

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of D. M. B.,
a Youth.

STATE OF OREGON,
Respondent,

v.

D. M. B.,
Appellant.

Clackamas County Circuit Court
18JU05047; A169886

Colleen F. Gilmartin, Judge pro tempore.

Submitted November 1, 2019.

Matthew J. Steven filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Daniel Norris, Assistant Attorney General, filed the brief for respondent.

Before Armstrong, Presiding Judge, and Tookey, Judge, and Aoyagi, Judge.

PER CURIAM

Judgment reversed and remanded for entry of a judgment reflecting adjudication for a single count of second-degree sexual abuse; otherwise affirmed.

PER CURIAM

Youth was found to be within the jurisdiction of the juvenile court for committing an act that, if committed by an adult, would constitute rape in the third degree, ORS 163.355 and sexual abuse in the second degree, ORS 163.415. On appeal, youth argues that the juvenile court plainly erred in failing to merge his adjudication for rape in the third degree into his adjudication for sexual abuse in the second degree. The state concedes that, under ORS 161.067(1) and *State v. Breshears*, 281 Or App 552, 555, 383 P3d 345 (2016), when the same conduct violates two statutory provisions, they are separately punishable only if each provision requires proof of an element that the other does not, and because “proof of the elements of third-degree rape will necessarily prove the elements of second-degree sexual abuse,” *id.* at 559, these adjudications should have merged. *See State v. K. R. S.*, 298 Or App 318, 331, 449 P3d 511 (2019) (juvenile adjudications are subject to merger under ORS 161.067). We agree, accept the state’s concession, and exercise our discretion to correct plain error.

Judgment reversed and remanded for entry of a judgment reflecting adjudication for a single count of second-degree sexual abuse; otherwise affirmed.