

IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

STATE OF OREGON,  
*Plaintiff-Respondent,*

*v.*

BRIAN JOSEPH MANN,  
*Defendant-Appellant.*

Marion County Circuit Court  
17CR55426; A169465

Courtland Geyer, Judge.

Argued and submitted July 16, 2020.

Anne Fujita Munsey, Deputy Public Defender, argued the cause for appellant. Also on the briefs was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Greg Rios, Assistant Attorney General, argued the cause for respondent. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Lagesen, Presiding Judge, and James, Judge, and Kamins, Judge.

PER CURIAM

Reversed and remanded for resentencing; otherwise affirmed.

## PER CURIAM

Defendant appeals a judgment of conviction for two counts of attempted sexual abuse. He assigns error to the trial court's award of \$4,400 in restitution to Willamette Valley Community Health. He contends that the award was legally erroneous under *State v. Moreno-Hernandez*, 365 Or 175, 442 P3d 1092 (2019), and *State v. White*, 299 Or App 165, 449 P3d 924 (2019), in which we applied *Moreno-Hernandez* to reverse and remand a restitution award under circumstances not meaningfully distinguishable from those present here. The state does not seriously dispute<sup>1</sup> that the award is erroneous under the reasoning in *White* but argues that we should affirm on an alternative ground that was not raised in *White*, thereby obviating the need for a remand.

Whether to consider a proffered alternative basis for affirmance is a matter of discretion. *State v. Fry*, 303 Or App 587, 593, 464 P3d 521 (2020). We decline to exercise that discretion here, mainly because we are not wholly confident that the parties would not have generated a different record if the state had raised its alternative theory before now. As explained in *White*, on remand, the court may consider whether there are "other permissible options," including the option proposed by the state, for awarding restitution to Willamette Valley Community Health. 299 Or App at 169.

Reversed and remanded for resentencing; otherwise affirmed.

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<sup>1</sup> The state raises a preservation argument, but that argument is nearly identical to the one we rejected in *White* itself, and we reject it for the same reasons here. See *White*, 299 Or App at 168 n 1.