

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Respondent,
Respondent on Review,

v.

STEVEN DONALD PARKINS,

Defendant-Appellant,
Petitioner on Review.

Clackamas County
Circuit Court No. CR0500337

Court of Appeals No. A130219

Supreme Court No. S056356

COMBINED BRIEF ON THE MERITS, AND APPENDIX,
OF PETITIONER ON REVIEW PARKINS

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Clackamas County
Honorable JEFFREY S. JONES, Judge

Affirmed Without Opinion: May 28, 2008
Before: Edmonds, P.J., Wolheim, J., and Sercombe, J.

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BRIEF ON THE MERITS OF PETITIONER ON REVIEW PARKINS

STATEMENT OF THE CASE

Nature of the Proceeding

This is a direct criminal appeal of defendant's convictions on one count of first-degree unlawful sexual penetration, one count of second-degree unlawful sexual penetration, six counts of first-degree sexual abuse, and one count of first-degree kidnapping. Defendant waived his right to a jury trial, the trial court found him guilty of those offenses and entered a judgment of conviction, and defendant appealed. The Court of Appeals affirmed without opinion. *State v. Steven Donald Parkins*, 220 Or App 314, 185 P3d 1132 (2008).

Legal Questions Presented on Review

(1) Is an alleged kidnapping victim confined in "a place where [she] is not likely to be found," under the meaning of ORS 163.225(1)(b), when another person in the home knows that the alleged victim is in a bedroom with the defendant at the pertinent time?

(2) Should separate convictions for first-degree sexual abuse merge, when they involve a single act committed against a single victim, but rest on different legal theories?

Proposed Rules of Law

(1) For purposes of a kidnapping prosecution under ORS 163.225(1)(b), an alleged victim is not confined in "a place where [she] is not likely to be found," when

another person in the home knows where the alleged victim is in a bedroom with the defendant at the time of the purported kidnapping.

(2) Separate convictions for first-degree sexual abuse should merge when they merely represent different legal theories for proving a single act of sexual abuse against a single victim.

Summary of Argument

The trial court erred in denying defendant's motion for judgment of acquittal on the charge of first-degree kidnapping, because even when construed in the light most favorable to the state, the evidence shows that the complainant's sister knew she was in their mother's bedroom with defendant the entire time, and therefore was not confined in "a place where [she was] not likely to be found." Under the plain, natural, and ordinary meaning of the quoted language, the presence in the home of another person who was not confined, nor otherwise under defendant's control, demonstrates the complainant was not confined in such a place.

Contrary to the state's argument in the Court of Appeals, this error was sufficiently preserved, where the record shows that it was the *prosecutor* who raised the issue on this element, that defense counsel responded to that argument and distinguished the case the prosecutor cited—making the same argument defendant makes on review—and that the trial court explicitly ruled on the issue.

The trial court also erred in failing to merge defendant's first-degree sexual abuse convictions in Counts 3 and 4 into a single conviction and sentence, because each of those counts merely represent a different legal theory for proving a single act

of sexual abuse by touching of the complainant's breast—*i.e.*, by forcible compulsion or because the complainant was younger than 14. The same is true of the first-degree sexual abuse convictions in Counts 5 and 6, which alleged a single touching of the vaginal area under the same alternate theories, as well as those in Counts 7 and 8, which alleged a single touching of the buttocks. The text, context, and legislative history of the first-degree sexual abuse statute demonstrates that the legislature intended to define a single offense *via* that statute, and did not intend that the alternative ways of committing the offense would violate “two or more statutory provisions” under the meaning of ORS 161.067(1), such that multiple convictions would flow from a single touch.

This issue also was sufficiently preserved, where the state itself admitted in the Court of Appeals that defendant filed a sentencing memorandum in which he cited the anti-merger statute, ORS 161.067, and explicitly argued that his sexual-abuse convictions should be merged. Although the Court of Appeals held in *State v. Turley*, 202 Or App 40, 120 P3d 1229 (2005), *rev den* 340 Or 157 (2006), that an issue raised in a written motion is not preserved unless it is again presented at the hearing on that motion, that case misconstrued this court's preservation case law, and should be overturned. Alternatively, to the extent *Turley* is good law, it is distinguishable from this case. Moreover, because the prosecutor himself argued against merger at the sentencing hearing and recited *verbatim* the language of the anti-merger statute—apparently in response to defendant's sentencing memorandum—the issue was preserved regardless of what defendant did or did not say at the sentencing hearing.

To the extent the merger issue was not preserved, it qualifies as an error of law apparent on the face of the record, and defendant asks this court to exercise its discretion to review and correct it.

Statement of Facts

Defendant's convictions are based on allegations that, while visiting the home of his friend's girlfriend, he locked the girlfriend's 11-year-old daughter¹ in a bedroom, threw her on the bed, touched her breast, buttocks, and genital area, and inserted his finger into her vagina. (Tr 47-52, 68-69, 83-88, 95-96). Defendant testified and denied all the complainant's allegations. (Tr 322-23).

At the time in question, the complainant was living in a trailer with her mother and sister. (Tr 29-31, 142-43). The complainant's mother often had other adults hanging out at the trailer, including her then-boyfriend and his friend defendant. (Tr 31, 56-57, 59, 115-16, 131, 144-45, 165, 322-23, 329).

The complainant testified that on the day in question, her mother and went somewhere and left the complainant, her sister, and defendant alone in the trailer. (Tr 54). According to the complainant, she asked her sister where she got the cigarette she was smoking, and her sister said defendant gave it to her, and to ask him for one. (Tr 47, 80, 239). The complainant testified that she decided not to, but while walking to her room she passed defendant in her mother's room, and he offered her a cigarette. (Tr 47, 69, 81). She said she went in and got one from the pack on the

¹ The complainant was 11 years-old at the time of the alleged abuse, and 14 at the time of trial. (Tr 26, 29-30, 45, 62).

headboard of her mother's bed, and when she turned around to ask for a light, defendant threw her on the bed, locked the door, and climbed on top of her, putting his knees on her shoulders. (Tr 47-48, 51, 69, 83-86). She testified that defendant started kissing her, and when she screamed and tried to push him off, he slapped her in the face, covered her mouth with his hand, and pretended he was going to burn her with a cigarette. (Tr 48-49, 86, 88, 89). According to the complainant, while still on top of her with his knees on her shoulders, defendant put his hands under her shirt, reached around the back and undid her bra, which he pulled out through her shirt sleeve, grabbing her breasts beneath her shirt. She said he also put his hand down her shorts and put his fingers all the way up inside her vagina, and touched her buttocks. (Tr 49-50, 51-52, 68-69, 85-86, 87-88, 95-96). The complainant testified that she struggled and continued to yell throughout the incident, which she estimated lasted about a half hour, and defendant told her no one would hear her or care. (Tr 48, 51-52, 70, 87, 88). She said that when her sister jiggled the door knob, defendant let her up, and she unlocked the door, passed her sister in the hall, and went to her room.² (Tr 52-53, 87).

As far as the complainant knew, her sister was in or around the trailer the entire time the complainant was yelling, but her sister did nothing and said nothing when the complainant opened the door and came out. (Tr 52, 91).

² Several witnesses testified at trial that the complainant related a version of essentially the same story to them. (Tr 79-80, 90, 112, 164-66, 168, 170, 224-25, 227, 230, 236, 239-41, 247, 258-59, 273, 293-94).

At trial, the complainant's sister first testified that she remembered being home alone with defendant and the complainant when she was 14 and the complainant was 11, and that the complainant had asked her for a cigarette, and she suggested asking defendant, who was in their mother's room. (Tr 145-46, 153). The sister said she finished her cigarette and wondered what was taking the complainant so long, because they were supposed to go their grandmother's house together, and she jiggled the door to her mother's room, which was locked. (Tr 146-47). According to the sister, someone inside the room said something, and she went back out to the porch where she had been waiting. (Tr 147-48).

ARGUMENT

1) The complainant was not confined in “a place where she was not likely to be found,” when her sister knew where she was.

The Court of Appeals wrongly upheld the trial court's denial of defendant's motion for judgment of acquittal on the charge of first-degree kidnapping in Count 9, because even when construed in the light most favorable to the state, the evidence shows that the complainant's sister knew the complainant was in their mother's bedroom with defendant the entire time, and therefore was not confined in “a place where [she was] not likely to be found.”

a) The issue was sufficiently preserved.

Contrary to the state's argument in the Court of Appeals, this issue was sufficiently preserved. In its respondent's brief, the state admitted that, “at the close of the state's case [it was] *the prosecutor* [who] identified *State v. Montgomery*, 50 Or App 381, 824 P2d 151, *rev den* 290 Or 727 (1981), as ‘an important case with regard to the Kidnapping charge.’” (Resp Br 21, *citing* Tr 301; emphasis added). In the

same breath, the prosecutor also informed the trial court that *Montgomery* was the *only* case “in the State of Oregon with regard to secreting somebody in a place not likely to be found[.]” (Tr 301). In other words, it was *the prosecutor* who raised the issue of the sufficiency of evidence on that element.

The state also admitted in its Court of Appeals’ brief that in response to the prosecutor raising that issue, defense counsel “acknowledged *Montgomery* and tried to distinguish *Montgomery* in his argument in support of his motion for judgment of acquittal.” (Resp Br 23, *citing* Tr 303). Specifically, the record shows that defense stated the following:

[Defense counsel]: I know [the prosecutor] referred, before the break, to *State v. Montgomery*, which is a case regarding a person being secreted. And although *I would factually distinguish the present case from the Montgomery case* in that the individual that this took place—that the individual who did secret or attempt to secret or hold [the complainant], did not follow the dictates set out I think in *Montgomery* in that there wasn’t any attempt to secret her in the sense of *when somebody rattled the door, people exited the room apparently. There were other people—at least one other person, no matter what version you believe, in the trailer*, which was certainly by all accounts not difficult to hear throughout, and the sister, being the only one there, her being present in the trailer or at the furthest, present on the porch, which in some respects may even be closer physically to the room that [the complainant] claims this took place in, was certainly within ear shot, and any cry would have been heard and could have been heard, *seems to defeat the secreting aspect that is referred to in Montgomery.*

(Tr 302-03; emphasis added). In other words, in arguing that the sister’s presence in the trailer, and her act of jiggling the doorknob, distinguished this case from *Montgomery*—which the prosecutor cited on the element of “secreting somebody in a place not likely to be found”—defense counsel made the *same argument* that defendant now makes on appeal, namely, that the complainant was not held in such a

place under the facts of this case.³ Defense counsel therefore adequately preserved the issue he raises on review.

The state nonetheless also asserts that defendant then immediately abandoned or waived the above argument, by subsequently saying “[t]hat’s not *our* issue. *Our* issue is not a nit-picking argument regarding specific elements and specific crimes. * * We’re simply saying that there’s insufficient evidence as a whole, * * * that [defendant] had anything to do with any alleged molestation that took place of the [victim].” (Resp Br 21-22, 23-24, *quoting* Tr 303; emphasis added). The state’s argument is without merit.

First, reasonably construed, defense counsel’s statements were merely arguments *in the alternative*, and not an abandonment or waiver of any challenge to the sufficiency of evidence on the element of “a place no likely to be found”—which issue the *prosecutor* raised. Specifically, defense counsel’s statements about “*our* issue” was merely an acknowledgement that, because this was a bench trial, the judge was both the decider of the motion judgment of acquittal, *and* the ultimate finder of fact on the question of defendant’s guilt or innocence. In prefacing the second part of his argument by stating that “as the Court knows from the entire case from opening statement to now” (Tr 303), defense counsel was merely being consistent with the

³ Additionally, because—as noted—the prosecutor himself identified *Montgomery* as the only “case in the State of Oregon with regard to *secreting somebody in a place not likely to be found*” (Tr 301; emphasis added), the state mischaracterized the record in asserting that defense counsel’s above-quoted response to *Montgomery* was “not specific to the kidnapping count as defendant suggests in his [appellant’s] brief at page 32[.]” (Resp Br 21).

overall defense theory—that the evidence did not establish beyond a reasonable doubt that it was defendant, as opposed to someone else, who molested the complainant. (See Tr 20-25 [defense opening statement], 367-68 [excerpts from closing argument]). That did not mean, however, that defendant abandoned or waived the issue raised by the prosecutor on the specific element of kidnapping, which defense counsel already had addressed. If—as the state asserted—defense counsel was waiving the “not likely to be found” issue under *Montgomery*, and instead moving for a judgment of acquittal *solely* on the ground that the evidence did not show defendant to be the perpetrator, he would not have responded at all the prosecutor’s citation to *Montgomery*, nor otherwise “tried to distinguish *Montgomery* in his argument in support of his motion for judgment of acquittal”—which the state acknowledged he did. (Resp Br 23).

Second, the state mischaracterized the record in implying that the trial court “did not have the opportunity to make the correct ruling[.]” (Resp Br 22).⁴ In denying defendant’s motion for judgment of acquittal, the trial court explicitly addressed the sufficiency of the evidence on the element raised by the prosecutor.

THE COURT: Okay. That motion will be denied, and I do believe that there’s sufficient evidence on *the kidnapping count* to support the allegations set forth in the indictment, particularly the evidence that was brought up by the State, that there were attempts by [the complainant] to seek help and to scream, but that the Defendant told her that nobody would hear and nobody would care.

⁴ In arguing that this issue was not preserved, the state cited *State v. Wyatt*, 331 Or 335, 343, 15 P3d 22 (2000), for the proposition that an “argument is not preserved where trial court did not have the opportunity to make the correct ruling[.]” and *State ex rel. Juv. Depart. v.* 177 Or App 187, 190, 33 P3d 729 (2001), for the proposition that “[i]n determining whether an assignment of error is preserved, the most significant question is whether the trial court had a realistic opportunity to make the right decision.” (Resp Br 22).

And, in light of that evidence, I believe that *that charge* is legally sound in this case. (Tr 304-05; emphasis added). In its preservation argument in the Court of Appeals, the state completely ignored the above-quoted language, in which the trial court explicitly denied defendant's motion for judgment of acquittal on *the kidnapping count*. Under these circumstances, the issue was sufficiently preserved. *See State v. Reyes-Camarena*, 330 Or 431, 438, 7 P3d 522 (2000) ("reasons for preservation rule are to allow adversary to present its position and to permit trial court to understand and correct any error") (*citing State v. Brown*, 310 Or 347, 356, 800 P2d 259 (1990)).

Although the state also argued in the Court of Appeals that defendant "waived" this issue, it did not provide any "waiver" analysis separate from its preservation argument, other than citing very various "waiver" cases, one of which mentions "invited error." (Resp Br 23-24). Because the state did not develop any "waiver" or "invited error" argument apart from its "preservation or error" argument, defendant here addresses only the preservation question. *See State v. Dilts*, 336 Or 158, 164 ns 6 and 7, 82 P3d 593 (2003) (declining to address claims not developed on appeal), *vac'd and rem'd on other grounds* 542 US 934, 124 S Ct 2906, 159 L Ed 2d 809 (2004).

b) The evidence in this case does not satisfy the plain meaning of "not likely to be found" sufficient to support a kidnapping conviction.

On the merits, a rational trier of fact could not have found on this record that the complainant's confinement was in "a place where [she was] not likely to be found," for purposes of first-degree kidnapping. ORS 163.235(1) provides:

A person commits the crime of kidnapping in the first degree if the person violates ORS 163.225 with any of the following purposes:

- (a) To compel any person to pay or deliver money or property as ransom;
- (b) To hold the victim as a shield or hostage;
- (c) To cause physical injury to the victim; or
- (d) To terrorize the victim or another person.

ORS 163.225(1) provides:

A person commits the crime of kidnapping in the second degree if, with intent to interfere substantially with another's personal liberty, and without consent or legal authority, the person:

- (a) Takes the person from one place to another; or
- (b) Secretly confines the person in *a place where the person is not likely to be found*.

(Emphasis added). In this case, the charge of first-degree kidnapping in Count 9 alleged that defendant “did unlawfully and knowingly, without consent or legal authority, secretly confine [the complainant] in a place she was not likely to be found, with the intent to interfere substantially with [her] personal liberty and with the purpose of causing physical injury to [the complainant] * * * .” (ER-3).

In construing the meaning of a statute, this court attempts to discern the legislative intent under its well-established methodology—first examining the statute’s text and context, and if intent remains unclear, then the legislative history, and finally maxims of statutory construction. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993). Because the kidnapping statutes do not define the phrase “a place where the person is not likely to be found,” this court should apply the plain, natural, and ordinary meaning of that language. *PGE*, 317 Or at 611. This court typically discerns plain meaning by resort to the dictionary. *See*,

e.g., *Smoldt v. Henkels & McCoy, Inc.*, 334 Or 507, 511, 53 P3d 443 (2002). The dictionary defines “likely,” in part, as

adj * * * **1 a** : of such a nature or so circumstanced as *to make something probable* < any approach more ~ of success > * * * **2** : seeming to justify belief or expectation < if there is a failure in one quarter . . . it is a ~ sign of failure in the other—R.P. Blackmur > : CREDIBLE < a ~ story > **b** : having *a better chance of existing or occurring than not* : having the character of a *probability* < tell the road authorities of their ~ future demands—John Kemp > < it is ~ that modern farming methods are increasing the quantities of small animals—*Amer Guide Series: Ark* >

* * * * *

adv * * * : in all *probability* : PROBABLY < a popular dance hall was more ~ her choice than his—Valentine Williams > < they will ~ betray themselves by loud breathing—*Scribner’s* > * * *

Webster’s Third New Int’l Dictionary, 1310 (unabridged ed 1993) (emphasis added).

As pertinent here, “found” is defined as the “past of FIND[.]” *Webster’s*, 897. The dictionary defines “find,” in part, as

1 a (1) : to come upon accidentally : gain the first sight of (as something new or unknown) < *found* the tracks of some unknown animal > < *found* a large stone blocking the way > < the child *found* a coin in the street > < the well diggers *found* a number of Indian artifacts > (2) : to fall in with (a person) : ENCOUNTER < ~s interesting people wherever he goes > * * * **2 a** : to come upon (a material object) by searching or effort < they *found* water at a depth of 10 feet > < the committee must ~ a suitable man for the job > < *found* his missing brother at last > * * *

Webster’s, 852 (emphases in original). Based on those definitions, “a place where the person is not likely to be found,” as used in ORS 163.225(1)(b), means a place where it is not probable the person will be discovered or come upon, either accidentally or by searching.⁵

⁵ As for the plain meaning of “secretly confines,” the dictionary defines “secretly,” in part, as “in secret,” “in secrecy,” or “not openly.” *Webster’s*, 2052. The
Footnote continued...

Defendant can locate no pertinent statutory context or legislative history shedding light on the intended meaning of “a place where the person is not likely to be found” as used in ORS 163.225(1)(b). According to the Court of Appeals, the “[l]egislative history reveals only that the Criminal Law Revision Commission considered the meaning of subsection (b) [of ORS 163.225(1)] to be a question of fact for the jury. Minutes, June 17, 1969, Criminal Law Revision p. 6.” *State v. Montgomery*, 50 Or App at 386 (construing meaning of “a place where the person is not likely to be found”).⁶ A prerequisite to the jury’s resolution of that question, however, is a determination of the meaning of the pertinent language, which is a question of law for the court. *Springfield Education Assn. v. School Dist.*, 290 Or 217, 224, 621 P2d 547 (1980) (“The determination of the meaning of a statute is one of law, ultimately for the court.”). *See also Montgomery*, 50 Or App at 386 (“Thus, this court’s function on appeal is to determine whether there was sufficient evidence, viewed in the light most favorable to the prosecution, for a rational trier of fact to find

(...continued)

word “secret” is defined, in part, as “kept from knowledge or view,” “concealed,” or “hidden.” *Id.* The dictionary defines “confine,” in part, as “to hold within bounds,” “to keep in narrow quarters,” or to “imprison.” *Id.*, 476.

⁶ More specifically, according to that legislative history, in response to a question about whether “the language ‘... he is not likely to be found ...’ * * * was a legal term which is quite clear,” a member of the Criminal Law Revision Commission responded that “this would be a question of fact before a jury.” APP-8 [Minutes, June 17, 1969, Criminal Law Revision p. 5]). Although Jacob Tanzer—then of the Attorney General’s Office—“added that this was a recognized definition in the receiving and concealing of stolen property and he thought it would be in this area, also[,]” APP-9 [Minutes, June 17, 1969, Criminal Law Revision p. 6]), defendant can locate no where in the “receiving and concealing of stolen property” statute or case law where the term “not likely to be found” has been defined, or even used.

that defendant ‘secretly confined’ the victim in a place where he was ‘not likely to be found.’”).

Although the legislative history of ORS 163.225(1)(b) also demonstrates that Oregon’s second-degree kidnapping statute was based on those of Michigan and New York (APP-3 [Commentary to Proposed Criminal Code,⁷ §§ 98 and 99, B. Derivation, p. 100]), defendant can locate no decisions from those jurisdictions—nor any others—interpreting their pertinent language *before* Oregon enacted its current kidnapping statutes in the Criminal Code of 1971. For that reason, the typical rule of statutory construction relying on interpretations from other jurisdictions does not apply here. *See, e.g., State v. Cooper*, 319 Or 162, 167-68, 874 P2d 822 (1994) (“When the Oregon legislature adopts a statute modeled after another jurisdiction, an interpretation of that statute by the highest court of that jurisdiction that was rendered in a case decided before adoption of the statute by Oregon is considered to be the interpretation of the adopted statute that the Oregon legislature intended.”).

As such, this court is left with the above-described plain meaning of “a place where the person is not likely to be found”—*i.e.*, a place where it is not probable the person will be discovered or come upon, either accidentally or by searching. In this case, the bedroom of the complainant’s mother does not satisfy that definition, where the record shows the sister knew exactly where the complainant was the entire time. According to both witnesses, when the complainant asked her sister where she got the

⁷ The commentary to the 1971 Criminal Code is considered part of its legislative history. *State v. Chakerian*, 325 Or 370, 379, 938 P2d 756 (1997).

cigarette, the sister told her to ask defendant for one, and when the sister went to see what was taking so long, she jiggled the doorknob on the door to their mother's bedroom where the complainant and defendant were located. (Tr 47, 52-53, 80, 87, 146-47, 239-40, 244-45). Because the sister did, in fact, find the complainant simply by going to where she knew the complainant and defendant were, the evidence does not show that the complainant was confined in "a place where [she was] not likely to be found."

For that reason this case is distinguishable from the Court of Appeals' opinion in *Montgomery*. In that case, the Court of Appeals held that the jury could conclude that the defendant secretly confined the victim in a place where he was not likely to be found under the meaning of ORS 163.225(1)(b), where there was evidence that the defendant and his brother locked the victim in the bathroom of his own apartment and closed the curtains, one of them held a knife on him, the other said he was not at home when two police officers knocked at the front door of the apartment, and the officers left. 50 Or App at 383-84, 386. According to the Court of Appeals,

although a victim's own bathroom is not ordinarily a place where that person is not likely to be found, the room can be made into such a place by the efforts of the kidnapper. Here, defendant and his brother made a calculated effort to insure that the police would not find the victim in his own apartment *and they succeeded*.

50 Or App at 386-87 (emphasis added). Here, however, even accepting the state's evidence as true, it did not show that defendant succeeded, because the sister knew exactly where the complainant and defendant were, and when she jiggled the

doorknob, the complainant got up, unlocked the door and walked out of the bedroom.⁸ (Tr 52-53, 87, 146-47, 240, 244-45).

In denying defendant's motion for judgment of acquittal, the trial court relied on evidence of "attempts by [the complainant] to seek help and to scream, but that the Defendant told her that nobody would hear and nobody would care." (Tr 305). As noted, there was also testimony from the complainant that defendant locked the bedroom door, held her down, slapped her, covered her mouth, and threatened to burn her with a cigarette when she screamed. (Tr 47-49, 51, 69, 83-86, 88, 89, 145-46, 153). But all of that evidence went, at most, only to the question of whether the complainant was "secretly confined," not to whether she was confined "in a place where she was not likely to be found." The trial court's reasoning simply failed to address the meaning of that latter element, and the lack of evidence supporting it.

The same is true of the state's argument on the merits in the Court of Appeals, which essentially parroted the trial court's flawed rationale. According to the state in its respondent's brief, "[a]lthough the victim was in a room in her own house, the fact that defendant took other actions to prevent others from finding her is sufficient evidence to establish that he secretly confined her in a place where she was unlikely to be found." (Resp Br 25). However, the only such "actions" the state identified in its brief pertained to the fact of confinement, not to whether that confinement was in

⁸ The state's assertion in its Court of Appeals brief that it was *defendant* who unlocked the door (Resp Br 25) is contrary to the record. The complainant testified that *she* unlocked the door when defendant let her up, after they heard the sister jiggling the doorknob. (Tr 53, 87).

place the complainant was not likely to be found. (See Resp Br 2: “evidence that defendant locked the victim in a room, pinned her down on a bed, threatened to burn her with a cigarette if she screamed, and told her that no one would here her or care if she screamed, was sufficient to establish that defendant secretly confined the victim in a location where she was unlikely to be found”).

The state’s attempt in the Court of Appeals to analogize this case to *Montgomery* was also without merit. In its respondent’s brief, the state asserted:

* * * [T]he fact that defendant unlocked the door after the victim’s sister jiggled the doorknob does not mean that the victim was still not secretly confined before that point in time. There is no temporal requirement for the secret confinement. *Montgomery* is not to the contrary. Although the defendant’s efforts in *Montgomery* to prevent the police from locating the victim were successful, 50 Or App at 387, that fact was not determinative of whether the actions taken up to that point already constituted secret confinement. There is no suggestion in *Montgomery* that had the police discovered the victim in the bathroom—as opposed to the defendant later allowing the victim to leave—the actions taken by [the] defendant up to that point would not have constituted secret confinement. If that were a correct interpretation of *Montgomery* and of ORS 163.225, the only time the state could prove secret confinement would be in a situation where the victim escaped without the assistance of any other people or where the kidnappers voluntarily allowed the victim to leave. That interpretation of the statute applied in this case would require this court to ignore all of defendant’s actions up to the point where the doorknob is jiggled. * * *

(Resp Br 25-26; emphasis added). The state’s argument misconstrued defendant’s argument, as well as the Court of Appeals’ analysis in *Montgomery*.

The significance of the defendant’s success in concealing the victim in *Montgomery* is that it reflected *the overall state of the evidence* on the question of whether the confinement was in “a place where the person was not likely to be found.” Specifically, that the police in *Montgomery* did *not find* the victim merely reflected that the “calculated effort” of the defendant and his brother in that case—

which included locking the victim in the bathroom, closing the curtains, holding a knife on him, and telling the police he was not there—was sufficient under the circumstances to transform the victim’s own home into a place where he was not likely to be found.

Conversely, in this case, the sister’s act of jiggling the doorknob to the bedroom where defendant the complainant were located was significant because it demonstrated, unlike in *Montgomery*, that defendant’s actions—which included locking the bedroom door, pinning the complainant to the bed, slapping her face, threatening to burn her with a cigarette, and telling her no one would care if she screamed—were *not enough* under the circumstances to transform the complainant’s own home into a place where she was unlikely to be found. That is so because she *was in fact found*. In that sense, what distinguishes this case from *Montgomery* is the presence in the home of someone not confined or otherwise under defendant’s control, who knew the complainant’s precise location during the entire period of confinement.

In other words, contrary to the state’s misreading of defendant’s argument, what is significant is not the fact that defendant let the complainant up, such that she was able to unlock the bedroom door and walk out. Instead, what is significant is that in looking for the complainant, the sister knew to jiggle the doorknob of their mother’s bedroom in the first place, because she knew that was where the complainant was located. Under those circumstances, the mother’s bedroom did not constitute “a place where [the complainant was] not likely to be found.”

The state further argued in the Court of Appeals that the sister's presence in the trailer did not distinguish this case from *Montgomery*, because she "was outside the house smoking a cigarette when defendant locked the victim in the bedroom[,] and she "drank heavily and had consumed a significant amount of alcohol on the day of the assault." (Resp Br 25). Therefore, according to the state, "although she may have been in the vicinity of the bedroom when the attack occurred, a rational fact finder could conclude that her presence was not enough to overcome defendant's other efforts to secretly confine the victim." (Resp Br 25).

To the extent the state meant that the sister's intoxication rendered her *unable to assist* the complainant, that is not what the statute requires. Instead, according to the plain language of ORS 163.225(1)(b), the question is the character of the place of confinement—in this case, whether the complainant was confined in a place where she was not likely to be found, given the sister's presence in the home during that confinement. That the sister knew where the complainant was the entire time, *despite* her intoxication, is evidence that their mother's bedroom did not constitute such a place. Alternatively, to the extent the sister's ability to help is relevant, evidence that she was capable of locating the complainant demonstrates she was equally capable of calling the police or a neighbor for help. Along those lines, it is also not dispositive that the sister was on the porch smoking a cigarette during much of the confinement, because when she came inside to look for the complainant, she went exactly to where she knew the complainant and defendant were located.

c) Decisions from other jurisdictions construing identical or similar language support defendant’s interpretation.

To the extent the intended meaning of ORS 163.225(1)(b) remains unclear after the first and second levels of analysis under *PGE*, defendant offers—as persuasive authority—decisions from other jurisdictions interpreting kidnapping statutes that employ language identical or similar to Oregon’s. Stated differently, at the third level of *PGE*’s analysis, the most pertinent maxim of statutory construction is that “the court will attempt to determine how the legislature would have intended the statute be applied, had it considered the issue.” *Carlson v. Myers*, 327 Or 213, 225, 959 P2d 31 (1998). On that question, defendant offers interpretations of identical or similar language in other jurisdictions’ kidnapping statutes, which were issued after Oregon adopted ORS 163.225(1)(b).

For example, the kidnapping statutes of seven other states—Alabama, Connecticut, Nebraska, New York, North Dakota, Texas, and Washington—make it a crime to “abduct” another person⁹—defining “abduct,” in part, as “secreting or holding [the person] in *a place where he is not likely to be found*[.]”¹⁰ (Emphasis added). *See also* MRS 17-A [Maine], § 301(1)(B)(2) (defining kidnapping, in part,

⁹ Ala Code 1975, §§ 13A-6-43(a), 13A-6-44(a); Conn General Statutes §§ 53a-92(a), 53a-94(a); Neb Rev Stat § 28-313(1); New York CPL 135.20, 135.25; NDCC [North Dakota] §§ 12.1-18-01(1), 12.1-18-02(1); Tex Penal Code Ann., §§ 20.03(a), 20.04(a); RCW [Wash] 9A.40.020(1), 9A.40.030(1).

¹⁰ Ala Code 1975, § 13A-6-40(2)(a); Conn General Statutes § 53a-91(2)(A); Neb Rev Stat § 28-312(2)(a); New York CPL 135.00(2)(a); NDCC [North Dakota] § 12.1-18-04(1)(a); Tex Penal Code Ann., § 20.01(2)(A); RCW [Wash] 9A.40.010(2)(a).

as “restraining” another person “[b]y secreting and holding the other person in *a place where the other person is not likely to be found*”) (emphasis added).

In Texas, “proof that a victim is kept *isolated from anyone who might have been of assistance* meets the element of secreting or holding in a place where the victim is not likely to be found.” *Megas v. State*, 68 SW 3d 234, 240 (Tex App - Houston [1st Dist.] 2002) (emphasis added). In *Megas*, the Texas Court of Appeals held that a jury could have found that the defendant “abducted” the victim—his girlfriend—where the evidence showed she attempted to exit his parked car on the side of the highway, and he dragged her back into car and drove away from a motorist who had stopped to render aid. 68 SW 3d at 240.

Similarly, in Washington state, the term “abducted” has been interpreted to mean that the victim is “held in areas or under circumstances where it is unlikely those persons directly affected by the victim’s disappearance” will find her—such persons being, for example, her “parents, legal guardian or custodian, and law enforcement officers.” *State v. Stubsjoen*, 48 Wash App 139, 145, 738 P2d 306, *rev den* 108 Wash 2d 1033 (1987). In *Stubsjoen*, the defendant argued that the state failed to prove she had “secreted or held the baby in a place where she was not likely to be found” because “virtually all of the time she had the child, they were in public areas where the child could easily be seen.” 48 Wash App at 144. The Washington Court of Appeals rejected that argument, because the defendant “in effect concealed the child by acting as though the child was her own.” *Id.* at 145. In other words, although having the child in several public places, the defendant’s actions made it

unlikely the child’s parents or the police would find her. *Id.* See also *State v. Pawling*, 23 Wash App 226, 227-28, 232, 597 P2d 1367, *rev den* 92 Wash 2d 1035 (1979) (“removal of the victim from her parents’ house”—where she was alone—“to the waterfront [portion of the property] after 10 p.m. would constitute restraint by secreting or holding in an unlikely place”).

Under the Texas and Washington interpretations of the “not likely to be found” language in those states’ kidnapping statutes, the record in this case does not show that the complainant was “isolated from anyone who might have been of assistance,” nor that it was unlikely the complainant’s mother, family members, or law enforcement officers would find her, where—as noted—her sister knew the entire time that the complainant was in their mother’s bedroom, in their own home. See, e.g., *Beeman v. State*, 828 SW 2d 265, 267 (Tex App - Fort Worth 1992) (“the State failed to show beyond a reasonable doubt that [defendant] took [the victim store clerk] to a place where she was not likely to be found,” where she was held in storeroom of a convenience store on a highway, the storeroom was visible from the store’s public restroom, and “it is not unlikely that [a] customer would go back to the rest room-storeroom area to see if the clerk were there”).

Indeed, in Texas, an individual’s own home is *not* considered a “place where [she] is unlikely to be found” under the meaning of that state’s kidnapping statute. See *Kenny v. State*, ___ SW 3d ___, ___, No. 14-06-00764-CR, 2007 WL 2790373, *6 (Tex App – Houston [14th Dist] September 27, 2007) (“appellant drove his adult girlfriend directly from a local pub to *their nearby residence*, a place she desired to go

and that, as noted, does not constitute a place where she was unlikely to be found under these facts[.]” and “there is no evidence that appellant affirmatively sought to isolate the complainant from people who could potentially render aid to her”).¹¹

Although the Connecticut Supreme Court and the Connecticut Court of Appeals have upheld kidnapping convictions based on victims being restrained in their own homes, it is unclear whether those decisions were based on the victims being held in “a place not likely to be found,” or on the alternative ground of the defendants “using or threatening to use physical force or intimidation.” *See State v. Paolella*, 211 Conn 672, 675-77, 678-79, 561 A2d 111 (1989) (defendant forced his way into victim’s home with a rifle, disconnected telephone, forcibly prevented her from escaping, physically and sexually assaulted her, tied her up and gagged her, and told victim’s son he would shoot his mother if the son said anything); *State v. Betancourt*, 106 Conn App 627, 630, 634-35, 942 A2d 557, *cert den* 287 Conn 910 (2008) (defendant and others pushed their way into victim’s apartment, knocking him

¹¹ In *Kenny*, the Texas Court of Appeals concluded that “[t]he State does not cite, and we have not found, any authority holding that a victim’s own residence can constitute a ‘place where [the victim] is unlikely to be found’ and that, by extension, an expressed intention to take the victim home could satisfy the secreting requirement under section 20.01(2)(A).” ___ SW 3d at ___, 2007 WL 2790373, * 5. In support of that statement, *Kenny* cited *Schweinle v. State*, 915 SW 2d 17, 19 (Tex Crim App 1996), which held that “a rational jury could have believed that [the] defendant’s house, where complainant was held against her will, did not constitute [a] place where complainant was not likely to be found because there was evidence that complainant had [a] key to house, had formerly lived there, and had spent [the] night there [the] past three or four nights before [the] offense[.]” ___ SW 3d at ___, 2007 WL 2790373, * 5. In the alternative, the court in *Kenny* held that “[e]ven assuming a victim’s own residence could constitute such a place under the statute, we do not find any facts in this record to justify such a conclusion here.” ___ SW 3d at ___, 2007 WL 2790373, * 5.

to floor and breaking his glasses, bound his hands and feet with duct tape, covered his head with a pillow case, asked where his guns were, and demanded to know personal identification number of his bank card); *State v. Rocco*, 58 Conn App 585, 591-92, 754 A2d 196, *cert den* 254 Conn 931 (2000) (defendant waited inside victim's apartment, and when she entered he grabbed her by her hair, threw her against the wall, and hit her numerous times in the head with a hammer, kicked her, took all telephones off receivers, would not let her use bathroom, forced her to shower and use enema bag, and refused to let her seek medical care or allow her children into apartment). Alternatively, the extensive efforts of the defendants in *Paoletta*, *Betancourt*, and *Rocco* to isolate and conceal their victims made those cases more like *Montgomery*, distinguishing them from this case.

For these reasons, a rational fact-finder in this case could not have concluded from the evidence that the complainant was secretly confined in "a place where [she] was not likely to be found." The trial court therefore erred in denying defendant's motion for judgment of acquittal on the charge of first-degree kidnapping in Count 9, and the Court of Appeals erred in upholding the trial court's ruling on that issue.

2) Convictions based on a single act against a single victim, and involving only different legal theories, should merge.

The trial court also erred in not merging, under ORS 161.067(1), the sexual abuse convictions in Counts 3 and 4 into a single conviction and sentence, those in Counts 5 and 6 into a single conviction and sentence, and those in Counts 7 and 8 into a single conviction and sentence.

a) The issue was sufficiently preserved.

Contrary to the state's argument in the Court of Appeals, defendant also sufficiently preserved this issue. In its respondent's brief, the state conceded that "defendant filed a sentencing memorandum in which he cited ORS 161.067 and argued that his convictions 'should be merged for purposes of conviction[.]'" (Resp Br 26). More specifically, in that memorandum, defendant argued that his "convictions for sexual abuse in the present case should be merged for purposes of conviction[.]" citing ORS 161.067 and *State v. McCloud*, 177 Or App 511, 518, 34 P3d 699 (2001), for the proposition that "the statutory language was intended to mean something different than merely offenses that may be punished by consecutive sentences" and "the court recognizes the distinction between a merger for the purposes of conviction and a merger for sentencing purposes[.]" (9/12/05 Memorandum of Law, p. 2).

The state, however, argued in its respondent's brief that defendant did not sufficiently preserve the issue of merger because he made a *different* argument at the sentencing hearing—namely, that the court should not impose consecutive sentences. (Resp Br 26-27). According to the state, defendant denied the trial court "the opportunity to address the merger issue that defendant now raises on appeal." (Resp Br 27, citing *State v. Turley*, 202 Or App 40, 47-48, 120 P3d 1229 (2005), *rev den* 340 Or 157 (2006), for the proposition that an "argument raised in motion to suppress memo but not again raised at hearing is not preserved for appellate review"). The state's preservation argument is without merit for several reasons.

First, as with the kidnapping issue on defendant's motion for judgment of acquittal, defense counsel's argument at the sentencing hearing *against* imposing consecutive sentences was in response to the prosecutor's immediately preceding argument *in favor* of consecutive sentences. (Tr 379, 382, 384, 387-88). That did not mean defense counsel waived or abandoned the merger argument he already had preserved in his sentencing memorandum. Instead, defense counsel again was merely arguing in the alternative—*i.e.*, if the trial court did not merge the convictions, it still should not impose consecutive sentences.

Second, to the extent the Court of Appeals' decision in *Turley* means that an issue sufficiently raised in a written motion or memorandum is not preserved for appellate review unless explicitly argued at the applicable hearing, that is contrary to this court's preservation case law, and *Turley* should be overturned. *See, e.g., State v. Milbradt*, 305 Or 621, 630, 756 P2d 620 (1988) (“a defense attorney does not have to walk over any more legal coals to protect the record after first stating the grounds for the objection”). In *Turley*, although the defendant explicitly asserted in her written motion to suppress that she “was not advised of her *Miranda* rights after being taken into custody and therefore any and all statements were made without a knowing and intelligent waiver of defendant's right to remain silent[,]” her arguments at the hearing on that motion focused entirely on a different issue—whether there was probable cause to believe that her parolee husband was in her trailer, such that police could enter to execute a warrant for the husband's arrest. 202 Or App at 43-45, 47. Moreover, “[i]n denying the motion to suppress, the trial court based its decision on

the probable cause issue, and, in response, defendant did not address the issue of the admissibility of the statements or seek a specific ruling on the *Miranda* issue.” *Id.* at 47-48. The Court of Appeals held that under those circumstances, “the trial court was entitled to infer that, although defendant had initially raised the issue in her motion, she was no longer asserting it.” 202 Or App at 48 (*citing State v. Chavez*, 335 Or 44, 48, 56 P3d 923 (2002), as “holding that, by asserting that one ground was dispositive, the defendant was implicitly telling the trial court not to consider an alternative ground”).

The Court of Appeals’ holding in *Turley* mischaracterized this court’s opinion in *Chavez*, and was therefore an unwarranted extension of that decision. In *Chavez*, this court held that the “defendant *affirmatively asked* the trial court not to consider the argument that he seeks to advance in this court.” 335 Or at 48 (emphasis added). The issue presented to this court on review in *Chavez* was “whether the Vienna Convention on Consular Relations (VCCR) * * * grants to foreign nationals who have been arrested by state authorities a personal right to be told that they have the right to contact and communicate with their country’s consul and, if so, whether suppression of evidence is the appropriate remedy for a violation of that right.” 335 Or at 46 (footnote omitted). Although the Court of Appeals had addressed that question on its merits, this court declined to do so, because the defendant

expressly told the trial court that he was not trying to argue that the VCCR created individual rights beyond those that *Miranda* confers. By asserting that the court’s resolution of the *Miranda* claim was dispositive, defendant *affirmatively asked* the trial court not to consider the argument that he seeks to advance in this court.

335 Or at 48 (emphasis added). The issue therefore was not preserved. *Id.*

As the foregoing demonstrates, the defendant in *Chavez* did not “implicitly tell” “the trial court not to consider an alternative ground,” as the Court of Appeals incorrectly characterized that case in *Turley*. Moreover, unlike in *Chavez*, the defendant in *Turley* never *expressly* or *affirmatively* told the trial court that she was no longer asserting her *Miranda* claim. The same is true in this case, where defendant never told the trial court he was withdrawing or otherwise abandoning his request for merger of sentences. Because *Chavez* does not support *Turley*’s holding that an issue sufficiently raised in a written motion or memorandum is not preserved unless explicitly argued at the hearing on that motion, *Turley* was wrongly decided and should be overturned.

Third, even if correctly stating the law of preservation, *Turley* is distinguishable from this case. The specific basis for the Court of Appeals’ holding in *Turley* was that “[t]he *Miranda* issue raised by [the] defendant was dependent on the state of the evidentiary record made at the hearing on the motion to suppress” and under those circumstances a trial court is not given the requisite opportunity to consider and correct the asserted error, “if a defendant does not alert the court *at the completion of the evidence* that a ruling is sought.” 202 Or App at 48 (emphasis added). Moreover, the defendant in *Turley* did “not raise the issue when the testimony from the hearing was adopted for purposes of the stipulated facts trial.” *Id.* at 47.

Here, however, unlike in *Turley*, the merger issue did not involve a fact-based determination dependent on an evidentiary hearing, but rather was a straight question

of law based on the trial court's previously rendered guilty verdicts on the six counts of first-degree sexual abuse. (*See* Resp Br 28: "the state agrees that this assignment of error presents a question of law"). As such, even if defense counsel failed to re-state his merger request at the sentencing hearing, that did not entitle the trial court to infer, as in *Turley*, that defendant was no longer requesting a merger. Additionally, the Court of Appeals itself in *Turley* qualified its holding with the following *caveat*:

* * * [T]hat is not to say that every issue asserted in a pre-hearing or trial memorandum must be argued to be preserved for purposes of appeal. The key to satisfying preservation requirements is to alert the trial court and opponents in some manner as to issues on which a ruling is requested before the matter concludes.

202 Or App at 48 n 3. In this case, defendant's sentencing memorandum sufficiently alerted both the trial court and the prosecutor that a merger ruling was requested at the sentencing hearing.

Fourth, along those lines, even if defendant's sentencing memorandum did not sufficiently put the trial court on notice of the need to address the question of merger, the prosecutor did, by raising it several times himself at the sentencing hearing. Specifically, the prosecutor opened his sentencing argument by asserting, "there are nine counts in the indictment, and the defendant was found guilty of all nine counts, and they're all Ballot Measure 11 counts. I believe that *none of the charges legally merge* for sentencing purposes. *They're all separate convictions.*" (Tr 379; emphasis added). The prosecutor then closed his sentencing arguments by explicitly arguing that ORS 161.067(1) did not mandate merger.

[Prosecutor]: * * * [ORS] 161.067 talks about determining punishable offenses for violation of multiple statutory provisions, and/or multiple victims or repeated violations. Subsection 1 is the one that applies in this case. It says

when the same conduct or criminal episode violates two or more statutory provisions, and each provision requires proof of an element that the others do not, there are as many separately punishable offenses as there [are] separate statutory violations. And we have that in this case. * * *

(Tr 390). (*See also* Tr 381: assertion by prosecutor that sexual abuse convictions in Counts 3 and 4 “don’t merge for sentencing purposes”). Because the prosecutor was allowed to “present [his] position,” and the trial court was permitted “to understand and correct any error,” the reasons for the preservation rule were satisfied, *Reyes-Camarena*, 330 Or at 438, and the merger issue was sufficiently preserved for review.

For these reasons, the state’s preservation arguments in the Court of Appeals were without merit.

b) Defendant’s sexual abuse convictions should have merged.

To the extent they are based on a single act of touching the complainant, defendant’s sexual abuse convictions should have been merged under ORS 161.067(1), which provides:

When the same conduct or criminal episode violates *two or more statutory provisions* and each provision requires proof of an element that the others do not, there are as many separately punishable offenses as there are separate statutory violations.^[12]

¹² Subsection (2) of ORS 161.067—which “involves two or more victims”—does not apply here. Subsection (3) of ORS 161.067 provides, in part:

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

(Emphasis added). According to this court, the term “two or more statutory provisions” means provisions that address “separate and distinct legislative concerns.” *State v. Crotsley*, 308 Or 272, 278, 779 P2d 600 (1989) (construing *former* ORS 161.062(1) (1987), the nearly identical precursor to ORS 161.067(1)).

In *Crotsley*, this court held that a defendant who had forcibly raped a 14-year-old girl was properly convicted under *former* ORS 161.062(1) of both first-and third-degree rape, as well as first-and third-degree sodomy, because in a single act he had violated the first-degree rape statute, ORS 163.375(1)(a) (involving sexual intercourse by forcible compulsion), the third-degree rape statute, ORS 163.355(1) (involving sexual intercourse with a victim younger than 16), as well as the first-degree sodomy statute, ORS 163.405(1) (involving deviate sexual intercourse by forcible compulsion), and the third-degree sodomy statute, ORS 163.385(1) (involving deviate sexual intercourse with a victim younger than 16). 308 Or at 278-81. According to *Crotsley*, “each statutory alternative addresses a separate and distinct legislative concern, and each alternative is a separate statutory ‘provision’ for purposes of [former] ORS 161.062(1).” *Id.* at 279.¹³ See also *State v. Barrett*, 331 Or 27, 33, 10 P3d 901 (2000) (“Because the defendant’s conduct [in *Crotsley*] violated four

(...continued)

In this case, the trial court found at sentencing that although “this was a crime of molestation, and it was a crime of violence, * * * it was *one crime*. It was *one episode*. It was *one attack*.” (Tr 392; emphasis added). The prosecutor did not object to that finding.

¹³ This court in *Crotsley* further concluded, under the second part of the statute, that “each statutory offense requires proof of a separate element.” 308 Or at 279-80.

different statutes[.] * * * the court held that the defendant had violated ‘two or more statutory provisions.’”).

Conversely, *State v. Barrett* held that multiple counts of aggravated murder involving only one victim should have merged into a single conviction and sentence under *former* ORS 161.062(1), because the multiple counts in that case merely represented alternative ways of committing one offense—*i.e.*, although the defendant in *Barrett* was found guilty of the aggravated murder statute in multiple respects, he had killed only one victim. 331 Or at 35-36.¹⁴ According to this court, “although [the] defendant properly was charged with and convicted of multiple counts of aggravated murder based on the existence of multiple aggravating circumstances, defendant’s conduct in intentionally murdering one victim did not violate ‘two or more statutory provisions,’ as that phrase is used in *former* ORS 161.062(1)[.]” in part because “the use of a single section * * * is some indication that the legislature intended to define a single crime.” 331 Or at 31, 35.

Specifically, ORS 163.095 defines aggravated murder as “murder as defined in ORS 163.115 which is committed under, or accompanied by, any of the following circumstances[.]”—such as, for example, if the victim was a police officer or the murder was committed personally and intentionally by the defendant. ORS

¹⁴ The defendant in *Barrett* was found guilty, among other things, of (1) aggravated felony murder, based on his intentional killing of the victim during the commission of a robbery; (2) aggravated felony murder, based on his intentional killing of the victim during the commission of a kidnapping; (3) aggravated murder committed to conceal the perpetrator’s identity; and (4) “simple murder” under ORS 163.115. 331 Or at 29.

163.095(2)(a)(A), (2)(d). Based on the text and context of ORS 163.095, this court in *Barrett* reasoned that the various aggravating factors did not each define a separate offense, but instead

constitute no more than *different theories* under which murder becomes subject to the enhanced penalties for aggravated murder. That defendant’s conduct in intentionally murdering the victim in this case was “aggravated” by “any,” *i.e.*, one or more, act surrounding that conduct does not convert that conduct into more than one separately punishable offense.

331 Or at 36 (emphasis added). As such, it was error to convict the defendant in *Barrett* of multiple counts of aggravated murder. 331 Or at 37.¹⁵

In *State v. White*, 341 Or 624, 147 P3d 313 (2006), this court explained that *Barrett* “maps out the proper approach to the question whether [a] defendant’s conduct * * * violated ‘two or more statutory provisions’ * * * for purposes of ORS 161.067(1)”—*i.e.*, the court “must determine if the legislature intended to define a single crime or two separate crimes when it enacted the [applicable] statute[.]” 341 Or at 638-39. As part of that approach, this court in *White* cited its opinion in *State v. Kizer*, 308 Or 238, 779 P2d 604 (1989)—issued the same day it decided *Crotsley*. 341 Or at 631.

¹⁵ According to *Barrett*, “the appropriate procedure would have been to enter one judgment of conviction reflecting the defendant’s guilt on the charge of aggravated murder, which judgment separately would enumerate each of the existing aggravating factors.” 331 Or at 37. *See also State v. Acremant*, 338 Or 302, 330, 108 P3d 1139 (2005) (noting *Barrett*’s holding that, “when a trial court convicts a defendant of multiple counts of aggravated murder for the death of a single victim based upon different aggravating circumstances, the trial court should enter only one judgment of conviction of aggravated murder for that victim, with the judgment enumerating each of the supporting aggravating factors”).

In *Kizer*, this court held that a defendant was wrongly convicted and sentenced for two counts of forgery based on him forging and passing a single check, because although the applicable statute appeared to contain two separate criminal prohibitions—against “making” or “uttering” a forged instrument, ORS 165.007—the accompanying legislative commentary clearly revealed a legislative intent to define a single crime. 308 Or at 243-44. According to *White*, “*Kizer* * * * demonstrates that it is necessary to examine the relevant substantive statute (or statutes) in order to determine whether the legislature intended that particular conduct be treated as violating ‘two or more statutory provisions’ for purposes of ORS 161.067(1).” 341 Or at 631.

The question in *White* was whether a defendant who made a single unlawful entry into the victim’s apartment could be convicted of two counts of first-degree burglary, where he “was found guilty of ‘entering and remaining unlawfully’ with the intent to menace and also was found guilty of ‘entering and remaining unlawfully’ with the intent to commit assault[.]” 341 Or at 637. After examining the text of the first-degree burglary statute, its context (the second-degree burglary statute), and its legislative history, this court in *White* concluded that

[a]lthough the legislature intended to provide two alternative ways to commit the crime of burglary, it did not define those alternatives in a manner that would permit multiple burglary convictions to arise out of a single unlawful entry. It did not intend to provide that a defendant would violate separate ‘statutory provisions’ contained within the burglary statutes by, first, unlawfully entering a building and then by unlawfully remaining therein.

341 Or at 640 (emphasis in original). This court further concluded:

Neither do the burglary statutes suggest a legislative intent to treat a single unlawful entry or remainder as violating more than one “statutory

provision” based on the burglar’s intent to commit more than one crime inside the building. The burglary statute refers to an “intent to commit *a* crime” (emphasis added) inside the building—any crime. Under the clear words of the statute, the state must prove *some* criminal intent, but the nature of the intended crime is irrelevant. That is, there is no apparent basis for differentiating a burglary based on an intent to assault from a burglary based on an intent to menace. Defendant’s act of unlawfully entering the victim’s apartment with either intent or with both intents would violate only one statutory provision.

341 Or at 640.

Under this court’s analysis in *White, Barrett, Kizer, and Crotsley*, defendant’s single act in this case of touching the complainant’s breasts did not violate “two or more statutory provisions” under the meaning of ORS 161.067(1). Neither did his single act of touching her vaginal or genital area, nor his single act of touching her buttocks.

First, as a factual matter, the record demonstrates that each of the three pairs of sexual-abuse charges at issue here merely represented different legal theories for proving a single act of first-degree sexual abuse of the complainant. Specifically, Count 3 alleged that defendant “did unlawfully and knowingly, *by means of forcible compulsion*, subject [the complainant] to sexual contact by touching her *breast*,” and Count 4 alleged that defendant “did unlawfully and knowingly subject [the complainant], *a person under the age of fourteen years*, to sexual contact by touching her *breast*[.]” (ER-1 to ER-2; emphasis added). Similarly, the allegations in Counts 5 and 6 also merely involve alternate theories for proving a single act of first-degree

sexual abuse of the complainant by touching her “vaginal and genital area,”¹⁶ and the allegations in Counts 7 and 8 involve different theories for proving a single act of first-degree sexual assault of the complainant by touching her “buttocks.”¹⁷

Moreover, the complainant did not testify, nor assert in any of her out-of-court statements, that defendant touched her breasts more than once, nor her vaginal area more than once, nor her buttocks more than once. In fact, at sentencing, the prosecutor admitted that “Count 3 and 4 go together[,]” “Count 5 and 6 go together[,]” and “Count 7 and 8 go together”—explicitly stating that “Count 3 and 4 are Sex Abuse in the First Degree, and I believe that is the *breast touch*[,]” “Count 5 and 6 * * * [i]t’s a *vaginal touch* * * * it’s *the same act*[,]” and “Counts 7 and 8 is * * * the *buttocks touch*—same situation, double count of Forcible Compulsion, under the age of 14.” (Tr 379, 381-82; emphasis added).

Second, as a legal matter, the text, context, and legislative history of ORS 163.427 demonstrate that the legislature intended to define a *single crime* when it defined the offense of first-degree sexual abuse in that statute, and did not intend that the alternative ways of committing that offense would violate “two or more statutory

¹⁶ Count 5 alleged that defendant “did unlawfully and knowingly, *by means of forcible compulsion*, subject [the complainant] to sexual contact by touching her vaginal and genital area,” and Count 6 alleged that defendant “did unlawfully and knowingly subject [the complainant], *a person under the age of fourteen years*, to sexual contact by touching her vaginal and genital area[.]” (ER-2; emphasis added).

¹⁷ Count 7 alleged that defendant “did unlawfully and knowingly, *by means of forcible compulsion*, subject [the complainant] to sexual contact by touching her buttocks,” and Count 8 alleged that defendant “did unlawfully and knowingly subject [the complainant], *a person under the age of fourteen years*, to sexual contact by touching her buttocks[.]” (ER-2; emphasis added).

provisions” under the meaning of ORS 161.067(1), such that multiple convictions would flow from a single touch.

As pertinent to this case, ORS 163.427, provides, in part:

(1) A person commits the crime of sexual abuse in the first degree when that person:

(a) Subjects another person to sexual contact^[18] and:

(A) The victim is less than 14 years of age; [or]

(B) The victim is subjected to forcible compulsion by the actor[.]

As a textual matter, the legislature’s choice to define first-degree sexual abuse in a single statutory section, like the aggravated murder statute in *Barrett*, demonstrates its intent to define a *single crime*. In that sense, this case is distinguishable from *Crotsley*, in which the defendant’s single act amounted to different degrees of rape and sodomy—which were defined in four different statutes—and thus *violated four different statutes*. 308 Or at 278-81. Here, however, because defendant’s single act of touching the complainant’s breast violated only *one statute*, the legislature did not intend that that single act would violate “two or more statutory provisions” under the meaning of ORS 161.067(1). The same is true of defendant’s single act of touching the complainant’s vaginal area, and his single act of touching her buttocks. For that reason, there is no merit to the state’s argument in the Court of Appeals that “[d]efendant’s convictions in this case are materially indistinguishable from the crimes of conviction in *Crotsley*.” (Resp Br 30).

¹⁸ ORS 163.305(6) defines “sexual contact” as “any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the actor for the purpose of arousing or gratifying the sexual desire of either party.”

This conclusion is confirmed by the legislative history of ORS 163.427. The offense of *second-degree* sexual abuse was originally defined, in part, as follows:

- (1) A person commits the crime of sexual abuse in the second degree if he subjects another person to sexual contact; and
 - (a) The victim does not consent to the sexual contact; or
 - (b) The victim is incapable of consent by reason of being mentally defective, mentally incapacitated or physically helpless.

(APP-10 [Proposed Criminal Code, § 115, p. 121]). The offense of *first-degree* sexual abuse was originally defined, in part, as follows:

- (1) A person commits the crime of sexual abuse in the first degree when he subjects another person to sexual contact; and
 - (a) The victim is less than 12 years of age; or
 - (b) The victim is subjected to forcible compulsion by the actor.

(APP-11 [Proposed Criminal Code, § 116, p. 122]). In explaining the relationship between those two provisions, the official commentary states:

The *offense* is raised a degree if *either* of the following factors is present:

- (1) The victim is under 12 years of age; *or*
- (2) The victim was subjected to forcible compulsion by the actor.

(APP-12 [Commentary to Proposed Criminal Code, §§ 115 and 116, A. Summary, p. 123]; emphasis added). Although largely just reflecting the words of the first-degree sexual abuse statute, that portion of the commentary nonetheless confirms that the legislature intended the above-described factors merely to represent *alterative ways* to commit a *single* offense. The commentary explicitly states that the “offense”—singular—is raised to the first degree if *either* factor is present. In other words, the legislature did not intend the aggravators to define separate crimes. In that sense, they are akin to the aggravating factors listed in ORS 163.095—the aggravating murder

statute—which this court held in *Barrett* do not each define a separate offense, but instead “constitute no more than *different theories* under which murder becomes subject to the enhanced penalties for aggravated murder.” 331 Or at 36 (emphasis added). As in *Barrett*, the existence of both those aggravating factors under the facts of this case merely raised defendant’s single act of sexual contact in each instance to first-degree sexual abuse.

As such, because defendant’s single act of touching the complainant’s breast did not violate “two or more statutory provisions” under the meaning of ORS 161.067(1), the trial court erred in failing to merge Counts 3 and 4 into a single conviction and sentence for first-degree sexual abuse. The same is true of defendant’s single act of touching the complainant’s vaginal area as represented by Counts 5 and 6, and his single act of touching the complainant’s buttocks as represented by Counts 7 and 8.

However, because ORS 161.067(1) “reflects a legislative intent that ‘a person who commits multiple crimes by the same conduct or during the same criminal episode should have a criminal record reflecting each crime committed.’” *White*, 341 Or at 630 (*quoting Crotsley*, 308 Or at 276-77), the appropriate procedure, as set out in *Barrett*, “would have been to enter one judgment of conviction” for each pair of offenses, “reflecting the defendant’s guilt on the charge of” first-degree sexual abuse, “which judgment separately would enumerate each of the existing aggravating factors.” 331 Or at 37. For these reasons, defendant’s sexual abuse convictions

should be reversed and this case remanded with instructions to merge the above described convictions.

The state's argument to the contrary in the Court of Appeals is without merit. The state asserted in its respondent's brief that defendant's "separate sexual abuse convictions in this case" should merge because, under the rationale of *Crotsley*, they "were targeted at separate and distinct legislative concerns." (Resp Br 30). But the same could be said of the separate aggravating murder factors in *Barrett*, the "entering and remaining unlawfully" burglary allegations in *White*, and the "making" and "uttering" forgery allegations in *Kizer*. In each of those cases, however, this court held on the basis of the statutory language and legislative history that the legislature did not intend to define separate crimes such that a single act satisfying those alternative theories would support separate convictions and sentences. The same is true in this case, based the legislature's intent to define a single crime of sexual abuse, as reflected in the text, context, and legislative history of the ORS 163.427.

c) To the extent the issue was not preserved, it qualifies as an error of law apparent on the face of the record.

Although it is defendant's position that this issue was sufficiently preserved, to the extent this court concludes otherwise, the issue nonetheless satisfies the requirements for error apparent on the face of the record under ORAP 5.45(1) and *State v. Brown*.

In the Court of Appeals, the state admitted that the merger of convictions is an issue of law,¹⁹ and that in this case the issue appears on the face of the record. (Resp Br 28). The state’s assertion that the error is not apparent—because it is reasonably in dispute (Resp Br 31-32)—is without merit. As noted above, the state’s argument that defendant’s sexual abuse convictions should not merge under *Crotsley* is contrary to this court’s analysis and holdings in *Barrett*, *White*, *Kizer*, and *Crotsley* itself—the latter of which is distinguishable from this case—as well the text, context, and legislative history of the first-degree sexual abuse statute. For that reason, the merger issue qualifies as plain error, and this court is free to exercise its discretion to review and correct it.

Defendant requests that the court do so because the state does not have a legitimate interest, and the ends of justice would not be served, in having the judgment wrongly reflect three additional convictions that should have merged. *See Ailes v. Portland Meadows, Inc.*, 312 Or 376, 382 n 6, 823 P2d 956 (1991) (providing those among a non-exclusive list of reasons for appellate court to exercise discretion). Although defendant did not receive consecutive sentences, the error nonetheless affects his liberty interest because it wrongly increases his criminal history score, and could affect the length and intensity of his post-prison supervision upon his release. Moreover, correcting that error on review would not “sandbag” or otherwise take the prosecutor or trial court by surprise, because defense counsel clearly raised the merger

¹⁹ *See, e.g., Barrett*, 331 Or at 36-37 (reversing failure to merge convictions, without deference to trial court).

issue in his sentencing memorandum, and the prosecutor responded to it, explicitly arguing against merger at the sentencing hearing. The trial court therefore had a realistic opportunity to address the issue of merger. Additionally, correcting the error will not involve extensive proceedings on remand, but only the entry of a corrected judgment of conviction. For these reasons, defendant respectfully requests that this court exercise its discretion and correct the erroneous failure to merge his convictions.

CONCLUSION

For the reasons asserted, this court should reverse the decision of the Court of Appeals.

Respectfully submitted,

s/Daniel J. Casey

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that I filed the original Petitioner's Brief on the Merits with the State Court Administrator, Appellate Records Section, at 1163 State Street, Salem, Oregon 97301-2563, on January 7, 2009.

I further certify that I served a copy of Petitioner's Brief on the Merits on Paul L. Smith, attorney for respondent on review, on January 7, 2009, by mailing two copies, with postage prepaid, in an envelope addressed to:

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s/Daniel J. Casey

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