

FILED: February 8, 2012

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

MASON MICHEAL MILLS,
Defendant-Appellant.

Washington County Circuit Court
C081459CR

A142328

Steven L. Price, Judge.

Submitted on July 28, 2011.

Peter Gartlan, Chief Defender, and Meredith Allen, Senior Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

John R. Kroger, Attorney General, Mary H. Williams, Solicitor General, and Susan G. Howe, Senior Assistant Attorney General, filed the brief for respondent.

Before Haselton, Presiding Judge, and Brewer, Chief Judge, and Armstrong, Judge.

ARMSTRONG, J.

Convictions for first-degree arson reversed and remanded with instructions to enter a judgment of conviction for one count of first-degree arson and for resentencing; otherwise affirmed.

1 ARMSTRONG, J.

2 Defendant appeals a judgment of conviction for three counts of first-degree
3 arson, ORS 164.325, and one count of second-degree arson, ORS 164.315. Of the four
4 assignments of error raised by defendant, we write to address only his contention that the
5 trial court erred in entering four convictions rather than merging them into a single first-
6 degree arson conviction. Although we agree with defendant that the three first-degree
7 arson convictions should have been merged into a single conviction, defendant did not
8 preserve his merger argument regarding his second-degree arson conviction, and, for that
9 reason, we reject that argument. Accordingly, we reverse defendant's first-degree arson
10 convictions and remand with instructions to enter a judgment of conviction for one count
11 of first-degree arson and for resentencing.

12 Because defendant was convicted, we state the few necessary contextual
13 facts in the light most favorable to the state. [State v. Dasa](#), 234 Or App 219, 221, 227
14 P3d 228, *rev den*, 349 Or 173 (2010). Defendant's ex-girlfriend, Weeks, and her new
15 boyfriend, Jacob, were sleeping in Weeks's bedroom above the garage at her
16 grandparent's home when defendant--upset that Weeks was with another man--and
17 Messick, who was a friend of defendant, decided to throw eggs at Jacob's car, which was
18 parked below Weeks's bedroom window. After "egging" the car, defendant and Messick
19 left the house, but, having decided that throwing eggs at the car was not sufficiently
20 vindictive, they later returned to the house to inflict more damage to the car by throwing

1 gasoline on it. Once there, either defendant or Messick eventually set fire to Jacob's car,¹
2 setting off the car's alarm and waking up Weeks and Jacob. Weeks called the fire
3 department, and, by the time that the firefighters arrived, the flames had proceeded from
4 merely burning the car to damaging parts of the house itself, filling areas of it with
5 smoke.

6 The state charged defendant with three counts of first-degree arson, alleging
7 the following in the indictment:

8 "COUNT 1

9 "The defendant * * * did unlawfully and intentionally damage property, to-
10 wit: a car, by starting a fire, thereby recklessly placing protected property of
11 another * * * in danger of damage.

12 "* * * * *

13 "COUNT 2

14 "The defendant * * * did unlawfully and intentionally damage property, to-
15 wit: a car, by starting a fire, thereby recklessly placing [Weeks] in danger of
16 physical injury.

17 "* * * * *

18 "COUNT 3

19 "The defendant * * * did unlawfully and intentionally damage property, to-
20 wit: a car, by starting a fire, thereby recklessly placing [Jacob] in danger of
21 physical injury."

22 (Capitalization in original.) Further, the state charged defendant with one count of
23 second-degree arson. The jury found defendant guilty of all of the charges.

¹ During trial, the state proceeded on the theories that defendant either set the fire or assisted Messick in doing so, and the record supports either possibility.

1 At the ensuing sentencing hearing, defendant argued to the court that, under
2 [State v. Luers](#), 211 Or App 34, 153 P3d 688, [adh'd to as modified on recons](#), 213 Or App
3 389, 160 P3d 1013 (2007), his three first-degree arson convictions had to be merged into
4 a single conviction because those charges all had been brought under the same subsection
5 of ORS 164.325--viz., ORS 164.325(1)(a)(B).² In support of that argument, defendant
6 further contended that the three counts of first-degree arson alleged in the indictment
7 were merely alternative theories to prove his guilt for committing a single act of that
8 crime, which should lead to a single conviction.

9 The court disagreed, concluding that, because it was not going to impose
10 consecutive sentences on the three first-degree arson convictions, it did not need to
11 follow *Luers* as "it is not really going to come [into] play." Following the sentencing
12 hearing, the court entered three convictions on the first-degree arson counts, imposing
13 three years of probation as the cumulative sentence on those convictions, and one second-

² ORS 164.325(1) provides, as relevant:

"A person commits the crime of arson in the first degree if:

"(a) By starting a fire or causing an explosion, the person intentionally damages:

"* * * * *

"(B) Any property, whether the property of the person or the property of another person, and such act recklessly places another person in danger of physical injury or protected property of another in danger of damage[.]"

Further, ORS 164.305(1) generally defines "[p]rotected property" as "any structure, place or thing customarily occupied by people."

1 degree arson conviction, imposing a sentence of nine months' imprisonment on that
2 conviction.

3 On appeal, defendant reprises his merger argument on the three first-degree
4 arson convictions, and the state concedes that the court erred in failing to merge those
5 convictions. That concession is well taken. *See Luers*, 211 Or App at 67 (concluding
6 that anti-merger statute, ORS 161.067, does not preclude merger of three first-degree
7 arson convictions, all of which were brought under *former* ORS 164.325(1)(b) (1999),
8 *renumbered as* ORS 164.325(1)(a)(B) (2005), despite allegations in indictment alleging
9 for each count that the defendant's criminal conduct recklessly endangered different
10 protected property or person).³ Accordingly, the court erred in failing to merge the three
11 first-degree arson convictions into a single conviction.

12 Defendant also contends on appeal that the court erred in failing to merge
13 his second-degree arson conviction with his first-degree arson convictions. We will
14 consider that contention only if defendant raised it with the trial court and, thereby,
15 preserved it for appeal.⁴ ORAP 5.45(1); [State v. Walker](#), 350 Or 540, 548, 258 P3d 1228
16 (2011). To preserve an issue for appeal, a party must proffer to the trial court the basis
17 for the party's objection with enough specificity to "ensure that the court can identify its
18 alleged error with enough clarity to permit it to consider and correct the error

³ The text of *former* ORS 164.325(1)(b) (1999) was retained *in toto* when the statute was reorganized and renumbered as ORS 164.325(1)(a)(B) and has not been amended since; therefore, the case law interpreting the former statute applies in this case.

⁴ Defendant does not advance on appeal an argument that the court committed plain error in failing to merge the arson convictions.

1 immediately, if correction is warranted." *State v. Wyatt*, 331 Or 335, 343, 15 P3d 22
2 (2000).

3 Here, defendant argues that he adequately preserved at the sentencing
4 hearing his merger argument regarding the second-degree arson conviction because (1)
5 the state argued at the beginning of the hearing that none of the arson counts should
6 merge because "each of these different counts contain an element that the * * * others do
7 not"; (2) defendant concluded generally, after outlining his merger argument with respect
8 to the first-degree arson counts, that he should "end up with one conviction for sentencing
9 purposes"; and (3) after the court concluded that the first-degree arson convictions should
10 not be merged, it stated that the second-degree arson conviction "involve[d] a separate
11 element because it involve[d] proof of damage of property in a certain amount," and,
12 therefore, that conviction did not merge with the other convictions. In the context of the
13 merger argument that defendant made during the sentencing hearing, which focused
14 solely on his first-degree arson convictions and neither referred to ORS 164.315--the
15 second-degree arson statute--nor to whether second-degree arson requires proof of an
16 additional element from those required for first-degree arson, defendant's statements at
17 the sentencing hearing were insufficient to alert the court to the alleged error with respect
18 to the second-degree arson conviction. Therefore, defendant did not preserve that issue
19 for our review.

20 Convictions for first-degree arson reversed and remanded with instructions
21 to enter a judgment of conviction for one count of first-degree arson and for resentencing;
22 otherwise affirmed.