IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

SHAWN THOMAS LACHAT,
Defendant-Appellant.

Crook County Circuit Court
14CR02219; A162537

Gary Lee Williams, Judge.

Submitted April 24, 2018.

Ernest G. Lannet, Chief Defender, Criminal Appellate Section, and David Sherbo-Huggins, Deputy Public Defender, Office of Public Defense Services, filed the opening brief for appellant. Shawn Thomas Lachat filed the supplemental and reply briefs pro se.

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Cecil A. Reniche-Smith, Assistant Attorney General, filed the brief for respondent.

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

HADLOCK, P. J.

Convictions on Counts 3 and 4 reversed and remanded for entry of judgment of conviction for one count of felony fourth-degree assault; remanded for resentencing; otherwise affirmed.

HADLOCK, P. J.

Defendant was tried to a jury on multiple charges related to his sexual assault of his wife, D, part of which was witnessed by their young child. The jury found defendant guilty of first-degree unlawful sexual penetration, attempted first-degree rape, misdemeanor fourth-degree assault, and felony fourth-degree assault constituting domestic violence. On appeal from the resulting judgment of conviction, defendant raises five assignments of error challenging the trial court's rulings that allowed defendant's counselor to testify about certain statements that defendant made to her in counseling sessions. In a sixth assignment of error, defendant makes an unpreserved argument that the trial court erred when it failed to merge the jury's guilty verdicts on the two assault counts (Counts 3 and 4) into a single conviction for felony fourth-degree assault. Defendant also has filed a *pro se* supplemental brief arguing that the trial court should have dismissed the case on the ground of vindictive prosecution.

We conclude that defendant's arguments related to the counselor's testimony present no basis for reversal because, as explained below, any error associated with admitting that testimony was harmless. We reject the *pro se* assignment of error without discussion. However, we agree with defendant (and the state, which concedes the point) that the trial court plainly should have merged the guilty verdicts on the two assault counts into a single conviction for felony fourth-degree assault constituting domestic violence. Accordingly, we reverse and remand Counts 3 and 4 for the trial court to merge those guilty verdicts and remand for resentencing.

As noted, defendant asserts in his first five assignments of error that the trial court erred by admitting certain testimony from defendant's counselor about what defendant told her. Specifically, defendant contends that the court erred in determining that he had waived the OEC 507 privilege associated with those communications when he told other people something about them.[1] In considering that

[1] OEC 507 provides, in part:

"A professional counselor or a marriage and family therapist *** shall not be examined in a civil or criminal court proceeding as to any communication

argument, we ordinarily would review the record in the light most consistent with the trial court's ruling, bound by the court's implicit and explicit findings if the record supports them. *See Rowen v. Gonenne*, 274 Or App 803, 814-15, 362 P3d 694 (2015) (applying that standard in reviewing the "peer review body" privilege). Here, however, we ultimately conclude that any error associated with admitting the counselor's testimony was harmless. "A harmless error analysis is based on reviewing all pertinent portions of the record to determine if there is little likelihood that any error affected the verdict." *State v. Jones*, 296 Or App 553, 556, 439 P3d 485 (2019) (internal brackets and quotation marks omitted). We therefore summarize pertinent parts of the record in accordance with that standard.

At the time of the June 2013 incident that gave rise to charges against defendant, he and D were married and had a child, C, who was about four years old. D testified that, on the day in question, defendant pushed her down onto their bed as she was changing clothes, held her face down with an arm behind her back, and raped her. D thinks defendant may also have penetrated her digitally; she felt penetration and thought it was his penis. D repeatedly told defendant to stop, but he did not. Defendant and D were fighting physically and, at some point, D's arm "popped." D also testified that C walked into the room and saw what was happening. Later, friends and family of D splinted D's injured arm, which D testified was broken. D reported the incident to law enforcement officers several months later.

Defendant was charged with four counts: first-degree unlawful sexual penetration (alleged as forcible digital penetration), first-degree rape, second-degree assault (by knowingly causing D serious physical injury), and felony fourth-degree assault constituting domestic violence (by knowingly causing D physical injury "and the assault was

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given the counselor or therapist by a client in the course of a noninvestigative professional activity when such communication was given to enable the counselor or the therapist to aid the client [with certain exceptions]."

OEC 511 governs waivers of privileges and provides in pertinent part that a person upon whom certain evidentiary privileges are conferred "waives the privilege if the person *** voluntarily discloses or consents to disclosure of any significant part of the matter or communication."

committed in the immediate presence of or witnessed by [C]"). At trial, D testified to the facts outlined above. During her testimony, the state played a recording of a telephone call between D and defendant that D had recorded some months after the incident. That call included the following exchange:

"[D]: Why did you try to rape me and break my arm?

"[Defendant]: I tried to force myself on you because I wanted to have sex with you. It's pretty obvious.

"[D]: Okay. So—

"[Defendant]: *** It's been months before I—I had made love with you, and I wanted to have sex with my wife. You didn't want to, so I selfishly thought I deserved it.

"[D]: Okay.

"[Defendant]: I was wrong. I've told that—and I've told the counselor, I told you, I've told everybody I was horribly wrong in doing this. I've not once ever defended myself for trying to hurt you like that. I was fucked up. I was not in my right mind, and I—I felt that I deserved something that I didn't, because I didn't see you as a person, I saw you as a possession.

"[D]: So, you think in two counseling sessions, all of this shit's been resolved?

"[Defendant]: I know that what I did was horribly wrong. It'll be a long time before I ever forgive myself for it.

"[D]: And you should. I mean, you did it.

"[Defendant]: I know I—I know I did it. ***

"[D]: You could be in jail for what you did. Do you understand that?

"[Defendant]: Yes—

"*****

"[D]: You can't rape somebody, break their arm, and not serve the time. And you have.

"[Defendant]: You can't—really?

"*****

"[D]: You—you did it in front of our four-year-old child.

"[Defendant]: I know, and I can't take that back. I've just gotta make sure I'm a better person."

Other witnesses testified about splinting D's arm, which appeared to be broken, after she called them for assistance. One of those witnesses testified that C was crying and said, "Daddy pinned Mommy and hurt her naked on the bed."

In early 2014, a law enforcement officer arranged a pretext call between D and defendant; that recorded call, which was played for the jury, included the following exchange:

"[Defendant]: Okay. But [the incident was] months and months ago. And that's why I went to counseling.

"[D]: Okay. But you still did it. You still—you still did it. And you forced sex in front of [C], and that's illegal. That was over several crimes in one.

"[Defendant]: I honestly there—I didn't really force sex in front of [C].

"[D]: Okay. [C] came in the room while it was happening.

"[Defendant]: Okay. But yeah. I didn't sit there and say, '[C], sit down and watch me force sex on your mom.'

"*****

"[D]: *** I don't even understand why the hell you did it that got us here.

"[Defendant]: I did it because I wanted to have sex with my wife. And she—and I felt I deserved it no matter what she said."

After defendant was arrested and taken into custody, he was interrogated by a Sergeant Jurgens. During that recorded interrogation, defendant acknowledged that he had pushed D onto the bed (although he said, consistent with his later trial testimony, that she was on her back), pulled down her pants, and that D was telling him "no" and to stop. Defendant emphatically and repeatedly denied that he had penetrated D with his penis, stating that "there was the attempt, but there was no actual intercourse," because he was not erect. Defendant told Jurgens, "That's the one

silver lining in the sea on my part is that I—I was glad I didn't *** I mean, it's horrible what happened. But at least I didn't go to that—that point." Defendant said that, once he "realized what [he] was doing, we stopped" and he left the house. Late in the interrogation, after Jurgens had repeatedly asked why D would have said that defendant penetrated her and that she felt pressure in her vagina, defendant said that he "probably" had put his finger inside D, in relation to asking her "if she was wet."

Over defendant's privilege-based objection, the state also called defendant's counselor, Henderson, to testify about statements that he had made to her about the June 2013 incident during counseling sessions that took place before defendant was questioned by police. The court directed Henderson to testify. After refreshing her memory by consulting her notes, Henderson testified that defendant had said, with respect to an incident involving D, "I pressured her for sex," that "he had forced himself on her and broke her arm," that he had "[g]rabbed her arms and bruised her," and that C had walked in during the assault. On cross-examination, Henderson acknowledged that she had written a note, during her first session with defendant, "Neighbor told police. Saw her arm—no charges."

Defense counsel had indicated before trial that defendant was "almost certainly going to testify," and he did. Defendant described his sexual relationship with D, which he testified included acting out "fantasy role-play of—of rape." With respect to the June 2013 incident, defendant acknowledged that D had said she did not want to have sex. Defendant then testified that he had placed his hands on D's shoulders, pushed her onto the bed, pulled her pants down, undressed himself, straddled her, and unsuccessfully attempted to penetrate her with his penis. Defendant acknowledged that, after he got on the bed with D, "it did become a physical altercation of sorts." He admitted that D said "no" and physically resisted. Defendant also testified that C walked into the bedroom while this was happening, and that he covered himself and led her out of the room. According to defendant, he then went back into the bedroom and touched D on "her inner thigh area," commenting that she was wet. At that point, defendant said, he was

not holding or restraining D in any way. Defendant testified that he did not then know that D's arm was injured, and that he never intentionally or knowingly hurt her arm. On cross-examination, defendant acknowledged that, before the incident, he believed that he deserved to have sex with D and was frustrated because she did not want to.

In his opening statement, defense counsel had indicated that the evidence would show that defendant had "indicated to [D] in no uncertain terms that he wanted to have sex," that D's arm was injured during the incident, and that C walked in to see "a sexual event between the parties." After the parties presented their cases, defense counsel did not seek in closing argument to persuade the jury to acquit defendant of all criminal charges. Rather, he acknowledged that defendant had engaged in some criminal conduct—but not rape, unlawful sexual penetration, or second-degree assault—and asked the jury to convict him only of lesser charges. The jury accepted that invitation in part, convicting defendant of lesser-included offenses on Counts 2 and 3—attempted first-degree rape instead of the charged first-degree rape and fourth-degree assault instead of the charged second-degree assault. However, the jury convicted defendant of first-degree unlawful sexual penetration, as charged, as well as felony fourth-degree assault constituting domestic violence, based on C having witnessed the assault or having been present during it.

As noted, defendant argues on appeal that the trial court erred in admitting Henderson's testimony about statements that defendant made to her. He argues that the error was not harmless because, although the statements that Henderson described are similar to those that defendant made in the recorded calls with D and to Jurgens, the "disclosures are qualitatively more prejudicial because of the nature of her professional relationship with defendant" and because defendant had reasons for making admissions to D and to Jurgens that he would not have had in his conversations with Henderson. Relying on the Supreme Court's opinion in *State v. Moore/Coen*, 349 Or 371, 245 P3d 101 (2010), *cert den*, 563 US 996, (2011), defendant also argues that his own testimony cannot be considered in the harmless-error

analysis "because the trial court's error forced defendant to explain and qualify Henderson's testimony."

We begin by considering—and largely rejecting—defendant's argument that we cannot consider his testimony when determining whether any error associated with admitting Henderson's testimony was harmless. In *State v. McGinnis*, 335 Or 243, 64 P3d 1123 (2003), the Supreme Court addressed a situation where a defendant's statements about a drug transaction were surreptitiously recorded, purportedly in violation of state statutes. *Id.* at 245. The defendant moved unsuccessfully to suppress the statements and a jury convicted him of unlawful delivery of a controlled substance. *Id.* at 246. On appeal, we held that any error in admitting the recorded statements was harmless because the defendant had testified and conceded that he had engaged in a drug transaction, although he attempted to minimize his culpability. *Id.* The Supreme Court affirmed our decision, holding that the defendant's testimony could be considered in a harmless-error analysis. The court's decision turned on the fact that the defendant's recorded statements were voluntary and had not been obtained in violation of the constitutional protections against compelled confessions. *Id.* at 252-253. Thus, the court explained, a defendant's testimony generally may be used in a harmless-error analysis "unless the evidence that the defendant sought to rebut by taking the stand was an inadmissible *confession*, not evidence of some other kind, even if that evidence was obtained illegally." *Id.* at 253 (emphasis in original).

The Supreme Court subsequently addressed related questions in *Moore/Coen*, on which defendant relies. In that case, the defendants' out-of-court admissions had been obtained during police interrogation that violated their rights under Article I, section 12, of the Oregon Constitution. 349 Or at 375-76, 379-80. The question before the court was whether the defendants' own trial testimony, which sought to explain their statements to police, could be considered either on appeal, as part of a harmless-error analysis, or on a retrial in circuit court. *Id.* at 376, 379-80. In holding that the defendants' trial testimony could not be used for those purposes, the Supreme Court distinguished

McGinnis on two grounds. First, "*McGinnis* dealt with a statutory violation, not a constitutional one." *Id*. at 382. Second, "although *McGinnis* involved erroneously admitted incriminating statements, there was no question in that case that the defendant's wire-recorded statements were voluntarily made." *Id*. Acknowledging that "there are a variety of ways for a defendant to respond to erroneously admitted pretrial statements without testifying in court about those statements," and also acknowledging that "the state has gained an advantage over a defendant at trial when it unconstitutionally obtains the defendant's statements and then introduces them into evidence," the court announced a presumption that "a defendant's trial testimony is *tainted* by the erroneously admitted pretrial statements." *Id*. at 384-85 (emphasis in original). In those circumstances,

> "a defendant's trial testimony must be excluded on retrial or from harmless error review by an appellate court unless the court can determine from the record before it that a defendant's trial testimony did not refute, explain, or qualify the erroneously admitted pretrial statements."

Id. at 385. The court emphasized that the rule it announced and applied in *Moore/Coen* "is confined solely to issues involving the erroneous admission of unconstitutionally obtained pretrial statements." *Id*. at 385 n 8 (citing *McGinnis* for the proposition that the rule excluding a defendant's trial testimony from a harmless-error analysis does not apply to other types of illegally obtained evidence).

Here, in asserting that his own trial testimony cannot be considered in a harmless-error analysis, defendant provides only a footnote citing *Moore/Coen* with a parenthetical explanation that describes the case as having "exclud[ed] defendant's testimony from harmless error analysis where it refutes, explains, or qualifies erroneously admitted pretrial statements." Defendant does not acknowledge *McGinnis* or explain why it does not control here. In its answering brief, the state points out the distinction between *Moore/Coen* and *McGinnis*, arguing that "*Moore/Coen* did not overrule *McGinnis*" and asserting that the latter case governs the analysis in this case because defendant's statements to Henderson were voluntary and not obtained or

introduced at trial in violation of his constitutional rights. Defendant's reply brief does not cite *McGinnis* or otherwise respond to that argument. In the absence of any developed argument about why defendant's statements to Henderson should be treated like "unconstitutionally obtained pretrial statements" to which the rule of *Moore/Coen* is limited, we reject defendant's broad assertion that his trial testimony cannot be considered in a harmless-error analysis.[2]

We thus take defendant's testimony into account in considering whether any error associated with the admission of Henderson's testimony was harmless. "We must affirm a judgment, despite any error committed at trial, if we determine that there is 'little likelihood that the particular error affected the verdict.'" *State v. Abbott*, 274 Or App 778, 779, 362 P3d 1171 (2015), *rev den*, 358 Or 794 (2016) (quoting *State v. Davis*, 336 Or 19, 32, 77 P3d 1111 (2003)). That harmless-error inquiry "is informed by a variety of considerations, including 'the nature of the error' and the 'context' of that error." *Id.* (quoting *Davis*, 336 Or at 32-33). In conducting the harmless-error analysis, we differentiate among the various charges against defendant to determine,

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[2] In any event, very little of defendant's trial testimony was offered to "refute, explain, or qualify the [purportedly] erroneously admitted pretrial statements" of Henderson that were related to the June 2013 events. *Moore/Coen*, 349 Or at 385. Defendant's testimony described his own version of events and appears largely directed at explaining the statements he made in the recorded telephone calls between himself and D, as well as the statements he made to Jurgens. None of that testimony is aimed at refuting, explaining, or qualifying his statements to Henderson. Moreover, defendant indicated that he likely would testify long before the trial court ruled on the admissibility of Henderson's testimony, and nothing in the trial court record suggests that defendant would not have testified if the trial court had excluded Henderson's testimony about what defendant told her.

Defendant's testimony does, however, include two statements seeking to "explain" or "qualify" Henderson's testimony about the June 2013 incident. First, with respect to Henderson's testimony that defendant told her that he had broken D's arm, defendant explained that he "made that statement to [Henderson] based on what [he] had been told." Second, with respect to Henderson's testimony that defendant told her that he had forced himself on D, defendant testified that he believed he had told Henderson only that he "attempted to have sex with [D] and that it did not happen," but acknowledged that "the act was forced onto [D], yes." Even if *Moore/Coen* applied here, only those two statements by defendant would be excluded from the harmless-error analysis. Our harmless-error analysis does not turn on those two aspects of defendant's trial testimony, and—in an abundance of caution—we have omitted those parts of defendant's testimony from the harmless-error analysis described in the text of this opinion.

with respect to each, whether the record establishes that any error in admitting or excluding evidence was harmless. *See State v. Villanueva-Villanueva*, 262 Or App 530, 534-35, 325 P3d 783 (2014) (taking that approach).

We begin with Count 2, in which the state charged defendant with first-degree rape. Henderson's testimony pertinent to that charge was that defendant told her, during counseling, that he had "pressured [D] for sex" and "forced himself on her." Those statement are cumulative of other evidence in the record, including defendant's recorded statements to D and Jurgens, as well as his own testimony, in which he acknowledged that he was frustrated because D would not have sex with him and he forced D onto their bed and unsuccessfully tried to penetrate her with his penis during what he called "a physical altercation of sorts" while D told him "no" and physically resisted. Indeed, on cross-examination, defendant expressly acknowledged that he had forced himself on D.

Moreover—and in light of that evidence—defense counsel began his closing argument by acknowledging that defendant had tried to rape D:

> "And there's references to this on the pretext calls that [D] recorded, that he wanted to have sex with his wife, that he tried to force himself. And you may say, 'Well, that's enough for me. I—I don't like the fact that he tried.' Trying to force yourself, even repeatedly, is not Rape in the First Degree. It's Attempted Rape in the First Degree."

Later in the closing argument, defense counsel expressly informed the jury that defendant was "telling you he's guilty of Attempted Rape in the First Degree" and had "said that from the stand." Defense counsel urged the jury to find defendant guilty only of that lesser-included offense on Count 2, which alleged first-degree rape. And that is what the jury did, finding defendant guilty only of *attempted* first-degree rape, and not guilty of the first-degree rape that the state had charged. In light of that record, Henderson's testimony that defendant told her that he had "pressured [D] for sex" and "forced himself on her" is highly unlikely to have influenced the verdict. Accordingly, any error in admitting that testimony was harmless. *See Villanueva-Villanueva*, 262 Or

App at 534 (any error in admitting hearsay evidence about the victim's description of being assaulted by the defendant was harmless with respect to an assault charge when "defense counsel told the jury in opening statement and in closing argument that defendant admited hitting the victim in the face," defense counsel told the jury during closing that the defendant was guilty of assault, and a police officer testified that the defendant had admitting slapping the victim in the face).

Any error in admitting Henderson's testimony was harmless with respect to Count 3 for similar reasons. The amended indictment charged defendant with second-degree assault based on an allegation that he unlawfully and knowingly caused "serious physical injury" to D. Henderson's pertinent testimony was that defendant told her that he had broken D's arm, that neighbors had seen the broken arm and reported it to police, and that he had grabbed D's arms and bruised her. As noted above, individuals who assisted D after the incident testified about her arm injury and about their efforts to treat it, including by splinting. At trial, defendant testified that he had not been aware at the time of the June 13 incident that D's arm had been injured, but that D later told him that her arm had broken, and he had not questioned that. Defendant did not deny that D had suffered some injury, acknowledging that he had "seen pictures that would indicate that her arm was injured," but asserting that he "never intentionally or knowingly hurt her arm." Then, in closing argument, defense counsel stated, "We're acknowledging [the arm] was injured," noting the "photographs showing that the arm was injured." Instead of denying any injury, counsel argued that the state had not established the elements of the charged offense of second-degree assault, arguing that the jury should find defendant guilty only of assault in the fourth degree:

> "And *we're giving you a lesser included offense of Assault in the Fourth Degree saying that, in no uncertain terms, he injured her. He caused physical injury. Substantial pain. He's not denying that*. But he's also saying that it was done recklessly. It wasn't done with knowledge.
>
> "* * * * *

> "Clearly, the injury that occurred to her arm was reckless. *** And *** we're not arguing that her arm was not injured.
>
> "Last thing I want to say about Assault in the Second Degree and Assault in the Fourth Degree. We're not discounting the pain, as I've mentioned. You could have absolutely excruciating pain, pain you've never even heard of before. That doesn't make it Assault in the Second Degree. Assault in the Second Degree has to do with the protracted period of time where you can't use the item we're talking about prior to the way that you were prior to the injury. So it's a protracted sort of disfigurement or impairment of physical condition."

(Emphasis added.)

The jury did as defense counsel had suggested and found defendant not guilty of the charged second-degree assault and guilty of the lesser-included offense of fourth-degree assault. In light of the evidence regarding the injury to D's arm, including defendant's own testimony, and the defense closing argument, there is little likelihood that Henderson's testimony affected the jury's verdict.

We turn to the most serious crime of which defendant was convicted: first-degree unlawful sexual penetration (Count 1). With respect to that charge, too, defense counsel attempted to persuade the jury to find defendant guilty only of a lesser-included offense. In that effort, counsel focused on D's arguably ambiguous testimony about whether defendant digitally penetrated her, reasons why Jurgen's interrogation tactics might have led defendant to state inaccurately that he had digitally penetrated D during the assault, and defendant's explanation that he had touched D at or near her vagina only after the "altercation" was over and had not accomplished that by force. He summed up by arguing for conviction only for second-degree sexual abuse:

> "[Defendant] has given you the lesser-included offense of Sexual Abuse in the Second Degree, and he doesn't deny that.
>
> "*****
>
> "I want you to understand a subtlety here with what [defendant] is doing. [Defendant] is saying, 'I touched her

> vagina, and I'm admitting that at the time I touched it, she probably didn't consent.' That's Sexual Abuse in the Second Degree. Penetration of the vagina with a finger, knowingly, when somebody doesn't consent. The only thing he's saying is, at the time that I did that, I wasn't forcing her. I wasn't using physical force. It happened afterwards when I sat down on the bed. Earlier I thought that she was wet, she was interested in sex. I realize now she wasn't."

On that count, the jury found defendant guilty of the charged crime of first-degree unlawful sexual penetration, apparently persuaded by D's testimony that she had felt penetration as defendant forcibly held her down on the bed. Accordingly, defendant's acknowledgement that he was guilty of a lesser crime does not weigh into the harmless-error analysis with respect to Count 1 in the same way that it does with respect to Counts 2 and 3. Nonetheless, there is little likelihood that Henderson's testimony about what defendant told her during counseling affected the jury's verdict on Count 1—that testimony includes nothing related to whether, when, or under what circumstances defendant digitally penetrated D's vagina. Accordingly, any error associated with admission of Henderson's testimony was harmless with respect to Count 1, too.

The final count (Count 4) in the amended indictment was for fourth-degree assault, charged as a felony because it was committed in the presence of C or was witnessed by her. The jury found defendant guilty as charged of that crime. And Henderson's testimony did touch on that issue—she answered affirmatively when the prosecutor asked whether defendant had told her "that his four-year-old daughter walked in on him during the assault." After reviewing the record, however, we are persuaded that there is little likelihood that Henderson's testimony on that point affected the jury's verdict on Count 4. As noted above, defendant did not contest that he injured D during the June 13 incident; in fact, he urged the jury to convict him of fourth-degree assault as a lesser included offense of Count 3. With respect to the significance of C walking into the bedroom during the incident, the amended indictment alleged that "the assault was committed in the immediate presence of or witnessed by [C]." Defendant acknowledged in the recorded

conversation with D about the June 2013 incident that he "did it in front of [C]"; a witness testified that C later was crying and said, "Daddy pinned Mommy and hurt her naked on the bed"; defendant did not dispute D's assertion, during the recorded pretext call, that C "came in the room while it was happening"; and defendant acknowledged during interrogation by Jurgens that C had "opened the door and walked in" and that, from the child's perspective, it would have been accurate for her to describe what happened as "Daddy hurting mommy and that [they] were naked." In light of that evidence, any error associated with admitting Henderson's testimony was harmless with respect to Count 4.

In sum, none of defendant's challenges to the admission of Henderson's testimony establishes a basis for reversal because any error associated with admitting that testimony was harmless. Accordingly, we need not resolve whether defendant waived any privilege associated with his communications with Henderson, and we express no view on that issue.

We turn to defendant's sixth assignment of error, in which he makes an unpreserved argument that the trial court erred by failing to merge the guilty verdict for misdemeanor fourth-degree assault (the lesser-included offense on Count 3) with the verdict for felony fourth-degree assault (Count 4). Defendant argues that the elements of the misdemeanor assault are necessarily subsumed within the felony assault, as charged in the indictment. The state concedes the point. We agree that the verdicts plainly must merge because the Count 3 lesser-included offense of which defendant was found guilty (misdemeanor fourth-degree assault) includes no element that is not also included within the felony fourth-degree assault charged in Count 4. *See State v. Blake*, 348 Or 95, 99, 228 P3d 560 (2010) ("[I]f one offense contains X elements, and another offense contains X + 1 elements, the former offense does not contain an element that is not also found in the latter offense. In that situation, under ORS 161.067(1), there is only one separately punishable offense."). We conclude that it is appropriate for us to exercise our discretion to correct the plain error because a judgment reflecting two assault convictions does not accurately reflect the extent of defendant's criminal conduct, the

state does not have an interest in convicting a defendant twice for the same crime, and we cannot identify any strategic reason that defendant could have had for not raising the merger issue to the trial court. *See State v. Steltz*, 259 Or App 212, 220-21, 313 P3d 312 (2013), *rev den*, 354 Or 840 (2014), and *rev den*, 355 Or 751 (2014) (exercising discretion to correct plain merger error for similar reasons).

Convictions on Counts 3 and 4 reversed and remanded for entry of judgment of conviction for one count of felony fourth-degree assault; remanded for resentencing; otherwise affirmed.