

**FILED: August 15, 2012**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,  
Plaintiff-Respondent,

v.

DERRICK JERMAINE JAY,  
Defendant-Appellant.

Clackamas County Circuit Court  
CR0901085

A145218

Susie L. Norby, Judge.

Argued and submitted on June 27, 2012.

Neil F. Byl, Deputy Public Defender, argued the cause for appellant. On the brief were Peter Gartlan, Chief Defender, Office of Public Defense Services, and Louis R. Miles, Deputy Public Defender. Derrick Jay filed the supplemental brief *pro se*.

Timothy A. Sylwester, Assistant Attorney General, argued the cause for respondent. On the brief were John R. Kroger, Attorney General, Anna M. Joyce, Solicitor General, and Judy C. Lucas, Senior Assistant Attorney General.

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

PER CURIAM

Convictions on Counts 9 and 10 reversed and remanded for merger; remanded for resentencing; otherwise affirmed.

1 PER CURIAM

2 Defendant was convicted of first-degree robbery with a firearm, first-degree  
3 burglary with a firearm, second-degree assault, five counts of first-degree theft, and two  
4 counts of theft by receiving. On appeal, defendant argues that the trial court erred in  
5 receiving a nonunanimous verdict on his robbery conviction and raises an additional *pro*  
6 *se* assignment of error regarding double jeopardy. We reject without discussion the  
7 nonunanimous jury argument, *see* [State v. Cobb](#), 224 Or App 594, 596-97, 198 P3d 978  
8 (2008), *rev den*, 346 Or 364 (2009), as well as the double jeopardy argument.

9 However, defendant also argues, among other sentencing-related  
10 contentions, that the trial court erred in failing to merge two counts of first-degree theft  
11 by receiving (Counts 9 and 10) because defendant received both the laptop (Count 9) and  
12 knives (Count 10) during the course of one criminal episode and without evidence of a  
13 sufficient pause between thefts. *See* [State v. Huffman](#), 234 Or App 177, 227 P3d 1206  
14 (2010) (discussing merger of convictions for first-degree theft where separate items were  
15 stolen during one criminal episode and there was no evidence in the record as to when  
16 one theft ended and the other began). The state concedes that the court plainly erred in  
17 that regard, and that the error requires a remand for resentencing. We agree with the  
18 state's concession and, for the reasons expressed in [State v. Valladares-Juarez](#), 219 Or  
19 App 561, 564, 184 P3d 1131 (2008), exercise our discretion to correct the error.  
20 Accordingly, we reverse those two theft-by-receiving convictions and remand for merger

1 of those convictions and for resentencing.<sup>1</sup>

2 Convictions on Counts 9 and 10 reversed and remanded for merger;

3 remanded for resentencing; otherwise affirmed.

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<sup>1</sup> Defendant also raises other unpreserved sentencing-related errors, including regarding merger of other convictions. On remand, defendant will have an opportunity to raise those arguments to the trial court, and we decline to address them under the strictures of plain error. See [State v. Saucedo](#), 236 Or App 358, 362, 239 P3d 996 (2010) (similarly declining to reach unpreserved merger argument where "the trial court will have an opportunity to address that issue in the first instance" on remand for resentencing under ORS 138.222(5)).