

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

ROBBY LEE SMYTHE,
Defendant-Appellant.

Washington County Circuit Court
17CR46523; A166237

G. Philip Arnold, Senior Judge.

Submitted October 5, 2018.

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

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Robert M. Wilsey, 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 5 reversed and remanded for entry of judgment of conviction for one count of reckless endangerment of highway workers; remanded for resentencing; otherwise affirmed.

PER CURIAM

Defendant appeals from a judgment of conviction for one count of reckless driving (Count 2), one count of failure to perform the duties of a driver (Count 3), and one count of reckless endangerment of highway workers (Count 5). Defendant raises one assignment of error, arguing that the trial court erred in failing to merge the guilty verdicts on Counts 2 and 5. Defendant argues that those counts merge under ORS 161.067(1)¹ because all the elements of reckless driving are subsumed into the elements of reckless endangerment of highway workers. *See State v. Noe*, 242 Or App 530, 532, 256 P3d 166 (2011) (“[C]onvictions for conduct in a criminal episode that violates two or more statutory provisions merge if all of the elements in one provision are subsumed into the elements of the other provision.”). The state concedes the error, and we accept the state’s concession.

Defendant was charged with reckless driving and reckless endangerment of highway workers based on the same conduct. The elements of reckless driving are “recklessly driv[ing] a vehicle upon a highway or other premises described in this section in a manner that endangers the safety of persons or property.” ORS 811.140(1). As charged in this case, the elements of reckless endangerment of highway workers are “driv[ing] a motor vehicle in a highway work zone in such a manner as to endanger persons or property.” ORS 811.231(1). Because reckless driving does not contain any element that is not required to prove reckless endangerment of highway workers and the charged counts are based on the same conduct, the guilty verdicts for Counts 2 and 5 merge under ORS 161.067(1).

Convictions on Counts 2 and 5 reversed and remanded for entry of judgment of conviction for one count of reckless endangerment of highway workers; remanded for resentencing; otherwise affirmed.

¹ ORS 161.067(1) provides:

“When the same conduct or criminal episode violates two or more statutory provisions and each provision requires proof of an element that the others do not, there are as many separately punishable offenses as there are separate statutory violations.”