IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
SHANE DAVID MICKLEY,
Defendant-Appellant.

Washington County Circuit Court
16CR78512; A165034

Kirsten E. Thompson, Judge.

Submitted March 6, 2019.

Ernest G. Lannet, Chief Defender, Criminal Appellate Section, and Matthew Blythe, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Carson L. Whitehead, Assistant Attorney General, filed the brief for respondent.

Before Ortega, Presiding Judge, and Powers, Judge, and Kistler, Senior Judge.

PER CURIAM

Convictions on Counts 1 and 2 reversed and remanded for entry of a judgment of conviction for one count of unlawful delivery of methamphetamine within 1,000 feet of a school; remanded for resentencing; otherwise affirmed.

PER CURIAM

Defendant was convicted of unlawful delivery of methamphetamine within 1,000 feet of a school, ORS 475.892 (Count 1); unlawful delivery of methamphetamine, ORS 475.890 (Count 2); and unlawful possession of methamphetamine, ORS 475.894 (Count 3). The jury additionally found that Counts 2 and 3 involved substantial quantities of the drug. We reject defendant's first assignment of error without discussion. In his second assignment, defendant argues that the trial court erred in failing to merge the guilty verdict on Count 1 with the guilty verdict on Count 2. The state concedes that the trial court committed plain error.

We accept the state's concession that the trial court erred in failing to merge the guilty verdicts. *See State v. Rodriguez-Gomez*, 242 Or App 567, 568, 256 P3d 169 (2011) (concluding that delivery of methamphetamine within 1,000 feet of a school merges with delivery of methamphetamine); *State v. Unger*, 276 Or App 445, 450-51, 368 P3d 37 (2016) (explaining that the substantial-quantity subcategory factor is not an element of a crime). Furthermore, we agree that the error is plain.[1] *See Unger*, 276 Or App at 449-52 (concluding that the trial court plainly erred in failing to merge the guilty verdicts for manufacture of cocaine and manufacture of cocaine involving a substantial quantity); *State v. Villarreal*, 266 Or App 699, 700, 338 P3d 801 (2014) (concluding that the trial court plainly erred in failing to merge convictions for delivery of cocaine within 1,000 feet of a school and delivery of cocaine). Finally, for the reasons stated in *Unger*, we conclude that it is appropriate to exercise our discretion to correct the error. 276 Or App at 451-52.

Convictions on Counts 1 and 2 reversed and remanded for entry of a judgment of conviction for one count of unlawful delivery of methamphetamine within 1,000 feet of a school; remanded for resentencing; otherwise affirmed.

[1] Defendant argues that the error was properly preserved before the trial court and, in the alternative, that the error is plain. However, we need not decide whether the error was preserved in light of our conclusion that the error is plain.