

IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

STATE OF OREGON,  
*Plaintiff-Respondent,*

*v.*

JOSHUA SHANE HARMON,  
*Defendant-Appellant.*

Washington County Circuit Court  
C160327CR; A163091

Rick Knapp, Senior Judge. (Judgment)

D. Charles Bailey, Jr., Judge. (Supplemental Judgment)

Submitted August 14, 2018.

Bear Wilner-Nugent filed the brief for appellant. Joshua Shane Harmon filed the supplemental and reply briefs *pro se*.

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

Before Ortega, Presiding Judge, and Egan, Chief Judge, and Powers, Judge.

PER CURIAM

Convictions on Counts 2 and 3 reversed and remanded for entry of judgment of conviction for one count of first-degree sexual abuse; remanded for resentencing; otherwise affirmed.

## PER CURIAM

Defendant appeals from a judgment of conviction for two counts of first-degree unlawful sexual penetration (Counts 1 and 4) and six counts of first-degree sexual abuse (Counts 2, 3, 5, 6, 7, and 8). We write to address defendant's two assignments of error arguing that the trial court plainly erred in failing to merge the guilty verdicts on Counts 2 and 3 and on Counts 5 and 6. We reject defendant's *pro se* assignments of error without discussion.

In his first assignment of error, defendant argues that the trial court plainly erred by failing to merge the guilty verdicts on Counts 2 and 3 into a single conviction of first-degree sexual abuse. In his second assignment of error, defendant argues that the trial court plainly erred by failing to merge the guilty verdicts on Counts 5 and 6 into a single conviction of first-degree sexual abuse. Defendant argues with regard to both assignments of error that those counts should have merged because the facts underlying those counts constituted a single, uninterrupted course of conduct against a single victim. ORS 161.067(3).<sup>1</sup> Defendant acknowledges that he did not preserve his assignments of error, but requests that we review and correct the error as plain error. ORAP 5.45(1).

The state concedes that the trial court plainly erred by failing to merge Counts 2 and 3. We agree with and accept the state's concession. We further conclude that it is appropriate to exercise our discretion to correct the plain error for the reasons stated in *State v. Camacho-Alvarez*, 225 Or App 215, 217, 200 P3d 613 (2009).

With regard to Counts 5 and 6, the state responds that the trial court did not plainly err because there is

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<sup>1</sup> ORS 161.067(3) provides, in part:

“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.”

evidence in the record from which the trial court could have found a “sufficient pause” between the conduct underlying those two counts to justify separate convictions under ORS 161.067(3). *See State v. Nelson*, 282 Or App 427, 444-47, 386 P3d 73 (2016) (discussing what constitutes a “sufficient pause”). We agree that any error with regard to the trial court’s failure to merge the guilty verdicts on Counts 5 and 6 does not qualify as plain error under ORAP 5.45(1) for the reason articulated by the state. *See State v. Jury*, 185 Or App 132, 135, 57 P3d 970 (2002), *rev den*, 335 Or 504 (2003) (setting out the three criteria for plain error). Accordingly, we affirm defendant’s convictions on Counts 5 and 6.

Convictions on Counts 2 and 3 reversed and remanded for entry of judgment of conviction for one count of first-degree sexual abuse; remanded for resentencing; otherwise affirmed.