

FILED: April 25, 2012

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

ZACHARY OLIN HARRISON,
Defendant-Appellant.

Washington County Circuit Court
C091230CR

A144858

Gayle Ann Nachtigal, Judge.

Submitted on March 22, 2012.

Peter Gartlan, Chief Defender, and Stephanie J. Hortsch, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

John R. Kroger, Attorney General, Mary H. Williams, Solicitor General, and Paul L. Smith, Assistant Attorney-in-Charge, Criminal Appeals, filed the brief for respondent.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Nakamoto, Judge.

PER CURIAM

Reversed and remanded with instruction to merge conviction for fourth-degree assault (Count 10) into the conviction for first-degree assault (Count 6); remanded for resentencing; otherwise affirmed.

1 PER CURIAM

2 Defendant, who was convicted of three counts of first-degree assault, one
3 count of third-degree assault, two counts of fourth-degree assault, and various criminal
4 mistreatment offenses, arising out of his abuse of his two-month-old child, appeals,
5 raising two assignments of error. We reject without discussion defendant's unpreserved
6 contention that the trial court committed plain error in failing to grant a mistrial *sua*
7 *sponte* due to the prosecutor's remarks during closing argument. The state concedes that
8 defendant is correct in his second, preserved, contention that the guilty verdict for one
9 conviction of assault in the fourth degree (Count 10) must merge into one of the guilty
10 verdicts for first-degree assault (Count 6). The state's concession is well-founded, ORS
11 161.067; see [State v. Sanders](#), 189 Or App 107, 74 P3d 1105 (2003), *rev den*, 336 Or 657
12 (2004) (merger of convictions required where the offenses involved the same act of
13 violence against a single victim and the merged conviction is a lesser included of the
14 more serious offense), and we accept it.

15 Reversed and remanded with instruction to merge conviction for fourth-
16 degree assault (Count 10) into the conviction for first-degree assault (Count 6); remanded
17 for resentencing; otherwise affirmed.