

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

RODOLFO CERVANTES, JR.,
Defendant-Appellant.

Malheur County Circuit Court
09122662C; A163274

Gregory L. Baxter, Judge.

Submitted April 6, 2018.

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

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Lauren P. Robertson, 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 entered after his resentencing on remand in *State v. Cervantes*, 271 Or App 234, 351 P3d 761 (2015). Defendant argues that the trial court plainly erred when it failed to apply the “shift-to-I” rule in calculating his sentences on his convictions for third-degree sodomy in Counts 22 and 23, which involved the same criminal episode and the same victim. *See* OAR 213-012-0020. Specifically, defendant argues that the trial court erred by not applying the “shift-to-I” rule in calculating his criminal history score on Count 23 when the court ordered the sentence on that count to be served consecutively with the sentence on Count 22. *See State v. Monro*, 256 Or App 493, 495, 301 P3d 435, *rev den*, 354 Or 148 (2013) (explaining “shift-to-I” rule and that it was plain error to not apply the rule in that case). The state concedes that the court plainly erred. We accept the state’s concession and conclude that it is appropriate to exercise our discretion to correct the plain error because the state has no interest in our refusing to correct the error, and we perceive no strategic or tactical reason for defendant’s attorney to not have raised the issue at sentencing.

Remanded for resentencing; otherwise affirmed.