore, the trial court should have merged the guilty verdicts on both counts.”). And, for the reasons expressed in *Ferguson*, we exercise our discretion to correct the error, and we reverse and remand for merger of those guilty verdicts and for resentencing. *Id.* at 275; *State v. Silver*, 283 Or App 847, 858, 391 P3d 962, *rev den*, 361 Or 886 (2017) (failure to merge guilty verdicts on felony counts is an error that requires resentencing under ORS 138.222(5)(b)).²

In Case No. A161119, reversed and remanded with instructions to merge the guilty verdicts on Count 1 and Count 2 into a single conviction for felon in possession of a firearm and for resentencing; otherwise affirmed. In Case No. A161122, affirmed.

¹ This appeal was consolidated with defendant’s appeal of a judgment revoking his probation. Defendant’s arguments on appeal do not pertain to his probation case, and our disposition of the judgment of conviction does not affect that case. Accordingly, we affirm the judgment in the probation case.

² The state opposes resentencing and urges us to remand “only for entry of a corrected judgment,” citing *State v. Keller*, 284 Or App 660, 661, 391 P3d 1001 (2017), in which our disposition of a merger error stated, “Convictions on Counts 1 and 2 reversed and remanded for entry of judgment of conviction for one count of third-degree sexual abuse; otherwise affirmed.” *Keller*, however, involved only misdemeanors, so the sentencing error was not governed by ORS 138.222. The error in this case, which involves felonies, is governed by that statute and is controlled by our decision in *Silver*.