IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

HOSSEIN TAJIPOUR,
Defendant-Appellant.

Multnomah County Circuit Court
15CR26096; A162748

Michael A. Greenlick, Judge.

Argued and submitted August 23, 2018.

Ryan T. O'Connor argued the cause for appellant. Also on the briefs was O'Connor Weber LLC.

Doug M. Petrina, Assistant Attorney General, argued the cause for respondent. Also on the briefs were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Hadlock, Presiding Judge, and DeHoog, Judge, and Schuman, Senior Judge.

HADLOCK, P. J.

Affirmed.

HADLOCK, P. J.

Defendant appeals a judgment reflecting convictions for one count of first-degree sodomy (Count 1), three counts of first-degree sexual abuse (Counts 3, 5, and 7), and one count of coercion (Count 9). Defendant raises eleven assignments of error on appeal. We write only to address defendant's fourth and fifth assignments of error, in which defendant challenges the trial court's imposition of partly consecutive sentences on his convictions for sodomy and two of the counts of sexual abuse. For the reasons set out below, we conclude that the trial court did not err in imposing those partly consecutive sentences. We reject the remainder of defendant's assignments of error without extended discussion.[1] Accordingly, we affirm.

I. HISTORICAL AND PROCEDURAL FACTS

We describe defendant's criminal activity to provide context for those facts that are significant to the sentencing issues that we address in this opinion. We outline the pertinent facts in the light most favorable to the state. *State v. Kuester*, 275 Or App 414, 415, 364 P3d 685 (2015).

On an evening in February 2015, A, who was then a student at the University of Portland, attended a party near the university and drank multiple alcoholic beverages to the point that she felt "really drunk." A decided to leave the

[1] In his first assignment of error, defendant argues that the trial court abused its discretion when it did not deliver a requested "witness false in part" jury instruction. We reject that argument for reasons akin to those articulated in *State v. Payne*, 298 Or App 438, ___ P3d ___ (2019). In his second and third assignments of error, defendant contends that the trial court plainly erred when it did not merge the guilty verdicts for the three counts of sexual abuse into a single conviction. As defendant acknowledges, however, he invited any error by asserting at sentencing that "separate convictions" could be entered on those counts. For at least that reason, defendant's unpreserved merger argument presents no basis for reversal.

In his sixth through eleventh assignments of error, raised in a supplemental brief, defendant makes unpreserved arguments that the trial court erred when it instructed the jury that it could convict by nonunanimous verdict and when it accepted a nonunanimous (11-1) verdict on each of the five counts of which defendant was convicted. Defendant contends that the Sixth and Fourteenth Amendments to the United States Constitution require unanimous jury verdicts for the charges in this case. We reject those assignments of error on the merits without further discussion. *See State v. Gerig*, 297 Or App 884, 886 n 2, 444 P3d 1145 (2019) (taking that approach).

party by herself and find her way home. As she was walking through the neighborhood, she started to feel more drunk and blacked out; later, when she became "more cognizant," she found herself in a neighborhood with which she was not familiar. It was about 2:00 a.m., cold outside, and A could not call anybody because her phone battery was dead. After walking some more, A spotted a taxi, flagged it down, and got in.

By this point, it was 3:37 in the morning.[2] A gave her address to defendant, who was the cab driver, and told him that her house was near the University of Portland. Shortly after the ride began, defendant stopped the cab and asked A if she would like to get into the front seat, where the heaters worked better. Defendant also said that he could not find A's address. A got into the front seat of the cab at about 3:49. Defendant started driving away from the university, which A found "really odd." Within 30 seconds of when A got into the front seat, defendant reached toward her. Defendant grabbed A's hand; she initially thought he had noticed that she was cold and was trying to keep her hand warm. After that, defendant put his hand on A's knee and moved it up her thigh. A started to panic, tried to push defendant's hand away, and turned her body away from him. At some point, defendant put his hands down A's pants, touching her labia, and—"when his hand was near [A's] vaginal area"—said something to the effect that "this is what you need to do in order to go home." Defendant also touched A's breasts, both over and underneath her shirt.

A specifically remembers the moment that defendant touched her breasts and the moment that he touched her vaginal area. Those memories "are going to be burned in [her] mind for—forever." However, A does not recall the order in which defendant touched those parts of her body during the cab ride, as remembering the order "wasn't a priority" for her. Rather, she was thinking about "do[ing] whatever it took to make sure that [she] was safe and make sure that [she] wasn't in a ditch somewhere" and "would make it home

[2] A camera was installed in the taxi cab that took time-stamped photographs at regular intervals. A picture showing A getting into the cab is time-stamped 3:37.

safely." A felt "so scared and so violated." She just wanted to go home safely and she "thought that's like what taxis were for." At one point, defendant asked her if she liked the contact and she replied "yes," because she "was worried that if [she] verbally refused him, that he would do worse."

Toward the end of the ride, defendant forced A to kiss him. After that, defendant unzipped his pants, pulled out his penis, and said, "This is how it works." Defendant then forced oral sodomy. A felt "violated and disgusted that [defendant] was forcing [her] to do this—that he felt like he had this right to do this to [her]." A "felt helpless like [she] had to do it" because of defendant's statement and because defendant physically forced her, using his arm. A felt that she "had to do it" to be safe.

Afterward, A sat up and realized that the cab was parked in front of her house. At about 4:26, A got out of the car, ran to her house, and banged on the door, not recalling that she had her keys because she was "so shaken up." A then went to the house of neighbors, who responded to A's knocking and let her in. A was crying, hysterical, and shaking. One of the neighbors (Rose) called 9-1-1, saying that A "said the taxi driver tried to rape her." A then spoke to the 9-1-1 dispatcher and said that defendant had reached down her pants. The dispatcher asked, "was there more?" and A said, "No. That was it." At trial, A testified that she did not tell the dispatcher about other things that happened because other people were present and she did not want to "say all that had happened in front of people that [she] didn't know" or even one person whom she did know. A also did not think the dispatcher "needed all that information." A spoke to responding police, went to the hospital, and spoke to a nurse and a victim's advocate.

For the next month or two, A slept with a knife under her pillow. At first, A did not respond to inquiries from detectives. A was afraid that defendant—who knew where she lived—might come to her house and put A and her housemates in danger. She also wanted not to acknowledge what had happened and to carry on with her life. However, A learned in the spring that her younger sister had been raped. A "wanted to set an example for her," so she

went through with an interview by detectives in early June 2015. A felt "pretty exposed" during that interview, which took place in her house, and she mentioned only vaginal touching over her clothes, both because she had been forcing herself to forget about it and because her housemates were present.

Defendant was charged with multiple sex crimes and tried on five counts: one count of first-degree sodomy, three counts of first-degree sexual abuse, each premised on the forcibly compelled touching of a different sexual or intimate part (breast, vaginal area, lips), and one count of coercion.[3] A jury found defendant guilty of all five counts. With respect to sentencing, the state recommended that the court order that a portion of the incarceration term for one of the sexual-abuse convictions run consecutively to the incarceration term for sodomy. The state argued that such consecutive sentencing would be permissible under both ORS 137.123(5)(a) and ORS 137.123(5)(b). Defendant argued that consecutive sentencing could not be justified under either of those provisions.

The trial court sentenced defendant to the mandatory minimum 100-month term of incarceration on Count 1, first-degree sodomy, plus post-prison supervision. On Count 3, first-degree sexual abuse (breast), the court imposed the mandatory minimum 75-month term of incarceration and ordered that 12 months of that term be served consecutively to the incarceration term on Count 1 (the remaining 63 months to run concurrently). On Count 5, first-degree sexual abuse (vagina), the court similarly imposed a 75-month term of incarceration, with 12 months to be served consecutively to the terms on Counts 1 and 3. The sentence on Count 7, first-degree sexual abuse (lips), also includes a 75-month term of incarceration, but the court ordered that entire term to be served concurrently with the terms on Counts 1, 3, and 5. Finally, the court imposed a concurrent 13-month term of incarceration on Count 9, the coercion conviction.

[3] Defendant initially had been charged with a total of nine counts, because each of the four alleged acts of sexual conduct was charged both on a forcible-compulsion theory and on a mental-incapacitation (intoxication) theory. The state dismissed the four counts premised on mental incapacitation before trial.

At the sentencing hearing, the court explained why it was imposing partly consecutive sentences. First, the court found, as pertinent to ORS 137.123(5)(a), that all of the sentences for which it was imposing partly consecutive sentences "were not merely an incidental violation of separate statutory provisions in the course of commission of a more serious crime, but, rather, for an indication of [defendant's] willingness to commit more than one criminal offense." The court observed that the "touching took place over many, many minutes, if not dozens of minutes, and *** the sexual touching was distinct and very clearly indicated [defendant's] willingness to keep pursuing [his] sexual gratification in various ways while [he was] engaged in this 50-minute cab ride with the victim." The court also made findings pertinent to sentencing under ORS 137.123(5)(b), explaining that, with respect to both Counts 3 and 5, defendant had "created a risk of causing greater or qualitatively different loss, injury or harm to the victim[.]" The court asserted that "[a]nyone who would argue that first touching the victim on her breast and then touching her underneath her clothing on her vagina and then forcing her to engage in sodomy *** was not qualitatively a different harm is taking a very naïve and unrealistic view of how victims would [perceive] such conduct." After announcing the specific sentencing terms, the court further explained that it believed that the mandatory minimum sentence for sodomy was appropriate, given the harm to the victim, and that defendant should serve additional time on Counts 3 and 5.

II. ORS 137.123(5) AND THE PARTIES' ARGUMENTS ON APPEAL

On appeal, defendant challenges the trial court's imposition of the partly consecutive sentences described above. As detailed below, the parties' arguments are governed by ORS 137.123. When, as the parties agree is the case here, a defendant has "separate convictions arising out of a continuous and uninterrupted course of conduct," that statute allows imposition of consecutive sentences only if the trial court finds:

> "(a) That the criminal offense for which a consecutive sentence is contemplated was not merely an incidental

> violation of a separate statutory provision in the course of the commission of a more serious crime but rather was an indication of defendant's willingness to commit more than one criminal offense; or
>
> "(b) The criminal offense for which a consecutive sentence is contemplated caused or created a risk of causing greater or qualitatively different loss, injury or harm to the victim or caused or created a risk of causing loss, injury or harm to a different victim than was caused or threatened by the other offense or offenses committed during a continuous and uninterrupted course of conduct."

ORS 137.123(5).

Defendant argues on appeal that the trial court erred twice in imposing partly consecutive sentences in this case. In his fourth assignment of error, defendant asserts that the trial court erred when it imposed the sentence on Count 3 (sexual abuse: breast) partly consecutive to the sentence for Count 1 (sodomy). In his fifth assignment of error, defendant asserts that the court erred when it imposed the sentence on Count 5 (sexual abuse: vagina) partly consecutive to the sentences on Counts 1 and 3.

In a combined argument on those assignments of error, defendant asserts that the trial court erred in two ways when it imposed consecutive sentences. First, defendant contends that the sentence on Count 5 could not be made to run partly consecutive to the sentence on Count 3 under ORS 137.123(5)(a) because those two counts involve violation of the same statutory provision. Beyond that, defendant contends that the two sexual-abuse convictions do not indicate defendant's willingness to commit more than one criminal offense, because the touching occurred during an uninterrupted course of conduct and was aimed at a "single criminal objective of sexually touching [A] by forcible compulsion." Defendant emphasizes that A could not recall the order in which defendant touched her breast and her vagina, and asserts that the "record lacks evidence of the length of any temporal break between the touching." In response, the state argues that defendant could have committed either of the sexual-abuse offenses without committing the other, demonstrating his willingness to commit

each distinct offense, as required for consecutive sentencing under ORS 137.123(5)(a).

Defendant also argues against imposition of consecutive sentences for the two sexual-abuse counts under ORS 137.123(5)(b), asserting that the record does not support a finding of separate harms to the victim because the "harm caused or risked by defendant's conduct was the same: non-consensual sexual contact." And, to the extent that forcibly compelled touching of the breast and vagina might be considered harms that are different in some respect, defendant contends that the harm associated with the touching of A's vagina is "not *greater* than or *qualitatively* differen[t]" from the harm associated with the touching of A's breast. (Emphases added.) In response, the state echoes the trial court's view of how a victim would perceive the different crimes and how each type of compelled touching inflicts an additional or qualitatively distinct harm.

Defendant's second argument is that the trial court erred by making the sentences on the sexual-abuse convictions run partly consecutive to the sentence on the sodomy conviction. He contends that the sentencing was not permissible under ORS 137.123(5)(a) because defendant had only a single intention when he committed each of the crimes: "to have nonconsensual sexual contact with [A] by forcible compulsion" and because his touching of A's breast and vagina constituted only "incidental violations of other statutory provisions in the course of committing the more serious offense of sodomy in the first degree." In response, the state argues that the record supports a finding that defendant's separate acts demonstrated a willingness to commit each offense. The state emphasizes that defendant could have committed the sexual-abuse offenses without committing sodomy and vice versa.

Defendant also asserts that the sexual-abuse sentences could not be made partly consecutive to the sodomy sentence under ORS 137.123(5)(b) because the sexual abuse created "the same harm or risk of harm as sodomy in the first degree: non-consensual sexual contact." Moreover, he asserts, even if the harms differed in some respect, "the harm or risk of harm caused by [defendant] touching [A] is

not greater or qualitatively differen[t] than the harm caused or risked by the most serious offense, sodomy in the first degree." The state disagrees, asserting that the "commission of multiple sex offenses through distinct conduct is a quintessential example of offenses causing greater or qualitatively different harm."

III. ANALYSIS

A. *Partly Consecutive Sentence on Two Counts of Sexual Abuse*

We first address defendant's contention that the trial court erred by making the sentence on Count 5 (sexual abuse: vagina) partly consecutive to the sentence on Count 3 (sexual abuse: breast). With respect to that dispute, we begin and end by addressing the propriety of the sentencing under ORS 137.123(5)(b), which is dispositive. In *State v. Rettmann*, 218 Or App 179, 178 P3d 333 (2008), we described the analysis that a court applies when determining, for purposes of ORS 137.123(5)(b), whether an offense "caused or created a risk of causing greater or qualitatively different loss, injury or harm" than another offense:

> "'[A] court must (1) determine which offense is the offense for which a consecutive sentence is contemplated; (2) compare the harms—real or potential—that arose from that offense with those that arose from the offense to which it will be sentenced consecutively; (3) determine whether the offense for which a consecutive sentence is contemplated caused or risked causing any harm that the other did not; and, if so, (4) determine whether the harm that is unique to that offense is greater than or qualitatively different from the harms caused or threatened by the other."

Id. at 185-86 (footnote omitted). *See State v. Cazarez-Lopez*, 295 Or App 349, 366-67, 434 P3d 468 (2018), *rev den*, 364 Or 535 (2019) (adhering to that analysis).

Here, the offense for which the court imposed a partly consecutive sentence is Count 5, first-degree sexual abuse associated with the forcibly compelled touching of A's vagina. The counts to which it is sentenced consecutively include Count 3, first-degree sexual abuse associated with the forcibly compelled touching of A's breast. Defendant's

argument that those counts cannot be sentenced consecutively amounts to a contention that a victim whose vagina is forcibly touched suffers no harm that is greater than or qualitatively different from having her breast forcibly touched. We reject defendant's assertion that all compelled sexual contact creates the same harm. Put in terms of the facts involved here, a woman who has been (or is going to be) sexually assaulted in other ways but has not been attacked vaginally may experience additional and distinct sensations of terror, pain, and violation when she realizes that her assailant is forcibly touching her genital area or is attempting to do so. The trial court did not err when it determined that the harms associated with the compelled touching of A's vagina (Count 5) were greater than or qualitatively different from the harms caused or threatened by the compelled touching of her breast (Count 3).[4]

B. *Sexual Abuse Sentences Partly Consecutive to Sentence for Sodomy*

As noted, defendant also argues that the trial court erred when it ordered the sentences on Count 3 (sexual abuse: breast) and Count 5 (sexual abuse: vagina) to run partly consecutive to the sentence on Count 1 (sodomy). With respect to that aspect of the sentencing, we analyze the lawfulness of the trial court's decision under ORS 137.123(5)(a). Again, that subsection allows consecutive sentencing when the crime for which a consecutive sentence is contemplated was not "merely an incidental violation of a separate statutory provision in the course of the commission of a more serious crime but rather was an indication of defendant's willingness to commit more than one criminal offense." For purposes of that provision, a court must consider whether the defendant's conduct "demonstrated a separate and distinct intent" to commit the crime to be consecutively sentenced (here, sexual abuse). *State v. Edwards*, 286 Or App 99, 103, 399 P3d 463, *rev den*, 362 Or 175 (2017). When the offenses at issue are temporally or qualitatively distinct, the

[4] Because we hold that the trial court did not err when it made the sentence on Count 5 partly consecutive to the other sentences under ORS 137.123(5)(b), we need not address whether the court also ruled correctly when it determined that that consecutive sentencing would independently be justified under ORS 137.123(5)(a).

evidence "may support an inference that the commission of one offense was not merely incidental to the other." *Id*. In considering whether the evidence permits such an inference, it can be helpful to ask "whether, in committing the 'more serious crime,' the defendant did not have to commit the crime 'for which a consecutive sentence is contemplated.'" *State v. Byam*, 284 Or App 402, 408, 393 P3d 252 (2017). Ultimately, the question is whether the record includes "discrete facts" supporting an inference that the defendant acted with a willingness to commit multiple offenses. *Edwards*, 286 Or App at 104.

As applied here, the question under ORS 137.123 (5)(a) reduces to whether the record allows an inference that defendant's forcibly compelled touching of A's breast and vagina were offenses that he committed willingly and were not "merely *** incidental" to the sodomy that followed. It does. The record includes evidence supporting the trial court's finding that defendant touched A's breast and vagina during the course of "many minutes" as he drove the taxi cab around north Portland, that defendant subsequently stopped the cab in front of A's house, where he forcibly kissed her, and that defendant *then* forced oral sodomy. The trial court was not required to view defendant's sexual assaults on A's body, during the cab ride, as "merely incidental" to the sodomy that happened later. Nor was the court required to find that defendant's touching of A's breast and vagina did not evince a willingness on his part to engage in that conduct as something distinct from the sodomy that followed. Put bluntly, defendant could have willingly sexually abused A without later sodomizing her, just as he could have willingly sodomized her without also forcibly touching her breast and vagina. His choice to commit each of those separate acts amply supports the trial court's finding that defendant had a "willingness to keep pursuing [his] sexual gratification in various ways." We reject defendant's contrary argument, which implicitly asks us to hold that a person who sexually assaults another person over a period of "many minutes" has only a single, undifferentiated intention during the entire episode—to have nonconsensual sexual contact—and that the assailant cannot have any qualitatively different intention, desire, or willingness with

respect to the distinct criminal acts he commits during the assault.[5]

Affirmed.

[5] Because we hold that the trial court did not err when it ruled, under ORS 137.123(5)(a), that it could order the sentences on the sexual-abuse convictions to run partly consecutively to the sentence on the sodomy conviction, we need not address whether the trial court was correct when it ruled, separately, that that consecutive sentencing also was permissible under ORS 137.123(5)(b).