IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
STEVEN CLYDE DEARMITT,
Defendant-Appellant.

Clackamas County Circuit Court
CR1401357; A161616

Heather Karabeika, Judge.

Argued and submitted September 26, 2017.

Kenneth A. Kreuscher argued the cause and filed the opening brief for appellant. Steven DeArmitt filed the supplemental brief *pro se*.

Timothy A. Sylwester, Assistant Attorney General, argued the cause for appellant. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before DeHoog, Presiding Judge, and Egan, Chief Judge, and Aoyagi, Judge.

DEHOOG, P. J.

Convictions on Counts 4 and 6 reversed and remanded for entry of judgment of conviction for one count of second-degree sexual abuse; remanded for resentencing; otherwise affirmed.

DEHOOG, P. J.,

Defendant appeals a judgment of conviction entered upon his plea of guilty to four counts of sexual abuse in the second degree, ORS 163.425(1)(a), all of which he committed against the same victim.[1] In his opening brief, defendant assigns error to the trial court's failure to merge two of those counts—Counts 4 and 6—into a single conviction, as well as the court's determination that each of the four counts were level "7" offenses on the sentencing guidelines' crime seriousness scale. In a supplemental brief filed on his own behalf, defendant assigns error to three additional rulings: the trial court's denial of his motion to suppress, its imposition of upward departure sentences, and its calculation of defendant's criminal history score. Writing only to address defendant's first assignment of error, we conclude that the trial court erred in failing to merge its findings of guilt as to Counts 4 and 6. That error requires us to remand the entire case for resentencing; as a result, it is unnecessary for us to address defendant's second assignment of error—regarding the classification of his offenses at crime seriousness level 7—or his *pro se* assignments regarding sentencing, because the court will have an opportunity, to the extent it may be appropriate, to address those issues anew upon resentencing.[2]

As noted, defendant's first assignment of error contends that the trial court erred in failing to merge its findings of guilt as to two counts of sexual abuse in the second degree, Counts 4 and 6 of the indictment. In defendant's view, ORS 161.067(3) required the court to merge those two counts and enter a single conviction because they resulted from multiple violations of the same statutory provision and occurred in a single criminal episode. Citing the same statute, the state responds that the trial court properly entered separate convictions because Counts 4 and 6 involved different "methods" of committing second-degree sexual abuse. We conclude that, because the record reflects that Counts 4 and 6 were (1) committed against the same victim during a

[1] The text of ORS 163.425(1)(a) is set out below. 299 Or App at 27.

[2] We reject without further discussion defendant's *pro se* challenge to the trial court's denial of his motion to suppress.

single criminal episode; (2) violated only one statutory provision; and (3) were not separated by a sufficient pause to afford the defendant an opportunity to renounce his criminal intent, ORS 161.067(3) required the court to merge those counts and enter a single conviction for second-degree sexual abuse. We therefore agree with defendant that the trial court erred in not merging those counts.

A detailed discussion of the facts underlying defendant's convictions is unnecessary to frame the legal issue this case presents. We note, however, that we generally are bound by a sentencing court's findings of fact if there is constitutionally sufficient evidence in the record to support them, and we review the court's resulting merger ruling for legal error. *State v. Black*, 270 Or App 501, 504-05, 348 P3d 1154 (2015). Furthermore, we state the facts underlying that ruling in the light most favorable to the state; that is, in the light most favorable to the trial court's conclusion that merger was not required. *State v. Loving,* 290 Or App 805, 807, 417 P3d 470 (2018).

It is undisputed that defendant's plea of guilty to four counts of second-degree sexual abuse was based on conduct comprising three separate criminal episodes. All four counts involved the same victim, who was 13 or 14 years old when the crimes occurred. Count 1 occurred at an apartment complex, where defendant touched the victim and digitally penetrated her vagina. Count 2 occurred at a motel, where defendant again touched and digitally penetrated the victim's vagina. Counts 4 and 6 occurred at the home of defendant's father, where defendant subjected the victim to sexual intercourse without her consent (Count 4), and penetrated her anus with his finger (Count 6).

At the plea hearing, the parties agreed that defendant's conduct comprised three criminal episodes, with Counts 1 and 2 each arising out of its own criminal episode, and Counts 4 and 6 both arising out of a third, separate and distinct criminal episode. Defendant argued that, because Counts 4 and 6 arose out of the same criminal episode, the court was required to merge its determinations of guilt on those two counts. The state responded that, although Counts 4 and 6 were part of the same criminal episode, those counts

should not merge because each had caused the victim separate harm stemming from different conduct within that episode. The parties continued to argue the issue at sentencing. The state reasoned that the distinct conduct underlying Counts 4 and 6—digitally penetrating the victim's anus and engaging in sexual intercourse—demonstrated intent to commit two distinct criminal acts. Thus, although the state acknowledged that both acts constituted the same offense—second-degree sexual abuse—it argued that the two acts should "stand on their own" because they were "not in any way similar or the same conduct" and caused a "separate harm."

The trial court agreed with the state and declined to merge Counts 4 and 6, explaining to defendant:

> "There's also been a stipulation that there are at least three criminal episodes represented in the charges you pled guilty to, but they disagree on whether the fourth and sixth count merge. The District Attorney's Office has pointed out that, in his mind, these offenses have separate harms because they involve separate body parts, but they essentially fall under the same statute, Sex Abuse in the Second Degree. They are pled separately, however, and talk about different body parts, and you've admitted to those different acts, so I do not find that those merge for purposes of sentencing, in my mind."

Accordingly, the court entered a judgment convicting defendant of four counts of second-degree sexual abuse. Ultimately, the court imposed upward departure sentences of 60 months' imprisonment on each of the four counts, to be served consecutively. Defendant appeals.

As he did at sentencing, defendant argues on appeal that the trial court was required to merge its findings of guilt on Counts 4 and 6 into a single conviction. Merger is governed by ORS 161.067. Where multiple charges arise from a single criminal episode, "criminal conduct that violates only one statutory provision will yield only one conviction unless the so-called 'antimerger' statute, ORS 161.067, operates so as to permit the entry of multiple convictions." *State v. Reeves*, 250 Or App 294, 304, 280 P3d 994, *rev den*, 352 Or 565 (2012); *see also* ORS 161.067(3). Under the

"antimerger" rule, and specifically under the first sentence of ORS 161.067(3), when, in the course of a single criminal episode, a defendant has committed 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."

Thus, as the state acknowledges, a trial court generally may not enter multiple convictions for conduct comprising a single criminal episode, involving a single victim, and violating only one statutory provision *unless* the state establishes *both* that the defendant violated the statutory provision multiple times *and* that each violation was "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." ORS 161.067(3); *State v. Stanton*, 266 Or App 374, 379, 337 P3d 955 (2014) ("To convict on separate guilty verdicts pursuant to the anti-merger statute, a trial court therefore is required to determine the number of victims, and, if there was only one victim, whether there was a sufficient pause in defendant's criminal conduct.")); *Reeves*, 250 Or App at 304 (explaining operation of antimerger statute, ORS 161.067).

Here, as noted, it is undisputed that the conduct underlying the two second-degree sexual abuse charges alleged in Counts 4 and 6 comprised a single criminal episode involving a single victim. Further, the state does not contend—and did not contend at sentencing—that the conduct supporting those charges was separated by "a sufficient pause in the defendant's criminal conduct" to preclude merger. ORS 161.067(3). Rather, the state points to the second sentence of ORS 161.067(3), which provides that

> "[e]ach *method* of engaging in oral or anal sexual intercourse as defined in ORS 163.305, and each *method* of engaging in unlawful sexual penetration as defined in ORS 163.408 and 163.411 shall constitute *separate violations* of

> their respective statutory provisions for purposes of determining the number of statutory violations."

(Emphases added.)[3] Relying on that provision, the state argues that the trial court properly denied defendant's request that it merge Counts 4 and 6 and enter a single conviction for those counts, because each of those violations of ORS 163.425(1)(a) involved a different "method" of committing second-degree sexual abuse. *See State v. Nelson*, 282 Or App 427, 441-42, 386 P3d 73 (2016) (observing that, for purposes of unlawful sexual penetration statute, ORS 161.411, each "method" of violating statute gives rise to a punishable offense under ORS 161.067(3), even if convictions arise out of same conduct or criminal episode).

The state engages in rather strained logic to support its argument that, despite ORS 161.067(3)'s express reference to only two offenses (unlawful oral or anal sexual intercourse, as defined in ORS 163.305(4), and unlawful sexual penetration, ORS 163.408; ORS 163.411), each "method" of committing a third, statutorily omitted offense (second-degree sexual abuse, ORS 163.425(1)(a)), should similarly give rise to a separate conviction. The state first observes that, *if*, rather than subjecting the victim to sexual intercourse without her consent, he had unlawfully subjected her to oral or anal sexual intercourse, and *if*, rather than being charged with sexual abuse in the second degree, defendant had been charged with unlawful sexual penetration, he clearly could have been convicted of two separate offenses. *See* ORS 161.067(1) (providing, except in limited circumstances, that "there are as many separately punishable offenses as there are separate statutory violations"). Next, the state notes that, *if* (presumably on some factual basis other than the one present here), defendant had been charged with two counts of sodomy or two counts of unlawful sexual penetration, ORS 161.067(3) would have allowed for the entry of multiple convictions, so long as he

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[3] In 2017, the legislature amended certain provisions of the criminal code to replace the term "deviate sexual intercourse" with "oral or anal sexual intercourse." *See*, *e.g.*, ORS 161.067(3) (2015), *amended by* Or Laws 2017, ch 318, § 1; ORS 163.305(4) (2015), *amended by* Or Laws 2017, ch 318, § 2; ORS 163.425 (1)(a) (2010), *amended by* Or Laws 2017, ch 318, § 6. Because those changes have no effect on our analysis, we reference the current statutes throughout this opinion.

had committed each of his offenses by a different "method."[4] Finally, the state notes that, just like unlawful sexual intercourse, both unlawful oral or anal sexual intercourse and unlawful sexual penetration can give rise to charges of sexual abuse in the second degree under ORS 163.425 (1)(a).[5] Thus, the state reasons, if defendant is correct and ORS 161.067 requires merger in his case, an individual charged with multiple counts of sodomy or unlawful sexual penetration under the statutes defining those offenses could end up with multiple convictions, while the record of a defendant engaging in identical conduct but instead charged with multiple counts of second-degree sexual abuse would reflect only one.

In the state's view, that result would be anomalous and cannot be what the legislature intended in enacting ORS 161.067(3); to avoid that anomaly, the state urges us to deem each clause of ORS 163.425(1)(a)—prohibiting nonconsensual sexual intercourse, oral or anal sexual intercourse, or sexual penetration—to be a different "method" for purposes of ORS 161.067(3). For two reasons, however, we decline to adopt the state's proposed interpretation of ORS 161.067(3).

First, whatever logical merit the state's argument may have had under the hypothetical circumstances it describes, that argument has little if any bearing here, where defendant was alleged to have engaged in only one act of unlawful sexual penetration during the criminal episode in question, and he was not alleged to have at any time subjected the victim to oral or anal intercourse.

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[4] For example, under ORS 163.405, one element of sodomy is oral or anal sexual intercourse, which can be committed through various methods, ORS 163.305(4) ("Oral or anal sexual intercourse" consists of "contact between the sex organs of one person and the mouth or anus of another"); and ORS 163.411 defines unlawful sexual penetration as unlawfully "penetrat[ing] the vagina, anus or penis of another with any object other than the penis or mouth of the actor[.]"

[5] ORS 163.425(1)(a) provides that a person commits the crime of sexual abuse in the second degree when "[t]he person subjects another person to sexual intercourse, oral or anal sexual intercourse or, except as provided in ORS 163.412, penetration of the vagina, anus or penis with any object other than the penis or mouth of the actor and the victim does not consent thereto[.]"

Second, the state's argument conflicts with our obligation to construe ORS 161.067(3) as written, and not as the state believes that it might have been written with the benefit of hindsight. As with all matters of statutory interpretation, our understanding of ORS 161.067(3) must be driven by its text, viewed in context. *See State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009) (setting forth interpretive framework and giving primacy to the words chosen by the legislature and the context in which they appear). Further, that understanding is constrained by ORS 174.010, which instructs us, when construing statutes, "simply to ascertain and declare what is, in terms or in substance, contained therein, [and] not to insert what has been omitted or to omit what has been inserted[.]" Here, the text of ORS 161.067(3) affirmatively establishes specific exceptions to the general merger rule, those applicable to "[e]ach method of engaging in oral or anal sexual intercourse as defined in ORS 163.305, and each method of engaging in unlawful sexual penetration as defined in ORS 163.408 and 163.411[.]" ORS 161.067(3) does not, however, create an exception applicable to all sexual assault crimes that can be committed by means of different "methods." Nor does anything in the text or context of ORS 161.067(3) suggest an even more limited exception, one applicable to all sexual conduct that can be charged under multiple statutory provisions. In the absence of any further support for the state's interpretation of ORS 161.067(3), we understand that provision to establish exceptions for the sexual offenses it specifically references—unlawful oral or anal sexual intercourse and unlawful sexual penetration—but not for unlawful sexual intercourse, which the statute omits.[6]

Because Counts 4 and 6 alleged offenses committed in a single criminal episode, violating only one statutory provision, and involving only one victim, the trial court was required to merge the findings of guilt as to those counts unless either (1) the two offenses were separated by

[6] The parties have not identified any legislative history that sheds any light on this issue, nor are we otherwise aware of any that would be helpful. *See* ORS 174.020(3) (authorizing a court construing a statute to give available legislative history the weight "that the court considers to be appropriate"); *Gaines*, 346 Or at 165 (noting legislature's adoption of ORS 174.020).

a sufficient pause in defendant's criminal conduct to afford him an opportunity to renounce his criminal intent; or (2) a statutory exception to merger applied. As noted, the trial court did not find a sufficient pause (focusing instead on the fact that defendant's offenses involved different body parts), and the state does not argue that the record would have supported such a finding. Further, as we have explained, no exception to merger applied here. Accordingly, the trial court erred in denying defendant's request that the findings of guilt on Counts 4 and 6 merge; we therefore reverse defendant's convictions on those counts, and remand for entry of a single conviction for second-degree sexual abuse and resentencing on all counts. *Former* ORS 138.222(5)(a) (2015) ("If the appellate court determines that the sentencing court, in imposing a sentence in the case, committed an error that requires resentencing, the appellate court shall remand the entire case for resentencing.").[7]

Convictions on Counts 4 and 6 reversed and remanded for entry of judgment of conviction for one count of second-degree sexual abuse; remanded for resentencing; otherwise affirmed.

[7] *Former* ORS 138.222 (2015) was repealed in 2017 by Senate Bill (SB) 896. Or Laws 2017, ch 529, § 26. Because the judgment in this case was entered before the January 1, 2018, effective date of SB 896, its provisions do not apply. Or Laws 2017, ch 529, § 28 (providing that SB 896 applies "on appeal from a judgment or order entered by the trial court on or after the effective date of this 2017 Act").