IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of K. R. S.,
a Youth.

STATE OF OREGON,
Respondent,

v.

K. R. S.,
Appellant.

Yamhill County Circuit Court
15JU00894; A161695

Ladd J. Wiles, Judge.

Argued and submitted January 9, 2018.

Joshua B. Crowther, Deputy Chief Defender, argued the cause for appellant. Also on the brief was Shannon Storey, Chief Defender, Juvenile Appellate Section, Office of Public Defense Services.

Lauren P. Robertson, Assistant Attorney General, argued the cause for respondent. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Hadlock, Presiding Judge, and DeHoog, Judge, and Aoyagi, Judge.

HADLOCK, P. J.

Jurisdictional judgment reversed and remanded for entry of a judgment reflecting adjudication for a single count of first-degree sexual abuse; otherwise affirmed. Dispositional judgment vacated and remanded.

HADLOCK, P. J.

Youth appeals two judgments of the juvenile court. The first judgment adjudicated youth as being within the delinquency jurisdiction of the juvenile court for conduct that, if committed by an adult, would constitute one count of first-degree unlawful sexual penetration, ORS 163.411, and three counts of first-degree sexual abuse, ORS 163.427. In the second judgment, regarding disposition, the juvenile court placed youth on probation for five years with conditions that include sex offender treatment and registration requirements. On appeal, youth raises a single assignment of error, arguing that the juvenile court erred when it refused to merge the three counts of first-degree sexual abuse into a single adjudication. For the reasons set out below, we agree that the three sexual abuse counts should have merged. Accordingly, we reverse and remand the jurisdictional judgment for entry of a single count of first-degree sexual abuse and otherwise affirm. We also vacate and remand the dispositional judgment.

The underlying facts are not disputed. At the pertinent time, youth was 14 years old and the victim, the granddaughter of youth's foster parents, was 10 years old. The allegations against youth relate to his conduct on a single night, when he, the victim, and the victim's mother were sleeping together in one bed. The victim awoke to youth "rubbing [the] top part of [her] body" and then trying to kiss her cheek. Youth "went into [the victim's] pants" and touched her vagina for "like five minutes or so." Then, youth put the victim's hand into his underwear and made her touch his "private parts." During that time, the victim "was trying to push away," but youth "moved [her] back closer." The victim went to the bathroom, "and then that's when it stopped, and it didn't happen again."

The state filed a delinquency petition alleging that youth was within the juvenile court's jurisdiction for one count of first-degree unlawful sexual penetration and three counts of first-degree sexual abuse, one count each for touching the victim's vaginal area, for touching the victim's breasts, and for causing the victim to touch youth's penis. The court found youth within its jurisdiction on all four counts.

At the subsequent dispositional hearing, youth moved for the three sexual-abuse adjudications to be merged under ORS 161.067(3) as well as on constitutional double jeopardy grounds. Youth noted that the counts all involved the same statutory provision, the same victim, and a single criminal episode. Accordingly, youth argued, the counts should merge because "there was no evidence of a sufficient pause between the actions to give [youth] an opportunity to renounce their criminal intent." Youth asserted that, if merger principles were not applied in this juvenile proceeding, he was "going to be perversely subject to harsher collateral consequences than a similarly situated adult would be if they were found to have committed the same act under the same circumstances." In response, the state argued that merger was not required because each count alleged the touching of a different body part. The juvenile court did not address whether merger principles apply in juvenile delinquency cases. Instead, implicitly assuming that those principles could apply, the court nonetheless declined to merge the three counts because each count was based on touching of "separate and distinct sexual or intimate parts."

On appeal, youth argues both that (1) merger would be required under the circumstances of this case if it were a criminal proceeding, and (2) merger principles apply in juvenile delinquency proceedings. We start by addressing the first of youth's arguments because, if merger would not be required on these facts even if they were presented in the criminal context, we would not need to reach youth's second argument. *See State v. G. L. D.*, 253 Or App 416, 423, 290 P3d 852 (2012), *rev den*, 354 Or 597 (2013) (court did not decide whether ORS 161.067(3) applies in delinquency proceedings because, even if it did, merger would not have been required on the facts of that case).

ORS 161.067(3), the part of the "antimerger statute" that is pertinent here, provides:

> "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. Each 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."

In arguing that merger would be required under ORS 161.067(3) on these facts if this were a criminal case, youth relies on *State v. Nelson*, 282 Or App 427, 431, 386 P3d 73 (2016), a case in which the defendant was found guilty of two counts of first-degree sexual abuse and one count of third-degree sexual abuse for touching the victim's breast, touching the victim's vaginal area, and forcing the victim to touch the defendant's penis. We held that those three counts should have merged under ORS 161.067(3) into a single conviction for first-degree sexual abuse because the state had not proved the existence of a "sufficient pause" between the acts of sexual contact to give the defendant "an opportunity to renounce his criminal intent." *Id*. at 447. To the contrary, the entire episode occurred in a confined space "without interruption by any 'significant' event and without a pause in defendant's aggression." *Id*. We also rejected the state's threshold argument that ORS 161.067 did not apply at all because each of the guilty verdicts for sexual abuse "reflected different conduct by defendant" because each reflected touching of "a different body part." *Id*. at 432-33, 442.

We agree with youth that *Nelson* controls the merger analysis here if ORS 161.067(3) applies in delinquency proceedings. In this case, the conduct that led to the three charged acts of sexual abuse occurred during a relatively brief and uninterrupted period while the youth and victim lay in bed with the victim's mother. Moreover, here, as in *Nelson*, nothing in the record could "support a nonspeculative inference that something of significance occurred between the defendant's sequential acts of touching" the

victim's breasts and vagina and making her touch his penis. *Nelson*, 282 Or App at 446 (internal quotation marks omitted). Thus, the record could not support a determination that a "sufficient pause" separated the conduct that formed the basis for each of the sexual abuse adjudications. *Nelson*, which was decided after the juvenile court entered the dispositional judgment in this case, also establishes that merger of sexual-abuse counts is not defeated simply because each count is based on the touching of a different body part. Thus, if these facts were presented in a criminal case, merger of the sexual-abuse counts would be required under *Nelson*.

We therefore turn to the second question presented by this case, which is whether merger principles apply in juvenile delinquency proceedings. On that point, youth makes both a statutory and a constitutional argument. As a matter of statutory law, youth asserts that ORS 161.067 applies to delinquency adjudications. The state disagrees; it contends that the statute applies only in criminal proceedings. Anticipating that the state would take that position, youth argues that, if ORS 161.067 does not apply in the juvenile context, then constitutional double jeopardy principles require merger of the three sexual-abuse adjudications. Again, the state disagrees.

As explained below, we agree with youth that ORS 161.067 applies in the juvenile context and that his three adjudications for first-degree sexual abuse merge under that statute. Accordingly, we do not reach youth's constitutional argument.

On the statutory point, youth provides little in the way of analysis, instead relying on our decision in *G. L. D.* In that case, as in this one, the youth argued that multiple delinquency adjudications should merge under ORS 161.067(3) and the state argued that the statute does not apply in juvenile delinquency proceedings. 253 Or App at 422-23. In resolving that dispute, we did not decide whether ORS 161.067 applies in juvenile delinquency proceedings because, even if it does, the statute would not have required merger on the facts of that case. *Id.* at 423-24. Here, youth acknowledges that we did not reach the statutory question in *G. L. D.* Nonetheless, youth's briefing on appeal "proceeds

*** on the assumption that ORS 161.067 applies to juvenile adjudications" based on *G. L. D.* and the fact that the juvenile court rejected his merger argument for other reasons.

In response, the state touches on three themes in arguing that ORS 161.067 does not apply in juvenile proceedings. First, the state focuses on specific words used in the statute, including "punishable offenses," "criminal," and "defendant." The state observes that the statute "does not refer to juvenile delinquency proceedings" and that the juvenile code does not itself include an analog to ORS 161.067. Second, the state points to legislative history that, it contends, demonstrates that the legislature was concerned only with the appropriate treatment of criminal defendants whose conduct results in multiple convictions. Third, the state argues that "it is well established that juvenile proceedings are not criminal proceedings" and that a delinquency adjudication does not result in "punishment" for "offenses" because the delinquency code is not punitive, but aims at rehabilitation of youth offenders.

Although youth has not developed a statutory-construction argument, his appeal puts the applicability of ORS 161.067 to juvenile proceedings squarely at issue, so we proceed to construe that aspect of the statute. *See Oregon Shores v. Board of County Commissioners*, 297 Or App 269, 275, 441 P3d 647 (2019) ("When the meaning of a statute is at issue, we are responsible for identifying the correct interpretation regardless of whether it has been asserted by the parties."). We consider the text and context of ORS 161.067(3) together with any helpful legislative history. *See Nelson*, 282 Or App at 436 (setting out framework for construing ORS 161.067(3)).

Because the text of a statute generally is the best evidence of the legislature's intention, *Vasquez v. Double Press Mfg., Inc.*, 364 Or 609, 615, 437 P3d 1107 (2019), we again quote the pertinent part of ORS 161.067 here:

> "(3) 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."

(Emphases added.)

As the emphasized parts of the statute reflect, the statute is drafted in terms that may seem—at least at first glance—to relate only to criminal cases and not to juvenile delinquency proceedings. But those terms cannot bear the weight that the state places on them. The Supreme Court's decision in *State v. McCullough*, 347 Or 350, 220 P3d 1182 (2009), illustrates why that is so. In *McCullough*, the court addressed whether ORS 162.325(1), which prohibits interfering with "the apprehension, prosecution, conviction or punishment of a person who has committed a crime punishable as a felony" applied to a defendant who interfered with "the apprehension of a juvenile who ha[d] been found within the jurisdiction of the juvenile court for engaging in conduct punishable as a felony." 347 Or at 352. The court held that the statute did apply in that context, emphasizing that the youth had engaged in *conduct* that was "punishable as a felony" even though the youth, himself, could not be "punished" that way. *Id*. at 357. After considering additional context and legislative history, the court concluded that the legislature intended the statute to refer to an individual who has engaged in certain "criminal *conduct* even if that individual cannot be held criminally *responsible*." *Id*. at 358 (emphases in original).

We took a similar approach in *State v. Hinkle*, 287 Or App 786, 404 P3d 986 (2017), *rev den*, 362 Or 665 (2018), eschewing overreliance on statutory terms like "crime" and "felony" merely because they *usually* are used in the criminal context. The defendant in *Hinkle* was convicted of "felony failure to report as a sex offender, *former* ORS 181.599 (2011)," after he failed to report a change of residence. *Id*. at 788. Under that 2011 statute, a failure to report was a felony if "the crime for which the person [was] required to report [was] a felony." *Id*. The defendant had "an out-of-state juvenile adjudication for first-degree child molestation that

would have been a felony in Oregon had it been committed by an adult," thus raising his failure-to-report offense to a felony if the juvenile adjudication counted as "a felony" for purposes of *former* ORS 181.599 *renumbered as* ORS 181.812 (2013). *Id*. The defendant argued that his juvenile adjudication was not a felony "because juvenile adjudications are not adjudications for crimes and, therefore, cannot be adjudications for felonies." *Id*. We rejected that argument. We looked beyond the bare reference to "crime" and "felony" in the statute and, instead, relied on other statutes and legislative history that established that the legislature intended "to subject people with juvenile adjudications for sex offenses to the same enforcement provisions that apply to people with criminal convictions." *Id*. at 794 (discussing earlier statutes from 1995); *id*. at 797 (noting that subsequent legislative changes to the reporting statutes "left unchanged the relevant language in the enforcement statute that the 1995 legislature had made applicable to people with juvenile adjudications for sex crimes who fail to report"). We concluded that the phrase "the crime for which the person is required to report" referred to the "sexual offense for which a person is convicted as an adult or adjudicated as a juvenile." *Id*. at 797.

We are guided by analogous reasoning in considering the text of ORS 161.067(3). Even more than the statute at issue in *Hinkle*, which did refer to a "crime," the statute here is phrased in terms that are not directed solely at crimes for which a criminal defendant is convicted and sentenced. Indeed, ORS 161.067(3) does not refer to "crimes" at all; rather, it refers to criminal *conduct*. Conduct that is prohibited by criminal statutes, such as the statute defining first-degree sexual abuse, is criminal in nature whether it is an adult who engages in that conduct or, instead, a juvenile. *McCullough*, 347 Or at 358 ("Although juveniles, in certain circumstances, cannot be held criminally responsible for their criminal conduct, nothing in the juvenile code transforms the juvenile's conduct from criminal to noncriminal."). Similarly, ORS 161.067(3)—like the statute at issue in *McCullough*—does not refer to "punishments" imposed; rather, it refers to offenses that are "punishable," that is, to conduct that is *capable* of being punished, whether or not punishment will be imposed on a specific person who

engaged in that conduct. *Id.* at 357 (phrase "punishable as a felony" reflects legislature's focus on the nature of the conduct, rather than on "whether the person who engaged in that conduct is punishable as a felon"). Thus, although the text of ORS 161.067 does not refer to delinquency adjudications, neither does it reflect legislative intention *not* to have the statute apply in that context. If anything, as in *McCullough*, the legislature's focus on the nature of the conduct involved, instead of on the characteristics of the person who engaged in the conduct, counsels in favor of interpreting the statute to apply in the juvenile context as well as in criminal proceedings.

We also are not persuaded that the statute's use of the term "defendant" reflects legislative intention to have ORS 161.067(3) apply only in criminal proceedings. In some statutory contexts, the term "defendant" is defined to include alleged youth offenders. *E.g.*, ORS 147.500(6). The juvenile code incorporates many procedural provisions of the criminal statutes, including those that refer to a "defendant." ORS 419C.270. Conversely, ORS 131.025 defines "the defendant" as "the person prosecuted" in a "criminal action." Thus, the term "defendant" does not have a single meaning in Oregon statutes, but must be construed as context requires. Nothing about the text of ORS 161.067(3) suggests that the legislature would have meant "defendant" to apply only to people who have been found guilty of crimes in criminal proceedings, and not to youths who have been adjudicated delinquent. We proceed to consider the context of ORS 161.067 and its legislative history.

One aspect of the statute's context is the relationship between criminal and juvenile proceedings in Oregon. As the state emphasizes and as the Supreme Court acknowledged in *McCullough*, "juvenile adjudications themselves are not the equivalent of criminal proceedings." 347 Or at 358 n 6. Rather, they are *sui generis*—of their own kind—in that the juvenile code establishes a process for considering whether a youth has engaged in criminal conduct—conduct that is defined largely by statutes that apply in ordinary criminal proceedings—and determining what disposition is appropriate. *State ex rel Juv. Dept. v. Reynolds*, 317 Or 560,

575, 857 P2d 842 (1993). But the truism that juvenile delinquency proceedings are not criminal prosecutions does not supply the answer to a question regarding whether any particular statute applies in a delinquency proceeding. Rather, what matters is what the legislature intended in that specific circumstance. We turn to that question.

As discussed in *Nelson*, a proper interpretation of ORS 161.067 must take into account "the history of the merger issue in Oregon's appellate courts that led the legislature to enact" the statute. 282 Or App at 436. Our review of the legislative history suggests that the legislature did not expressly address whether the statute would apply in juvenile adjudications as well as in criminal prosecutions. True, as the state points out, the discussions generally were phrased in terms most often used in the criminal context. *See, e.g.*, *id*. at 438 (quoting testimony and legislative staff analysis that were phrased in terms of a "defendant," "convictions," and "crimes"). In our view, the state again puts more weight on the words than they can bear. That legislators and others discussed merger issues using common and familiar terms—terms that many people use, as shorthand, even when discussing issues in juvenile delinquency cases—does not suggest that legislators intended merger principles to apply *only* in the criminal context and not in analogous circumstances in delinquency proceedings.

Other aspects of the legislative history are more helpful. As we explained in *Nelson*, the legislature addressed various constituencies' concerns about the number of convictions that should be entered for crimes arising in a single criminal episode, including a desire that a person's criminal history "accurately portray the nature and extent of that person's conduct" and that the record reflect each crime the person committed. *Id*. at 438-39, 442. What emerged was "'a reasonable compromise *** that accounts for the competing public interests that are implicated in the criminal justice system.'" *Id*. at 439 (quoting Exhibit A, House Committee on Judiciary, Subcommittee 1, HB 2331, May 27, 1985 (written testimony of Oregon Deputy Attorney General, William F. Gary)). The "sufficient pause" requirement of ORS 161.067(3) reflects those concerns. *Id*. at 442. Thus, ORS 161.067 was

drafted to ensure that a judgment of conviction would both accurately reflect every crime that a person committed during a criminal episode *and* not reflect more separate crimes than the person actually committed. *See State v. West-Howell*, 282 Or App 393, 397-98, 385 P3d 1121 (2016), *rev den*, 361 Or 312 (2017) ("[T]o support the entry of multiple convictions for the same offense under ORS 161.067(3), one crime must end before another begins *and* each crime must be separated from the others by a sufficient pause in the defendant's criminal conduct to afford him an opportunity to renounce his criminal intent." (Emphasis in original.)).

Those legislative concerns are at least as applicable in the juvenile delinquency context as they are in the criminal context. Juvenile delinquency proceedings are not punitive but are, instead, "something quite different—proceedings to rehabilitate children." *State v. S. Q. K.*, 292 Or App 836, 846, 426 P3d 659, *adh'd to as modified on recons*, 294 Or App 184, 426 P3d 258, *rev den*, 364 Or 209 (2018); *see Reynolds*, 317 Or at 574 ("Juvenile courts are concerned with rehabilitation, not punishment."). The state emphasizes that rehabilitative purpose of the juvenile code in arguing that the anti-merger statute does not apply because it relates, by its terms, to "punishable" offenses. ORS 161.067. In our view, the rehabilitative nature of the juvenile code points to the opposite result. The consequences of *not* merging juvenile adjudications that would otherwise merge under ORS 161.067(3) would be significantly adverse to the affected youth in ways inconsistent with the legislative concerns discussed above.

Again, the legislature intended that the number of convictions on a person's record accurately reflect that person's criminal conduct—including that the record not portray the person as having engaged in more acts of criminal conduct than the person actually committed. Accurate characterization of a person's criminal history is important both for legal reasons and as a matter of human dignity and reputation. As a legal matter, one consequence of nonmerger in the delinquency context is that a youth's criminal history score might be higher than it otherwise would be, because the sentencing guidelines take into account a

defendant's previous criminal convictions *and* juvenile adjudications. OAR 213-004-0006(2). That heightened criminal history score could, in turn, lead to a longer sentence in the future if the youth later committed crimes for which he was sentenced under the guidelines—a sentence longer than the one he would have received if he had committed his previous crimes when he was an adult, rather than when he was a child.[1] An interpretation of ORS 161.067(3) that would lead to such a result is fundamentally incompatible with the rehabilitative purpose of the juvenile code, which is aimed at acknowledging the lesser culpability of children who engage in criminal behavior.

As a matter of personal dignity and reputation, nonmerger of juvenile adjudications also would result in juvenile offenders suffering worse consequences from their criminal conduct than adults who commit the same offenses. Suppose, in this case, that youth had been adjudicated only for the three counts of first-degree sexual abuse. Without merger, he would be labeled as somebody who had committed multiple sex crimes. With merger, he would be characterized as somebody with a single sexual offense on his record. And, put bluntly, it is worse to be labeled as a person who *repeatedly* committed sex crimes than as a person who did so once. We cannot conceive of any reason to believe that the legislature intended delinquent youth, but not convicted criminals, to be subjected to such misleading characterizations of

[1] This case provides a concrete example. Youth was adjudicated delinquent for conduct that, if committed by an adult, would constitute one count of first-degree unlawful sexual penetration and three counts of first-degree sexual abuse. Each of those counts is a "juvenile adjudication" for purposes of the sentencing rules. *See* OAR 213-001-0003(11) (defining "juvenile adjudication" as "a formal adjudication or finding by a court that the juvenile has committed an act, which, if committed by an adult, would be punishable as a felony"). Moreover, both first-degree sexual abuse and unlawful sexual penetration are classified as "person felonies" for purposes of the sentencing guidelines. OAR 213-003-0001(14). Thus, if the sexual-abuse adjudications do not merge, then youth has "three or more person felonies in any combination of adult convictions or juvenile adjudications," giving him a criminal history of "A"—the most serious possible. OAR 213-004-0007; *see also* OAR 213-004-0006(1) (generally describing the criminal history scale). Conversely, if the sexual-abuse adjudications are merged, then youth will have a criminal history of "B"—"two person felonies in any combination of adult convictions or juvenile adjudications." OAR 213-004-0007. Whether a person has an "A" or a "B" criminal history can make a significant difference in the presumptive period of incarceration if youth, at some point in the future, engages in criminal conduct for which he can be sentenced under the guidelines.

their conduct. Yet that is the result that would follow if ORS 161.067(3) did not apply to delinquency adjudications.

In sum, we conclude that ORS 161.067(3) applies to delinquency adjudications in the same way that it does to determinations of guilt in criminal cases. And, because the three instances of first-degree sexual abuse were not "separated *** by a sufficient pause in the [youth's] criminal conduct to afford the [youth] an opportunity to renounce the criminal intent," those counts should have merged. On remand, the juvenile court should enter a jurisdictional judgment that reflects that youth is within its jurisdiction for one count of first-degree unlawful sexual penetration (Count 1) and a single count of first-degree sexual abuse (merged Counts 2, 3, and 4). New dispositional proceedings necessarily will follow.

Jurisdictional judgment reversed and remanded for entry of a judgment reflecting adjudication for a single count of first-degree sexual abuse; otherwise affirmed. Dispositional judgment vacated and remanded.