

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Respondent,

v.

GREGORY ALLEN BOWEN,

Defendant-Appellant.

Curry County Circuit
Court No. 02CR0019

SC S061149

RESPONDENT'S ANSWERING BRIEF

Appeal on automatic and direct review
of the Judgment of conviction and sentence of death
imposed by the Circuit Court for Curry County
Honorable JESSE C. MARGOLIS, Judge

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RESPONDENT'S ANSWERING BRIEF

STATEMENT OF THE CASE

Respondent accepts defendant's statement of the case.

Summary of Argument

On direct review of the original judgment entered in this case, this court affirmed all of defendant's convictions and the sentences imposed, including his convictions for aggravated murder and murder and the death sentence imposed on those convictions. But this court remanded for entry of a corrected judgment that would merge the convictions for aggravated murder and murder into single conviction and to impose a single sentence of death on that merged conviction.

On remand, defendant contended that ORS 138.012(2)(a) required resentencing, but the trial court rejected that argument and entered a corrected judgment that merged the convictions for aggravated murder and murder. On direct review of the corrected judgment, this court rejected defendant's several claims of error, including his claim that the trial court erred by not holding a resentencing hearing. This court held that, in the particular circumstances of this case, resentencing was not required. But this court remanded the case for the trial court to enter another corrected judgment, this time to enumerate the aggravating factors in the underlying charges of aggravated murder on which defendant was convicted.

At the second remand hearing, defendant renewed his request for a resentencing and asked to be personally present for such a hearing. The trial court denied that request, and it entered a second corrected judgment in accordance with this court's instructions. In this direct review of the second corrected judgment, defendant does not dispute that that judgment fully conforms to this court's remand instructions. But he now contends for the first time that ORS 138.222(5)(b) required the trial court to hold a resentencing hearing.

Defendant's new argument has no merit. First, it comes too late. He could have raised that argument before the trial court during the first remand hearing and before this court in the previous direct-review proceeding, but he did not. As noted, this court denied his claim that he was entitled to a resentencing based on ORS 138.012, and it remanded only for entry of another corrected judgment in accordance with its specific instructions. The trial court during the second remand hearing had no authority to do anything but enter a corrected judgment in accordance with this court's instructions; it had no authority to hold a resentencing hearing. Consequently, defendant's new claim for a resentencing based on ORS 138.222(5)(b) is barred by "law of the case" and "claim preclusion" principles. In any event, ORS 138.222(5)(b) does not

apply to this case. The correct provision is ORS 138.222(5)(a), which does not require a resentencing. And this court previously ruled that a resentencing is not necessary in these circumstances.

ANSWER TO ASSIGNMENT OF ERROR NO. 1

The trial court correctly denied defendant's request for resentencing.

ANSWER TO ASSIGNMENT OF ERROR NO. 2

The trial court correctly denied defendant's request to be physically present for the hearing on entry of a corrected judgment.

Preservation of Error

As defendant concedes, he did not previously raise either before the trial court or this court the claim that he now makes on review based on ORS 138.222(5)(b). But he did raise before the trial court his claim that he was entitled to be present at the remand hearing. (App Br 24-25, 29-30).

Standard of Review

The state agrees with defendant that this court reviews for error of law. (App Br 25, 31).

ARGUMENT¹

A. Pertinent Procedural History

On December 29, 2001, defendant assaulted _____ and then, in a separate incident, murdered _____. He was charged by an 18-count indictment with crimes based on those two incidents, including two alternative counts of aggravated felony murder and one count of intentional murder for killing _____.² (App Br, ER 1). *See State v. Bowen*, 340 Or 487, 489-91, 135 P3d 272 (2006), *cert den*, 127 S Ct 1258 (2007) (“*Bowen I*”). After a trial on the charges of aggravated murder and the other related charges involving _____ the jury found defendant guilty on all those charges. In a subsequent penalty-phase trial, the jury returned a verdict that made sufficient findings to require imposition of a death sentence, and the court imposed a death sentence. *Id.* at 492.

On direct review, this court first rejected all of defendant’s challenges to the pretrial rulings and the guilt-phase verdicts. *Id.* at 492-517. This court then rejected all of his challenges to the penalty-phase verdict and the death

¹ Because defendant’s two claims of error present the same legal issue, this brief consolidates them for purposes of argument. ORAP 5.45(6).

² Count 1 alleged that defendant committed aggravated murder in violation of ORS 163.095(2)(d) by “personally and intentionally” murdering _____ during a burglary, and count 2 alleged that he committed aggravated murder in violation of ORS 163.095(2)(d) by “personally and intentionally” murdering Christiansen during a robbery. (App Br, ER 2).

sentence. *Id.* at 517-25. Next, this court considered defendant's claim that "the trial court erred by entering multiple convictions and imposing multiple sentences of death" on the two guilty verdicts based on the alternative charges of aggravated felony murder alleged in counts 1 and 2. *Id.* at 525. This court agreed with defendant and held:

[T]he trial court should have entered one judgment of conviction for the aggravated murder of the victim, which enumerated separately each aggravating factor and imposed one sentence of death. Accordingly, we reverse the judgments of conviction for aggravated murder on counts one and two, vacate the sentences of death imposed on those convictions, and remand to the trial court for entry of corrected judgments and resentencing.

Id. at 527. Finally, this court considered defendant's related claim that "the trial court erred by failing to merge his conviction of intentional murder [based on count 3] with his convictions for aggravated murder for the death of the same victim." *Id.* at 527. This court agreed with defendant and ruled that those convictions must be merged under ORS 161.067(1). This court ordered that it would "reverse the judgment of conviction for intentional murder on count three, vacate the sentence imposed on that conviction, and remand to the trial court for entry of a corrected judgment and resentencing." *Id.* at 529.

In the final "Conclusion" paragraphs of the opinion, this court summarized the disposition and set out the scope of the remand:

In summary, we find that only defendant's assignments of error relating to the trial court's entry of multiple aggravated murder convictions and sentences of death, and the court's failure

to merge defendant's conviction of intentional murder with his convictions of aggravated murder, are well taken. Accordingly, *we remand the case for entry of a corrected judgment of conviction, reflecting defendant's guilt on the charge of aggravated murder, based upon alternative aggravating factors, and intentional murder, and imposing one sentence of death. We otherwise affirm the judgments of conviction and the sentences of death.*

The judgments of conviction and sentences of death are affirmed. The case is remanded to the circuit court for further proceedings.

Id. at 529 (emphasis added). In short, this court affirmed all of defendant's convictions and all the sentences, including the death sentence, but it vacated the judgment and remanded only to correct the *form* of the judgment—*i.e.*, “for entry of a corrected judgment of conviction” that merges the homicide convictions and imposes only “one sentence of death.”

In April 2007, defendant filed a petition for post-conviction relief challenging the judgment in this case. *Bowen v. Belleque*, Marion County Circuit Court, case no. 07C-13345. When the parties to that proceeding realized that the circuit court in this case had not yet entered a corrected judgment in accordance with this court's remand order in *Bowen I* they asked the trial court to enter a corrected judgment. After a hearing, the trial court denied several motions filed by defendant—including one requesting “resentencing” under ORS 138.012(2)(a)—and entered a corrected judgment that merged the convictions for aggravated murder and murder in accordance with this court's remand order. *See State v. Bowen*, 352 Or 109, 112-13, 282

P3d 807 (2012) (“*Bowen II*”).

On direct review of the corrected judgment, this court held that the trial court correctly rejected defendant’s claim that he was entitled to a resentencing hearing under ORS 138.012(2)(a). This court held that, in the particular context of this case, the merger error in the original judgment did not require a resentencing:

Because this court’s intended disposition in *Bowen I* was to remand solely for entry of a corrected judgment, the corollary result is that the court did not intend that the remand proceed to the resentencing provisions set out in ORS 138.012(2)(a). * * * If this court determines that an error under ORS 161.067(1)—such as that at issue in *Bowen I*—occurred, then the court must remand, so that the trial court may enter a corrected judgment that accurately reflects the crimes for which the defendant was convicted.

* * * * *

Defendant is correct that, in the event of an error under ORS 161.067(1), a renewed sentencing determination may be required, depending on the circumstances of the case. For example, in *State v. Barrett*, 331 Or 27, 10 P3d 901 (2000), the trial court had imposed consecutive life sentences for two aggravated murder convictions involving the same victim. After concluding that the trial court had erred under a companion provision to ORS 161.067(1) and that the defendant’s record must “depict the full extent of his involvement in the criminal conduct that led to the victim’s death,” 331 Or at 36, this court remanded for entry of a corrected judgment of conviction for one count of aggravated murder that separately enumerated the applicable aggravating factors and resentencing based on entry of a corrected judgment. In *Barrett*, a new sentencing determination was required in addition to the corrected judgment, because this court had invalidated the basis for the previously imposed consecutive life sentences.

By contrast, however, the jury here returned two unanimous verdicts imposing the death sentence, one on each charge of aggravated murder involving victim _____ Unlike in *Barrett*, where the error under what is now ORS 161.067(1) would have resulted in a longer period of incarceration, the practical result of the jury’s sentencing determination here was to return a single sentence of death, because—unlike a life sentence with the possibility of parole—a death sentence can be imposed only once. It follows that the error identified in *Bowen I* was remedied by entry of a corrected judgment for a single conviction of aggravated murder and a single sentence of death, which, in turn ensured that defendant’s record accurately reflected the crimes for which he was convicted. That narrow result is consistent with our statutory and constitutional obligations to affirm the verdict and the judgment of the trial court unless an error affects a substantial right of a party.

Bowen II, 352 Or at 115-18 (some citations and footnote omitted).

But this court then ruled that the manner in which the corrected judgment merged the guilty verdicts on the two counts of aggravated murder was not adequate, because it did not “separately enumerate each aggravating factor underlying the merged convictions for aggravated murder.” *Id.* at 352-53. Based on that error, this court remanded the case to the trial court to enter another corrected judgment in accordance with its specific directions:³

We therefore exercise our discretion to reverse the corrected judgment and direct entry of a new corrected judgment that, in addition to again merging the two counts of aggravated murder and one count of intentional murder, also separately enumerates each of the aggravating factors underlying defendant’s merged aggravated murder convictions (here, death occurring in the course

³ This court rejected all of defendant’s other claims of error. *Bowen II*, 352 Or at 119-21.

of a robbery and death occurring in the course of burglary). *Our limited direction to the trial court on remand is to enter a new corrected judgment that complies with this decision; we continue to affirm defendant's merged aggravated murder convictions and the sentence of death.*

Bowen II, 352 Or at 119 (emphasis added).

On remand, defendant again asked the trial court for a resentencing hearing, and he asked to be personally present for that hearing. (App Br 24-25 & ER 90-112). The trial court denied that motion, ruling that this court's remand order in *Bowen II* was quite explicit and had authorized it only to enter a corrected judgment:

[THE COURT:] The motion for resentencing will be denied. It's clear upon this court's reading of the Supreme Court's decision that the Supreme Court intended this case to be remanded specifically for the purpose of correcting the judgment and not for resentencing, and this court intends to follow the Supreme Court's directive.

(Tr 22). The trial court then entered a second corrected judgment that separately enumerated the aggravating factors underlying defendant's convictions for aggravated murder, as this court had directed in *Bowen II*. (App Br, ER 74-75).

B. Defendant's Claims of Error

In this direct review of the second corrected judgment, defendant again claims that he was entitled to a resentencing hearing. He does not contend that the second corrected judgment fails to comply with this court's directions in

Bowen II, and he does not contend that any of its terms is otherwise erroneous. Nor does he pursue on review the argument that he had made to the trial court that resentencing was required by ORS 138.012. Rather, he now contends in his first assignment of error that ORS 138.222(5)(b)—which he has never previously cited in this case—required the trial court to hold a resentencing hearing. (App Br 26-28).

ORS 138.222(5) applies in any case in which a trial court has imposed a sentence on a felony conviction that is subject to the sentencing guidelines. *See* ORS 138.222(1). ORS 138.222(5) provides:

(a) The appellate court may reverse or affirm the sentence. If the appellate court concludes that the trial court’s factual findings are not supported by evidence in the record or do not establish substantial and compelling reasons for a departure, it shall remand the case to the trial court for resentencing. If the appellate court determines that the sentencing court, in imposing a sentence in the case, committed an error that requires resentencing, the appellate court shall remand the entire case for resentencing. The sentencing court may impose a new sentence for any conviction in the remanded case.

(b) If the appellate court, in a case involving multiple counts of which at least one is a felony, reverses the judgment of conviction on any count and affirms other counts, the appellate court shall remand the case to the trial court for resentencing on the affirmed count or counts.

Defendant contends that ORS 138.222(5)(b) applies in this case, that the operative terms are “unambiguous” and impose “a non-discretionary obligation on the appellate court,” and that, consequently, it required the trial court to hold

a resentencing hearing. (App Br 27-28). He concludes:

This court was required by law to remand the case to the trial court for resentencing on every count other than the aggravated murder and murder convictions that were reversed, and the trial court erred by interpreting this court's order to do otherwise. Therefore, this court should reverse the trial court's order on defendant's motion and remand for resentencing.

(App Br 28).⁴

Defendant then contends, in his second assignment of error, that because a resentencing was legally required under ORS 138.222(5)(b), the trial court was required by Article I, section 11, of the Oregon Constitution, the Due Process Clause of the United States Constitution, and ORS 137.030(1) to allow him to be personally present at that resentencing hearing. (App Br 30-32).

Defendant's claims of error have no merit for several reasons. First, his attempt to rely on ORS 138.222(5)(b) comes far too late. Because this court in *Bowen II* expressly remanded only for entry of a corrected judgment, the trial court on remand was obligated to strictly comply with this court's directive, which it did. Second, and in any event, ORS 138.222(5)(b) does not apply in this case. Rather, the provision that applies in these circumstances is ORS 138.222(5)(a), which does not require a resentencing, and this court

⁴ As will be discussed below, defendant appears to concede in this passage that he was not entitled to a resentencing on the conviction for aggravated murder—*i.e.*, he does not contend that ORS 138.222(5)(b) entitled him to a retrial of the penalty phase.

already held in *Bowen II* that a resentencing was not necessary in this case.

Third, because the trial court correctly did not hold a resentencing hearing and simply entered a corrected judgment at this court's direction, defendant did not have right to be personally present.

C. Defendant's Attempt to Rely on ORS 138.222(5)(b) Comes Too Late

As set forth above, this court in *Bowen II* reaffirmed all of defendant's convictions and all the sentences—specifically including the merged conviction for aggravated murder and the sentence of death—and it remanded only for entry of another “corrected judgment” with specific directions on how that correction was to be made. *Bowen II*, 352 Or at 119, 121. This court did not purport to remand for “resentencing,” nor did this court say anything in its opinion to suggest that the trial court would have discretion on remand to reconsider and change any other part of the disposition reflected in either the original or the first corrected judgment. Defendant does not dispute that the trial court on remand precisely followed this court's directions when it entered the second corrected judgment, and he does not contend that any part of judgment is otherwise erroneous.

Although defendant does not phrase it this way, his argument on review is essentially that *this court* committed plain error in its disposition in *Bowen II* when it remanded only for a corrected judgment. He contends that ORS 138.222(5)(b) required this court to remand instead for resentencing.

Even if that argument had merit—which it does not, as will be explained below—that is not a claim that the *trial court* committed any error when it entered the second corrected judgment. Defendant’s first assignment of error is: “The *trial court* erred by denying defendant’s motion for resentencing on the felony convictions.” (App Br 24; emphasis added). But he does not contend that, even though this court had remanded only for entry of a corrected judgment, the trial court nonetheless had authority to disregard that specific, limited remand order and to hold a resentencing hearing.⁵ In short, defendant’s first assignment of error is that the *trial court* erred when it denied his request for a resentencing, but his only argument in support of that claim is that *this court* erred when it did not order the trial court to conduct a resentencing. Consequently, this court should reject that assignment of error for the reasons that his argument does not support his claim of error and that, in any event, the trial court certainly did not err when it complied with this court’s specific, limited remand order.

⁵ Defendant does not proffer any authority in support of the proposition that when a case is remanded by an appellate court for a limited purpose and with specific instructions—as this court did in *Bowen II*—the trial court may choose to disregard those limitations. To the contrary, *see, e.g., State v. Simonsen*, 329 Or 288, 291-92, 986 P2d 566 (1999), *cert den*, 528 US 1090 (2000) (because the case was remanded only for new penalty-phase trial, the trial court correctly denied defendant’s motion to withdraw his guilty plea).

But perhaps more to the point, the fatal flaw in defendant's argument is that it is too late for him now, in this review of the second corrected judgment, to contend that ORS 138.222(5)(b) required this court in *Bowen II* to have remanded the case for resentencing rather than only for entry of a corrected judgment. That is an argument that he certainly could have raised before this court in *Bowen II*, either in his briefs or in a post-opinion petition for reconsideration.⁶ Because he chose to acquiesce in the limited remand that this court ordered in *Bowen II*, that disposition is the "law of the case" that he cannot now collaterally attack in this subsequent appeal.

State v. Pratt, 316 Or 561, 853 P2d 827 (1993) ("*Pratt II*"), illustrates application of "law of the case" principles. In that case, the defendant was convicted of aggravated murder and was sentenced to death. On direct review, this court affirmed the trial court's denial of his motion to suppress but it reversed on other grounds and remanded for a new trial. *State v. Pratt*, 309 Or 205, 216-17, 785 P2d 350 (1990) ("*Pratt I*"). On remand, the defendant was again convicted and sentenced to death. *Pratt II*, 316 Or at 564. On direct review of the second judgment, the defendant claimed that the trial court erred when it denied his request to relitigate his motion to suppress based on a new

⁶ See ORAP 9.25(1) and ORAP 6.25(1)(e) (allowing reconsideration based on error in disposition); *State v. Sierra*, 349 Or 604, 247 P3d 759 (2011) (granting reconsideration on state's motion and modifying remand order to comply with ORS 138.222(5)(b)).

argument. *Id.*, 316 Or at 568. This court noted that the defendant could have raised that argument in his original motion and that he then could have raised that argument in his first appeal, but that he did not. This court applied “law of case” principles to hold that the trial court correctly denied his belated attempt to relitigate his motion to suppress based on the new argument. *Id.* at 569.⁷ See also *Lincoln Loan Co. v. City of Portland*, 340 Or 613, 136 P3d 1 (2006) (applying “doctrine of claim preclusion” to bar plaintiff from pursuing declaratory-judgment action to collaterally attack the jurisdiction of Court of Appeals, which previously had reversed a judgment in its favor).

In summary, defendant could have argued before this court in *Bowen II* that ORS 138.222(5)(b) applied and required a remand for resentencing, but he did not make that argument. This court in *Bowen II* reaffirmed all of defendant’s convictions and all the sentences, and it expressly remanded only for entry of a corrected judgment with specific directions on how that correction

⁷ This court stated the “law of the case” rule as follows:

“It is a general principle of law and one well recognized in this state that when a ruling or decision has been once made in a particular case by an appellate court, while it may be overruled in other cases, it is binding and conclusive both upon the inferior court in any further steps or proceedings in the same litigation and upon the appellate court itself in any subsequent appeal or other proceeding for review.”

Pratt II, 316 Or at 569, quoting from *Simmons v. Wash. F. N. Ins. Co.*, 140 Or 164, 166, 13 P2d 366 (1932).

was to be made. On remand, the trial court strictly followed this court's directions and entered a second corrected judgment. Consequently, defendant's new claim on review that the trial court violated ORS 138.222(5)(b) when it refused to conduct a resentencing hearing to has no merit, because that argument is barred by "law of the case" or "claim preclusion" principles, and because the trial court did precisely what this court had directed it to do.

D. ORS 138.222(5)(b) Does Not Apply In This Case

Even if this court considers defendant's claim that a resentencing was required by ORS 138.222(5)(b), that claim has no merit. When, as in this case, the only error that the appellate court finds is that ORS 161.067 required the sentencing court to merge separate convictions, the proper remedy is governed by ORS 138.222(5)(a)—not by ORS 138.222(5)(b)—and the appellate court thus has discretion to determine whether the error, in the context of the case, is one that "requires resentencing." In *Bowen II*, this court already considered that question and correctly determined that, in the context of this case, the error in the form of the judgment was not one that required resentencing.

As noted above, the general rule is stated in ORS 138.222(5)(a), which provides that when an appellate court concludes "that the sentencing court, in imposing a sentence in the case, committed an error *that requires resentencing*, the appellate court shall remand the entire case for resentencing." (Emphasis added.) ORS 138.222(5)(b) then states a specific exception that applies when

an appellate court reverses a *conviction*: “If the appellate court, in a case involving multiple counts of which at least one is a felony, *reverses the judgment of conviction on any count and affirms other counts*, the appellate court shall remand the case to the trial court for resentencing on the affirmed count or counts.” (Emphasis added.) The necessary premise of defendant’s argument on appeal is that when, as in this case, an appellate court *affirms* two or more guilty verdicts but nonetheless concludes that those verdicts must be *merged* for purposes of conviction, that is a ruling that “reverses the judgment of conviction” on one of those convictions while affirming the other, which means that ORS 138.222(5)(b) applies. He does not cite any authority for that proposition,⁸ nor does he proffer any legislative history that suggests that the legislature intended subsection (5)(b) to apply to a situation such as is presented in this case.

Defendant simply asserts that “the terms of the statute are unambiguous” and clearly apply whenever, as in this case, the appellate court reverses *the*

⁸ Defendant appears to suggest, erroneously, that *State v. Sanders*, 189 Or App 107, 74 P3d 1105 (2003), *rev den*, 336 Or 657 (2004), supports that proposition. (See App Br 26). Because ORS 138.222(5)(b) was not enacted until 2005 (*see* Or Laws 2005, ch 563, § 1)—*i.e.*, after *Sanders* was decided—the decision in *Sanders* was not based on ORS 138.222(5)(b) but was instead based only on the provision that is now in ORS 138.222(5)(a). Moreover, the Court of Appeals in *Sanders* did not hold that a merger error *always* will require a resentencing but only that resentencing was appropriate in the particular context of the merger error in that case. 189 Or App at 111-12. In short, *Sanders* is completely inapposite here.

judgment and remands for any purpose. (App Br 27-28). But that argument fails to account for the statute’s use of the term “conviction” in conjunction with the terms “affirms” and “reverses.” In *Bowen I* and again in *Bowen II*, this court affirmed the *adjudications of guilt* on all of the charges but reversed and vacated the *judgments* based only on errors in the *form* of those judgments—it remanded only for *merger* of some of those adjudications of guilt for purposes of conviction. Therefore, the precise question that is presented here is whether the operative phrase in ORS 138.222(5)(b)—*viz.*, “reverses the judgment of conviction on any count and affirms other counts”—is a reference to the *judgment* itself or rather only a reference to the underlying *adjudication of guilt*.⁹

This court previously applied ORS 138.222(5)(b) in *State v. Sierra*, 349 Or 604, 247 P3d 759 (2011). In that case, the defendant was found guilty by jury verdicts on three counts of kidnapping, and this court on review affirmed one of the convictions but reversed the other two on the ground that the

⁹ As this court has noted, the term “conviction” has two generally accepted meanings: either “a finding of guilt by a plea or verdict” or “the final judgment entered on a plea or verdict of guilt.” *Vasquez v. Courtney*, 272 Or 477, 480, 537 P2d 536 (1975). *See also State v. Isabell*, 178 Or App 523, 526, 38 P3d 272 (2001). Whether the term “conviction” as used in a statute at issue means the determination of guilt or the final judgment entered on that determination is a question of legislative intent that is to be resolved by examining the use of that term in context and the legislative history of the provision. *See id.* at 526-29 (conducting such an analysis and concluding that the term “conviction” as used in ORS 137.712 means “a finding of guilt”).

evidence was not sufficient to support the guilty verdicts on those counts. This court then remanded “for further proceedings.” *See* 349 Or at 606. On the state’s motion for reconsideration of the disposition, this court held that, given that resolution on the three counts, ORS 138.222(5)(b) applied and required a remand specifically for resentencing:

In a felony case, when an appellate court reverses one or more of a defendant’s convictions but also affirms one or more convictions, ORS 138.222(5)(b) mandates that the appellate court remand for resentencing on the remaining convictions. * * * Our opinion in this case did not limit the scope of “further proceedings” on remand to exclude resentencing. Nonetheless, because we agree with the state that ORS 138.222(5)(b) requires this court to remand for resentencing in this case, we will make our instructions on remand more explicit.

349 Or at 607. In short, this court in *Sierra* construed the term “conviction” in ORS 138.222(5)(b) to mean the determination of guilt—this court held that the statute applied because it had reversed the determinations of guilt on two of counts but affirmed the determination of guilt on the third count.

That construction is consistent with the plain text of the statute.

Although that subsection uses the phrase “*judgment* of conviction,” it also limits its application only to those cases in which the appellate court “reverses the judgment of conviction on any count” but nonetheless “affirms other counts.” When, as in this case and in *Sierra*, the defendant is found guilty in a single case on multiple counts, the single, written “judgment of conviction” that is entered at the close of the case must incorporate all of those convictions—the

determinations of guilt. *See* ORS 137.071(1)(f) (the “judgment” must include “the court’s determination for each charge” in the case). If, as in *Sierra*, this court reverses one or more of those individual convictions but affirms one or more of the others, the entire “judgment of conviction” will be reversed and remanded. *See* 349 Or at 607. That is, given that the statute speaks in terms of an appellate court that “reverses” one or more of the convictions while it “affirms” one or more of the others, it is necessarily speaking only of *the determinations of guilt* on the individual counts, not the single, final written judgment entered in the case.¹⁰

Moreover, the history behind the enactment of ORS 138.222(5)(b) demonstrates that it is concerned with the situation in which a defendant is found guilty on multiple counts and the appellate court reverses on one or more but not all of those convictions. ORS 138.222(5)(a), which is the original provision that governs the remedy addresses only the situation in which an appellate court “determines that the sentencing court, *in imposing a sentence in the case*, committed an error that requires resentencing.” (Emphasis added.) As a result, when an appellate court simply reverses a *conviction* and does not

¹⁰ Defendant contends that ORS 138.222(5)(b) is “unambiguous” and applies here because this court in *Bowen II* reversed the “judgment of conviction.” *See* 352 Or at 121. But his argument is internally inconsistent, because if the term “judgment of conviction” as used in ORS 138.222(5)(b) means the final, written judgment, this court in *Bowen II* did not also “affirm” a “judgment of conviction.”

otherwise conclude that the trial court erred “in imposing a sentence,” it is arguable ORS 138.222(5)(a) does not apply and hence does not authorize a remand for resentencing.

A dispute on that very point resulted in a split decision by the Court of Appeals in *State v. Rodvelt*, 187 Or App 128, 66 P3d 577 (2003). In that case, the majority opinion construed that provision—which was then codified as ORS 138.222(5) (2004)—to allow for a remand for resentencing in such circumstances, but the dissenting opinion argued that the statute could not fairly be construed to authorize a remand for resentencing in such circumstances. To resolve that issue, the 2005 legislative assembly amended ORS 138.222(5) to add paragraph (b) to clarify that a remand for resentencing is required whenever an appellate court reverses one or more but not all of the convictions in a case, regardless of whether it also determines that any of the sentences that were imposed were erroneous.¹¹

In summary, ORS 138.222(5)(b) is concerned only with the situation in which a defendant is found guilty on multiple counts and the appellate court

¹¹ The bill that enacted ORS 138.222(5)(b) was House Bill 2224 (2005), which was proposed by the Oregon Department of Justice. In the Appendix are the written testimony by Assistant Attorney General Jonathan Fussner and the staff summaries of the bill. As those materials show, the impetus for the bill was the opinion in *Rodvelt* and the disposition in *State v. Fry*, 180 Or App 237, 246, 42 P3d 369 (2002), in which the Court of Appeals reversed several of the defendant’s convictions but did not remand for resentencing.

reverses one or more but not all of those *determinations of guilt*. As this court noted in *Sierra*, ORS 138.222(5)(b) requires the appellate court in that situation to remand the entire case for resentencing. The reason for that is that the reversed convictions, and the vacated sentences imposed on those convictions, may have played an important role in the overall sentence structure that the court had imposed in the case, and so simply vacating those convictions and sentences may significantly distort the remaining sentence.¹²

This court in *Bowen I* and again in *Bowen II* affirmed all of defendant's convictions and all of the sentences imposed on those convictions, and in both of those decisions, this court remanded with directions only to correct the *form* of the judgment, to ensure that it properly merged the convictions for aggravated murder and murder. Consequently, ORS 138.222(5)(b) has no

¹² See *Rodvelt*, 187 Or App at 132 (noting that reversal of a conviction may resentencing because “felony sentencing under the guidelines is complex, and the way that one conviction is sentenced affects how the remaining convictions are classified on the sentencing guidelines grid for purposes of determining what sentences may be imposed on those conviction.”). An example illustrates the point: Assume that a defendant is convicted on counts 1, 2, and 3, and an appellate court reverses the conviction on count 1 but affirms the other two convictions. If the sentencing court had used the conviction on count 1 as a basis to impose enhanced sentences on the other two convictions, simply vacating the conviction and sentence on count 1 would be unfair to the defendant, who should be entitled to resentencing on the other convictions. On the other hand, if the sentencing court had ordered the defendant to serve the sentence on count 1 consecutively to the sentence imposed on count 2 and then, deeming that to be a long enough total sentence, had chosen not to impose a consecutive sentence on count 3, simply vacating the conviction and sentence on count 1 might give the defendant an undeserved windfall.

application to this case. Instead, ORS 138.222(5)(a)—the more general provision—is the one that governs the proper scope of the remand in this case.

As noted above, ORS 138.222(5)(a) does not *require* a remand for resentencing in any case in which the appellate court concludes that the sentencing court committed an error. Rather, it gives the appellate court discretion to determine, in the specific context of the case, whether the sentencing court “committed an error that requires resentencing,” in which case, “the appellate court shall remand the entire case for resentencing.” The Court of Appeals has occasionally applied ORS 138.222(5)(a) in the particular context of a merger error, and sometimes it has ruled that the error was one that required a resentencing, but sometimes it has ruled that the error did not require a resentencing.¹³ This court, albeit without specifically citing ORS 138.222(5)(a), has occasionally remanded for resentencing when the only error it found on review was that the sentencing court failed to properly merge

¹³ For cases in which the Court of Appeals has held that a sentencing court’s error in failing to merge convictions required resentencing, *see, e.g., State v. Turner*, 211 Or App 96, 153 P3d 134 (2007) (*per curiam*) (remanding for “resentencing”); *State v. Bryan*, 244 Or App 160, 260 P3d 617 (2011) (same); *State v. Sanders*, 189 Or App 107, 111-12, 74 P3d 1105 (2003), *rev den*, 336 Or 657 (2004) (same); *State v. Rodvelt*, 187 Or App at 136 (same). For cases in which the Court of Appeals under such circumstances has remanded only for entry of a corrected judgment, *see, e.g., State v. Lassiter*, 244 Or App 327, 328, 267 P3d 854 (2011) (*per curiam*) (remanding only for entry of corrected judgment); *State v. Johansen*, 242 Or App 515, 517, 256 P3d 159 (2011) (*per curiam*) (same).

convictions, but in other cases it has remanded only for entry of a corrected judgment—and *not* for resentencing. *Compare State v. Barrett*, 331 Or 27, 37, 10 P3d 901 (2000) (finding only merger error, remanding for “resentencing”), with *State v. Acremant*, 338 Or 302, 330, 340, 108 P3d 1139, *cert den*, 546 US 846 (2005) (same, remanding for entry of “corrected judgment”).

In summary, when an appellate court concludes that the sentencing court erred when it failed to properly merge convictions but it has found no other error, the scope of the remand is governed by ORS 138.222(5)(a). Under that provision, the appellate court must determine whether that particular error, in the context of the case, is one that “requires resentencing.” In some cases, the error may be one that requires resentencing—*e.g.*, because the court had imposed a consecutive sentence on the should-be-merged conviction or it had used that conviction as a basis to enhance the sentence on another conviction. *See, e.g., Barrett*, 331 Or at 29-30 (the court had imposed a consecutive sentence on the should-be-merged conviction). In other cases, however, resentencing is not required, because it is obvious that the merger error had no possible effect on the sentence that was imposed. *See, e.g., Acremant*, 338 Or at 310 (defendant was convicted on two counts of aggravated murder for each of two victims, and the court had imposed only a single death sentence for each pair of convictions).

In this case, this court in *Bowen II* already conducted the analysis that is contemplated by ORS 138.222(5)(a). In the quotation set forth verbatim above, this court discussed and expressly distinguished *Barrett*; it concluded that, unlike in *Barrett*, the particular merger error in the original judgment did not require resentencing because it was sufficiently “remedied by entry of the corrected judgment for a single conviction of aggravated murder and a single sentence of death.” 352 Or at 117-18. That ruling certainly is correct. This court in *Bowen I* affirmed all of the convictions and all the sentences in this case and the only error it found was one relating to the *form* of the judgment insofar as it recorded the determinations of guilt on the convictions for aggravated murder and murder. Consequently, there is no possible reason why that error would make it necessary, or even appropriate, for the sentencing court to reconsider any of the sentences imposed in this case.

As noted above, defendant appears to concede that he is not entitled to resentencing on the merged conviction for aggravated murder—*i.e.*, that he is not entitled to a new penalty-phase hearing—but he appears to contend that he nonetheless is entitled to resentencing on the other convictions. (See App Br 28). But he makes no attempt to explain how the error in the *form* of the either the original judgment or the first corrected judgment, insofar as they incorrectly recorded the convictions for aggravated murder and murder, possibly could have affected the sentencing court’s determination of the proper sentences for

any of his other convictions. In other words, defendant's argument on review that he is entitled to a resentencing is premised entirely on his argument that ORS 138.222(5)(b) applies here and absolutely *requires* a resentencing; he does not attempt to explain how resentencing may be appropriate under these circumstances if ORS 138.222(5)(a) applies instead. Therefore, this court should reaffirm that the error in the *form* of the first corrected judgment was not one that required resentencing.

E. Defendant Was Not Entitled To Be Personally Present at Hearing

In his second assignment of error, defendant contends that the trial court erred when it refused to have him transported to court for the hearing on entry of the second corrected judgment, and instead allowed him to appear only by telephone. (App Br 29). Defendant's argument in support of his second assignment of error is entirely dependent on his first assignment of error that the trial court was required to hold a *resentencing* hearing. (App Br 30-32). He does not attempt to argue that even if the trial court correctly denied his request for a resentencing, he still was entitled to appear in person at the hearing on the trial court's ministerial act of entering a second corrected judgment in accordance with this court's directions in *Bowen II*. He does not cite any authority from this or any other court that a defendant is entitled to appear

personally in court in such circumstances.¹⁴

The state, of course, has no quarrel with the proposition that if the trial court is holding a resentencing hearing on remand, at which the defendant may allocute, present evidence in mitigation, and argue for leniency, the authorities that defendant cites generally require that he be allowed to attend in person. (App Br 30-31). But that is not this case. As set forth above, this court in *Bowen I* and *Bowen II* had already affirmed all of his convictions and all the sentences, and this court in *Bowen II* had remanded only for entry of a corrected judgment—and not for “resentencing.” The trial court had no authority or discretion to do aught but to impose the corrected judgment that this court had directed.¹⁵ In that context, defendant did not have either a constitutional or statutory right to be personally present. Therefore, the trial court correctly

¹⁴ The Court of Appeals has held that a defendant does not have a right to personally appear or to allocute when the sentencing court enters a “corrected judgment” that “is administrative as opposed to substantive, that is, when the modification involves neither disputed facts nor the exercise of discretion but occurs entirely by operation of law.” *State v. Riley*, 195 Or App 377, 384, 97 P3d 1269 (2004), *rev den*, 340 Or 673 (2006); *see also State v. Mayes*, 234 Or App 707, 712, 229 P3d 628 (2010); *State v. Kliment*, 45 Or App 511, 515, 608 P2d 618 (1980) (noting that the correction was required by law and that “the court made no discretionary decision which could have been affected by defendant’s presence”).

¹⁵ Given that this court in *Bowen II* had already reaffirmed all of the convictions and all the sentences imposed in this case, the trial court would not have had any authority to modify any of those sentences, even if it had wanted to. *See State ex rel. O’Leary v. Jacobs*, 295 Or 632, 636-38, 669 P2d 1128 (1983).

denied defendant's motion to be transported to court for the hearing on entry of the second corrected judgment.

CONCLUSION

This court should affirm the judgment of the circuit court.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on January 21, 2014, I directed the original Respondent's Answering Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Peter Gartlan and Robin A. Jones, attorneys for appellant, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 7,279 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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