

**FILED: June 6, 2012**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,  
Plaintiff-Respondent,

v.

PATRICK KINLEY CURNUTTE,  
Defendant-Appellant.

Jackson County Circuit Court  
101157FE

A145604

Mark S. Schiveley, Judge.

Submitted on April 30, 2012.

Peter Gartlan, Chief Defender, and Marc D. Brown, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

John R. Kroger, Attorney General, Mary H. Williams, Solicitor General, and Timothy A. Sylwester, Assistant Attorney General, filed the brief for respondent.

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

PER CURIAM

Reversed and remanded with instructions to merge guilty verdicts on Counts 1 and 2 into a single conviction for felon in possession of a firearm and for resentencing; otherwise affirmed.

1 PER CURIAM

2 Defendant was convicted, based on a jury verdict, of two counts of felon in  
3 possession of a firearm, ORS 166.270. The convictions arose from a controlled buy in  
4 which defendant purported to sell two different firearms to a police informant. On  
5 appeal, defendant asserts that the trial court erred in failing to merge the guilty verdicts  
6 into a single conviction under ORS 161.067(3). That statute provides, in part:

7 "When the same conduct or criminal episode violates only one  
8 statutory provision and involves only one victim, but nevertheless involves  
9 repeated violations of the same statutory provision against the same victim,  
10 there are as many separately punishable offenses as there are violations,  
11 except that each violation, to be separately punishable under this  
12 subsection, must be separated from other such violations by a sufficient  
13 pause in the defendant's criminal conduct to afford the defendant an  
14 opportunity to renounce the criminal intent."

15 ORS 161.067(3). According to defendant, "because [he] was charged under the same  
16 statutory provision for both counts, the state was the victim in both cases, and there was  
17 not a sufficient pause between possessing each gun, the trial court erred when it denied  
18 defendant's request for merger of the guilty verdicts." In response, the state argues that  
19 the trial court correctly did not merge the verdicts because ORS 161.067(3) applies "only  
20 if the crimes at issue involved a 'victim' who was a *person* and does not apply where, as  
21 here, the crimes are victimless crimes." (Emphasis in original.) We recently rejected the  
22 state's argument in [State v. Torres](#), 249 Or App 571, 578, \_\_\_ P3d \_\_\_ (2012), in which  
23 we held that "the public is a single collective 'victim' of a violation of ORS 166.270 for  
24 purposes of merger under ORS 161.067(3)." Thus, to be separately punishable under  
25 ORS 161.067(3), each of defendant's crimes--that is, each "possession," must have been

1 separated from the others "by a sufficient pause \* \* \* to afford the defendant an  
2 opportunity to renounce the criminal intent." The state does not contend that the record  
3 would support a finding of a sufficient pause in defendant's possession of the two  
4 firearms, nor is there evidence in the record to support such a finding. Accordingly, the  
5 trial court erred in failing to merge defendant's guilty verdicts on the felon in possession  
6 charges.

7           Defendant also argues that the trial court erred in instructing the jury that it  
8 could reach a nonunanimous verdict and in accepting the jury's nonunanimous verdict.  
9 We reject those arguments without discussion. See [State v. Cobb](#), 224 Or App 594, 596-  
10 97, 198 P3d 978 (2008), *rev den*, 346 Or 364 (2009); [State v. Bowen](#), 215 Or App 199,  
11 168 P3d 1208 (2007), [adh'd to as modified on recons](#), 220 Or App 380, 185 P3d 1129,  
12 *rev den*, 345 Or 415 (2008), *cert den*, \_\_\_ US \_\_\_, 130 S Ct 52 (2009).

13           Reversed and remanded with instructions to merge guilty verdicts on  
14 Counts 1 and 2 into a single conviction for felon in possession of a firearm and for  
15 resentencing; otherwise affirmed.