IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
THOMAS STEVEN SLAGLE,
Defendant-Appellant.

Lane County Circuit Court
15CR37277; A161733

Maurice K. Merten, Judge.

Submitted February 21, 2018.

Ernest G. Lannet, Chief Defender, Criminal Appellate Section, and Kristin A. Carveth, Deputy Public Defender, Office of Public Defense Services filed the opening brief for appellant. Thomas S. Slagle filed the supplemental brief *pro se*.

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Doug M. Petrina, Assistant Attorney General, filed the brief for respondent.

Before Ortega, Presiding Judge, and Powers, Judge, and Garrett, Judge pro tempore.

GARRETT, J. pro tempore.

Affirmed.

GARRETT, J. pro tempore

Defendant appeals a judgment of conviction for 10 counts of first-degree encouraging child sexual abuse, ORS 163.684. He raises 13 assignments of error. We reject the first assignment of error without discussion. In his second through fourth assignments of error, defendant argues that the trial court erred in finding that there were multiple victims of defendant's crimes and, as a result, imposing consecutive sentences. In his remaining assignments of error, defendant contends that the trial court erred by failing to merge the 10 guilty verdicts into a single conviction. Reviewing for legal error, *see State v. Huffman*, 234 Or App 177, 183, 227 P3d 1206 (2010) (reviewing trial court's merger ruling for legal error); *State v. Sumerlin*, 139 Or App 579, 588, 913 P2d 340 (1996) (reviewing trial court's imposition of consecutive sentences for legal error), we reject defendant's arguments and affirm.

Defendant was charged by district attorney information. Each of the 10 counts tracked the language of ORS 163.684.[1] Counts two through 10 stated:

> "The defendant, on or about June 11, 2015, in Lane County, Oregon, did unlawfully and knowingly possess a record in visual recording of sexually explicit conduct involving a child, separate and distinct from all others alleged in this Information, with the intent to disseminate the record in visual recording while knowing or being aware of and consciously disregarding the fact that creation of the visual recording of sexually explicitly conduct involved child abuse[.]"

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[1] ORS 163.684 provides:

"(1) A person commits the crime of encouraging child sexual abuse in the first degree if the person:

"(a)(A) Knowingly develops, duplicates, publishes, prints, disseminates, exchanges, displays, finances, attempts to finance or sells a visual recording of sexually explicit conduct involving a child or knowingly possesses, accesses or views such a visual recording with the intent to develop, duplicate, publish, print, disseminate, exchange, display or sell it; or

"(B) Knowingly brings into this state, or causes to be brought or sent into this state, for sale or distribution, a visual recording of sexually explicit conduct involving a child; and

"(b) Knows or is aware of and consciously disregards the fact that creation of the visual recording of sexually explicit conduct involved child abuse."

Count one differed only in that it did not include the phrase "separate and distinct from all others alleged in this Information."

Defendant did not demur to, or otherwise challenge, the information. *See* ORS 135.630 (providing for demurrer to charging instrument). He did not move the court either to require the state to elect specific visual recordings to support each count or to otherwise provide more specific information. He waived his right to a preliminary hearing and indictment by grand jury and pleaded guilty to all 10 counts. Defendant's plea petition stated:

> "Defendant knows and understands that this will be an open sentencing where his attorney and the State are both free to argue with no up-front agreement as to the sentence that should be imposed. Defendant knows and understands that he is an 8-D on at least the first Count, and that he may be subject to consecutive counts and potentially different and higher sentencing grid blocks ***."

Both parties filed sentencing memorandums. Attached to the state's supplemental sentencing memorandum was an affidavit from the investigating detective asserting that defendant possessed "5000 videos and 5000 images of pornography, the majority of which was child pornography." The affidavit described 10 specific videos that defendant possessed on June 11, 2015, corresponding to the 10 counts in the information. The affidavit asserted that each of the 10 videos depicted a different child victim.

Defendant moved to strike the affidavit on the ground that its admission would, in effect, improperly amend the charges of the information after his guilty plea by referring to 10 separate victims instead of what defendant described as the single "generic victim" in the charging instrument. Defendant also argued that the trial court was required to merge each of the 10 guilty verdicts into a single conviction under ORS 161.067 or, alternatively, that concurrent sentences were required. The trial court denied defendant's motions, found that each of the 10 convictions involved a different victim, and sentenced defendant consecutively for each conviction. *See* ORS 137.123(5)(b) (authorizing

consecutive sentences where there are multiple victims). On appeal, defendant argues that the trial court erred in both respects.

We address the merger issue first. ORS 161.067 sets out the circumstances in which trial courts must enter separate convictions for multiple offenses arising out of the same conduct or criminal episode. The state contends that ORS 161.067(2) operates to prohibit merger here because defendant pleaded guilty to criminal conduct against 10 different victims. *See* ORS 161.067(2) ("When the same conduct or criminal episode, though violating only one statutory provision involves two or more victims, there are as many separately punishable offenses as there are victims."). Defendant argues that that provision does not apply and that the trial court was therefore required to merge defendant's 10 guilty verdicts into a single conviction because the charging instrument did not specify that there were multiple victims and defendant consequently pleaded guilty to committing crimes against just one "generic victim."

Defendant's argument fails. The district attorney's information broadly alleges that defendant possessed 10 "visual recording[s] of sexually explicit conduct involving *a child*" (emphasis added) and does not specify whether each recording depicts the same child or different children. *Cf. Lake Oswego Preservation Society v. City of Lake Oswego*, 360 Or 115, 126-27, 379 P3d 462 (2016) (indefinite article "a" can be used both specifically and nonspecifically). We have held that, where a defendant pleads guilty or no contest to committing crimes "on or between" a range of dates as alleged in the charging instrument, the state can prove that the defendant committed the offenses on any of the dates alleged because the defendant, "by failing to limit or qualify his pleas, *** assent[s] to the broadest construction of his pleas." *Hibbard v. Board of Parole*, 144 Or App 82, 87-88, 925 P2d 910 (1996), *vac'd on other grounds*, 327 Or 594, 965 P2d 1022 (1998); *see also United States v. Broce*, 488 US 563, 570, 109 S Ct 757, 102 L Ed 2d 927 (1989) (in pleading guilty, a defendant admits to "the crime charged against him" and the factual predicate underlying the conviction (internal quotation marks omitted)); *State v. White*,

280 Or App 170, 171-72, 380 P3d 1205 (2016), *rev den*, 360 Or 752 (2017) (following *Hibbard*); *State v. Ostrom*, 257 Or App 520, 521-22, 306 P3d 788 (2013) (same). Our reasoning from *Hibbard*, *Ostrom*, and *White* applies here: Because defendant pleaded guilty without qualifying his pleas, he assented to the broader construction that he possessed 10 visual recordings of different children. Consequently, the trial court could enter 10 separate convictions under ORS 161.067(2). We reject defendant's fifth through thirteenth assignments of error.

We turn to defendant's argument that the trial court erred in denying his motion to strike the detective's affidavit, in finding that there were multiple victims (a finding for which the affidavit was the only supporting evidence), and in imposing consecutive sentences. As to the motion to strike, defendant's central argument, as we understand it, is that the affidavit—which identifies at least 10 different victims to defendant's crimes—relies on a different "factual basis" than the information—which purportedly identifies only a single "generic victim."[2] According to defendant, the trial court should not have relied on the affidavit to impose consecutive sentences because the inconsistent "factual bases" on which defendant's sentence is based retroactively compromises the constitutional notice, double jeopardy, and judicial review functions of the charging instrument. *See State v. Wimber*, 315 Or 103, 115, 843 P2d 424 (1992) (purposes of charging instrument are to (1) ensure that the defendant is informed of the nature and character of the charged offense, (2) ensure that the offense is sufficiently described so that defendant may plead double jeopardy if brought to trial a second time for the same criminal act, and (3) inform the court of the facts alleged so that it may determine whether they are sufficient to support a conviction (citing *State v. Smith*, 182 Or 497, 500-01, 188 P2d 998 (1948))); *see also* Or Const, Art I, § 11 (guaranteeing criminal defendants the right to demand the nature and cause of accusations against them).

Even assuming that defendant's "inconsistent factual basis" theory could be cognizable under other

[2] Defendant does not challenge the sufficiency of the information by itself.

circumstances,[3] it fails here because the argument relies on a premise that we rejected above: that the information identifies only one victim of defendant's crimes. As noted, the information can reasonably be read to allege that there were 10 different victims of defendant's crimes. Therefore, defendant's assertion that the affidavit rests on a different "factual basis" than the information is incorrect.[4]

As to the remaining assignments of error, the sentencing court could rely on the detective's affidavit to find that the counts involved separate victims. *See* ORS 137.090(1)(c) (in determining aggravation or mitigation at sentencing, "the court shall consider *** [a]ny other evidence relevant to aggravation or mitigation that the court finds trustworthy and reliable."); OEC 101(4)(d) (the rules of evidence do not apply to sentencing proceedings, except in aggravated murder or death penalty proceedings); *cf. State v. McNeil*, 170 Or App 407, 412, 12 P3d 992 (2000) (sentencing court may consider counsels' representations as evidence). The finding of multiple victims, in turn, was a permissible basis for imposing consecutive sentences. *See* ORS 137.123(5)(b) (authorizing consecutive sentences for offenses with different victims). Moreover, defendant acknowledged in his plea petition that he understood that the court could sentence him to consecutive sentences. For those reasons, we reject defendant's assignments of error.[5]

Affirmed.

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[3] Defendant has not cited authority for his view that the constitutional "purposes" of a charging instrument may be later compromised by the introduction of evidence at sentencing that rests on a different "factual basis" than the charging instrument. We express no view as to whether that theory could succeed under different circumstances than those here.

[4] Defendant has not argued that he failed to understand the nature of the charges against him. In all events, we have held that the burden is on a defendant to seek clarification before pleading guilty. *See, e.g.*, *State v. Antoine*, 269 Or App 66, 78, 344 P3d 69, *rev den*, 357 Or 324 (2015) (burden is on defendant to attempt to procure adequate notice of the charges against him).

[5] Defendant also filed a *pro se* supplemental brief in which he separately contends that the admission of the affidavit was an "unconstitutional amendment" to the charged offenses because it introduced new evidence, without going through the grand jury, after he entered his plea in violation of both the United States and Oregon constitutions. Defendant, however, waived his right to grand jury indictment under the Oregon Constitution and does not argue that that waiver was invalid. Further, the indictment clause of the Fifth Amendment does not apply to state prosecutions. *See Hurtado v. California*, 110 US 516, 521, 4 S Ct 111, 28 L Ed 232 (1884).