



COURT OF APPEALS

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The Court of Appeals issued these opinions:

State of Oregon v. Scott Leander Camirand
(A165966 - Lincoln County Circuit Court)

Timothy Kelley v. Washington County
(A166979 - Washington County Circuit Court)

Department of Human Services v. L. C.
(A171489 - Marion County Circuit Court)

State of Oregon v. Christopher Thomas Fuller
(A168630 - Yamhill County Circuit Court)

Marcia Ann Baertlein and Bradley Hase Stocks
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State of Oregon v. Jose Omar Ortiz-Rico
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State of Oregon v. Lametrius Tarrell Davis
(A161830 - Multnomah County Circuit Court)

State of Oregon v. Anthony Morgan Mailman
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State of Oregon v. Nicholas Patrick Merrill
(A165105 - Multnomah County Circuit Court)

Miguel Madrigal-Estrella v. State of Oregon
(A163556 - Washington County Circuit Court)

State of Oregon v. Scott Michael McNutt II
(A167963 - Washington County Circuit Court)

The Court of Appeals issued these *per curiam* opinions:

State of Oregon v. David William Fincher
(A167430 - Deschutes County Circuit Court)
State of Oregon v. James Calvin Dollman
(A167916 - Lane County Circuit Court)
State of Oregon v. Francisco Javier Chavez-Reyes
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State of Oregon v. Kristian Helmer Skjervem
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State of Oregon v. Michael David Phillips, Sr.
(A168626 - Washington County Circuit Court)
State of Oregon v. Alexander John Postlethwait
(A168635 - Klamath County Circuit Court)
State of Oregon v. Bryan Michael White
(A169094 - Washington County Circuit Court)
State of Oregon v. Gregory Thomas Hanson
(A169614 - Multnomah County Circuit Court)

The Court of Appeals affirmed these cases without opinion:

Marvin J. Daniels v. Brandon Kelly
(A166618 - Marion County Circuit Court)
State of Oregon v. Robert Michael Bigelow
(A167417 - Coos County Circuit Court)
First Horizon Home Loans v. Glen A. M. Larimer
(A167698 - Clackamas County Circuit Court)
State of Oregon v. Omar Gonzalez Fierro
(A167857 - Yamhill County Circuit Court)
State of Oregon v. Scotty Ray Pollard
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(A167944 - Klamath County Circuit Court)
State of Oregon v. Rudy Foki Fifita
(A167967 - Wasco County Circuit Court)
Erin Marie Doucet and Maurice Edward Doucet
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Kevin Tamar Davis v. State of Oregon
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State of Oregon v. Jacen D. Schuchardt
(A168093 - Multnomah County Circuit Court)

State of Oregon v. Alexander Eugene Clemens
(A168231 - Lane County Circuit Court)

State of Oregon v. Steven Lamar Roberts
(A168253 - Multnomah County Circuit Court)

State of Oregon v. Benjamin Lee Keith
(A168260 - Grant County Circuit Court)

State of Oregon v. Danielle Linn Wilson
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State of Oregon v. Zachery Wayne Summers
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State of Oregon v. Norman Gailen Gould
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State of Oregon v. Kaley Carlene Cervantes
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State of Oregon v. Andrea Jovonne Burton
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State of Oregon v. Lance Mitchell Griesen
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State of Oregon v. Erika C. Hise-Denk
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State of Oregon v. Casey Devron Longtree
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State of Oregon v. John Dale Parker
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Timothy Rodney Williamson v. Brandon Kelly
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State of Oregon v. D. B.
(A170719 - Linn County Circuit Court)

State of Oregon v. W. B. S.
(A170889 - Lane County Circuit Court)
Department of Human Services v. S. E.
(A172322 - Washington County Circuit Court)

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State of Oregon v. Scott Leander Camirand
(DeVore, J.)

Defendant appeals from a judgment of conviction for coercion and robbery in the third degree. He asserts, among other contentions, that the trial court erred by (1) allowing the prosecutor to argue facts not introduced into evidence about why a substance found on defendant's gloves had not been DNA tested as blood; and (2) by refusing to give the witness-false-in-part jury instruction. Held: Defendant failed to demonstrate that he was prejudiced by either asserted error. Although the trial court should have sustained defendant's objection to the prosecutor's improper closing argument, there was little likelihood that the argument affected the jury's determination about whether the substance on the gloves was, in fact, blood. And, given the limited value that the witness-false-in-part instruction provides, and the fact that defendant challenged the credibility of the state's witnesses during his closing argument, any error in failing to give that instruction was harmless. Affirmed.

Timothy Kelley v. Washington County
(DeVore, J.)

Plaintiff was a community corrections specialist for defendants. He brought this discrimination action, asserting that he was terminated because of his disability, obesity. Defendants responded that they discharged plaintiff for a nondiscriminatory reason, his inability to perform essential functions of the position, particularly running in response to emergencies. Plaintiff appeals a judgment dismissing his claim, arguing that the trial court erred in granting defendants' motion for directed verdict. He contends that the court erred in concluding (1) that running in response to emergencies was an essential function of the job and (2) that plaintiff failed to offer any evidence that he was able to perform that function. Held: Although the evidence compelled the conclusion, as a matter of law, that running is an essential function of the job, plaintiff presented some evidence to support the reasonable inference that he is capable of performing that function. Reversed and remanded.

Department of Human Services v. L. C.
(DeVore, P. J.)

In this consolidated juvenile dependency case, mother and father appealed judgments in which the juvenile court asserted dependency jurisdiction over their children. Since the time that they filed their appeals, the juvenile court dismissed its dependency jurisdiction. The Department of Human Services filed a notice of probable mootness, suggesting that the appeals are moot because they seek reversal on judgments that have already been dismissed. Mother and father claim that the judgments will still have collateral consequences if not reversed. The Court of Appeals concluded that the jurisdictional judgments will not significantly affect either parent's rights in the ways that they identified, that a decision on the merits will have no practical effect, and that the appeals are moot. Appeals dismissed.

State of Oregon v. Christopher Thomas Fuller
(Lagesen, P. J.)

Defendant's half-sister gave him permission to live in her car but not to drive it. Defendant drove it. For that conduct, defendant was charged and convicted of unauthorized use of a vehicle (UUV), ORS 164.135(1)(a). On appeal, he assigns error to the trial court's denial of his motion for judgment of acquittal, contending that there is insufficient evidence to convict him of UUV because he came into possession of the car with his sister's permission. Held: Under *State v. Civil*, 283 Or App 395, 415-18, 388 P3d 1185 (2017), when "a person who is in possession of a vehicle pursuant to an agreement with the owner deviates from the agreed use," that deviation cannot support a conviction for UUV under ORS 164.135(1)(a). The trial court therefore erred. Reversed in A168630; affirmed in A168631.

Marcia Ann Baertlein and Bradley Hase Stocks
(DeHoog, P. J.)

Father appeals a judgment concluding that, under a 2014 stipulated judgment modifying child support and the payment of college expenses, the amount each parent was required to pay for college costs was to be calculated as a percentage of the University of Oregon projected amount for the relevant academic year, regardless of the child's actual costs, and without regard to scholarships. The trial court also ruled that father was not entitled to a credit for payments he had made for one term for one child, when she ultimately did not complete the term. Father also appeals a supplemental judgment awarding mother and one child their attorney fees and costs. Held: Considering the text, context, and extrinsic evidence of the circumstances underlying its formation, the trial court did not err in its interpretation of the 2014 stipulated judgment. The court also did not err in denying father a "carry-over" credit, because father presented no viable legal theory entitling him to such a credit. Mother and child were entitled to attorney fees pursuant to ORS 107.135(8) because mother's action to enforce the 2014 stipulated judgment, which child joined, was "materially and reasonably" related to father's motion to modify child support. *Berry v. Huffman*, 247 Or App 651, 660, 271 P3d 128 (2012). Affirmed.

State of Oregon v. Jose Omar Ortiz-Rico
(DeHoog, P. J.)

Defendant appeals a judgment of conviction for, among other offenses, four counts of first-degree rape (Counts 1 through 4) and four counts of first-degree sexual abuse (Counts 5 through 8). In several assignments of error, defendant argues that the trial court erred in failing to merge the guilty verdicts in Counts 1 through 4 and in failing to merge the guilty verdicts in Counts 5 through 8. Defendant argues that merger is required because, under ORS 161.067(3), the underlying criminal acts were not separated by sufficient pauses in his conduct. Held: The trial court did not err in declining to merge Counts 1 and 3 or Counts 5 and 7. As to the remaining counts, however, the trial court declined to make factual findings regarding merger. Therefore, the Court of Appeals vacated and remanded those convictions for further consideration of merger under ORS 161.067(3). Convictions on Counts 2, 4, 6, and 8 vacated and remanded; remanded for resentencing; otherwise affirmed.

State of Oregon v. Lametrius Tarrell Davis

(James, J.)

Defendant appeals from a judgment of conviction for first-degree robbery, assigning error to the trial court's denial of his motion for a judgment of acquittal. He argues that the state failed to adduce sufficient evidence of the "violent, tumultuous or threatening behavior" element of disorderly conduct because his conduct was purely speech and was not accompanied by physical force. Held: Viewed in the light most favorable to the state and in the context of the encounter as a whole, a rational trier of fact could have found that defendant resisted his friends' attempts to pull him back--a use of strength and power--and that defendant aggressively pushed an officer's hand away in a manner that would indicate an incitement to a response. Affirmed.

State of Oregon v. Anthony Morgan Mailman

(James, J.)

Defendant appeals from a judgment of conviction for felony fourth-degree assault constituting domestic violence, ORS 163.160; strangulation constituting domestic violence, ORS 163.187; second-degree criminal mischief, ORS 164.354; and second-degree disorderly conduct, ORS 166.025. This is the second of two opinions issuing today in which a defendant asserts that State v. Hendricks, 273 Or App 1, 359 P3d 294 (2015), was wrongly decided, arguing that, in light of legislative history, a temporary interruption of breathing is legally insufficient to constitute a physical injury or impairment of condition for purposes of assault, thus requiring the strangulation and assault verdicts to merge. Held: In contrast with the defendant's argument in State v. Merrill, ___ Or App ___, ___ P3d ___ (Mar 18, 2020), defendant's failure to raise a challenge before the trial court that Hendricks was wrongly decided precludes consideration of that argument on appeal. Affirmed.

State of Oregon v. Nicholas Patrick Merrill

(James, J.)

Defendant appeals from a judgment of conviction for felony fourth-degree assault constituting domestic violence, ORS 163.160, and felony strangulation constituting domestic violence, ORS 163.187. Raising three assignments of error, defendant argues that the trial court erred in its denial of his motion for judgment of acquittal as to assault. This is the first of two opinions issuing today in which a defendant asserts that State v. Hendricks, 273 Or App 1, 359 P3d 294 (2015), was wrongly decided, arguing that, in light of legislative history, a temporary interruption of breathing is legally insufficient to constitute a physical injury or impairment of condition for purposes of assault, thus requiring the strangulation and assault verdicts to merge. Held: The evidence was legally sufficient to support a conviction of assault. Additionally, in contrast with the defendant's argument in State v. Mailman, ___ Or App ___, ___ P3d ___ (Mar 18, 2020), defendant's failure to challenge Hendricks below does not preclude consideration of that argument on appeal. Moreover, it is possible to prove the elements of assault, without also necessarily proving all the elements of strangulation. Thus, the two do not merge, and the trial court did not err. Affirmed.

Miguel Madrigal-Estrella v. State of Oregon

(Aoyagi, J.)

Petitioner, a citizen of Mexico living in the United States without legal immigration status, pleaded guilty and was convicted of one count of driving under the influence of intoxicants, ORS 813.010. Following his

conviction, petitioner unsuccessfully sought post-conviction relief. Relying on *Padilla v. Kentucky*, 559 US 356, 130 S Ct 1473, 176 L Ed 2d 284 (2010), petitioner argued that that his trial counsel was constitutionally ineffective under the Sixth Amendment to the United States Constitution for failing to adequately inform him of the immigration consequences of his guilty plea. The post-conviction court denied relief. Petitioner appeals, assigning error to that ruling. Held: The post-conviction court did not err in denying relief. Petitioner failed to establish that the immigration consequences of his plea were "clear and easily ascertainable" within the meaning of *Padilla*. As such, trial counsel only had to advise petitioner that his plea might carry adverse immigration consequences, at which point it was for petitioner to decide whether to seek specific immigration advice before entering the plea. The record is sufficient to establish that petitioner was advised that a guilty plea might have immigration consequences. Affirmed.

State of Oregon v. Scott Michael McNutt II
(Kistler, S. J.)

The state appeals from a pretrial order granting defendant's motion to suppress evidence obtained pursuant to a search warrant. The trial court ruled that the affidavit filed in support of the warrant did not establish probable cause that the files on defendant's computer contained child pornography in violation of ORS 163.684 and ORS 163.686. Held: The affidavit included three sets of facts that collectively established probable cause that the files on a computer in defendant's home contained child pornography: (1) the names of two specific files downloaded from the computer implied that both files contained child pornography; (2) an experienced detective's assessment after viewing some of the 300 files downloaded from the computer that those files contained child pornography; and (3) defendant's use of a network that is commonly employed to share child pornography over the internet. Pretrial order reversed and remanded.

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