IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. SHELBY EDWARD CROFT, Defendant-Appellant, Petitioner on Review.	Josephine County Circuit Court No. 11CR0665, 11CR0869, 11CR0874, 12CR0029, 12CR0381 CA A152423(Control), A152424, A152425, A152426, A152427 SC S062513

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Josephine County
Honorable PAT WOLKE, Judge

Affirmed Without Opinion: June 18, 2014

Before: Armstrong, P.J., Nakamoto, J., and Eagan J.

Continued…

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INTRODUCTION

The issue in this case is whether a trial court must make explicit findings before it may order a sentence for racketeering to run consecutively to the sentences imposed for the predicate property-crime offenses that establish the racketeering activity. As defendant has attempted to frames the case, the answer to that question requires this court to decide whether racketeering and its predicate offenses are properly regarded part of "a continuous and uninterrupted course of conduct," and he devotes the majority of his brief to that question. Respectfully, however, whether racketeering and its predicate offenses are part of "a continuous and uninterrupted course of conduct" is beside the point. Even assuming that they are, a trial court always has authority to impose a consecutive sentence for racketeering, and it need not make any express findings to exercise that authority.

Under ORS 137.123(5)(b), even if offenses are part of a continuous course of conduct, a trial court still may impose consecutive sentences if it determines that the offenses involved different harms or different victims. Nothing in ORS 137.123(5) requires that a trial court make such a determination *on the record*—and with respect to a racketeering conviction based on predicate property crimes against individuals, requiring the trial court

to make on-the-record factual findings on the existence of different victims makes no sense. Racketeering, as a *matter of law*, involves a different victim—the State of Oregon—from the individuals who are the victims of the predicate property-crime offenses. Thus in any such racketeering case, the record does not merely *support* a finding that the racketeering involved different victims, it *compels* such a finding. It follows that in any such case—including this one—there can be no basis on appeal to challenge to trial court's authority to impose a consecutive sentence for racketeering.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question Presented: Does a trial court have authority to order a sentence for racketeering to run consecutively to the predicate property-crime offenses that establish the racketeering activity without making on-the-record findings that racketeering causes a different harm, or risk of harm, to a different victim than the victims of the predicate offenses?

First Proposed Rule of Law: Yes. ORS 137.123(5) authorizes the court to impose a consecutive sentence if it determines racketeering involved a different victim. Racketeering will always have a different victim—as a matter of law—from its predicate offenses involving individual victims because the victim of racketeering is the State of Oregon, not a specific individual.

Second Question Presented: If ORS 137.123(5)(b) does require explicit findings on the record as a prerequisite to imposing consecutive sentences for

crimes committed against different victims, may a defendant challenge the absence of findings for the first time on appeal?

Second Proposed Rule of Law: No. As this court held in *State v. Bucholz*, 317 Or 309, 855 P2d 1100 (1993), a defendant cannot obtain review of a claim that a trial court failed to make express findings under ORS 137.123(5) when that claim is raised for the first time on appeal.

Summary of Arguments

If a defendant is convicted of predicate property crimes involving specific individuals and also convicted of racketeering based on those predicate crimes—regardless of whether the predicate crimes and the racketeering are properly regarded as "continuous and uninterrupted"— a trial court necessarily has authority to impose a consecutive sentence for the racketeering offense, and it need not make any express findings to exercise that authority. Under ORS 137.123(5), even if offenses are part of a continuous course of conduct, a trial court still may impose consecutive sentences if the court determines that the offenses involved different harms or different victims. Nothing in ORS 137.123(5), as correctly construed, requires that a trial court make such a determination on the record. Of course, the record must contain evidence to support a determination that the offenses involved different victims. But when the crime of conviction is racketeering based on predicate property crimes against individuals, the record will necessarily support that determination. The

victim of racketeering is the State of Oregon, whereas the victims of the predicate offenses are the specific individuals harmed by those discrete offenses. Racketeering, in other words, involves a different victim from the individuals who are the victims of the predicate property-crime offenses, as a *matter of law*. Thus, a trial court necessarily has authority to impose a consecutive racketeering sentence under ORS 137.123(5).

Even if ORS 137.123(5) does require express findings on the record at the time of sentencing, however, there is no basis for reversing the trial court here because defendant failed to preserve a challenge to the absence of such findings. In *State v. Bucholz*, 317 Or 309, 855 P2d 1100 (1993), this court held that a defendant cannot obtain appellate review of a claim that a trial court erred by failing to make express findings under ORS 137.123(5) if the defendant did not object to the lack of findings at sentencing. Here, defendant did not object to the absence of findings when the trial court imposed the consecutive racketeering sentence. Thus, he has not established plain error, and his claim is unreviewable under *Bucholz*.

ARGUMENT

A. The trial court properly imposed a consecutive sentence for racketeering without making express findings on the record.

In this case, the trial court did not make any formal findings on the record regarding whether defendant's racketeering conviction involved a different

victim than the predicate offenses. But, as explained below, it was not required to do so. Racketeering, as a legal proposition, involves a different victim—the State of Oregon—from the individuals who are the victims of the predicate property-crime offenses. Nothing in ORS 137.123(5) requires a trial court to recite that fact into the record before it may impose a consecutive sentence.

1. Under ORS 137.123(5)(b), a trial court's implicit or explicit determination that offenses cause harm, or risk of harm, to different victims authorizes the court to impose consecutive sentences for those offenses even if they were committed during a "continuous and uninterrupted course of conduct."

Under ORS 137.123(5), even if offenses are part of a "continuous and uninterrupted course of conduct," a trial court still may impose consecutive sentences if it determines that the crimes for which the defendant is being sentenced involved different harms or different victims. But nothing in that provision requires the court to make that determination expressly. As correctly construed, ORS 137.123(5), does not require formal, on-the-record findings.

ORS 137.123 was enacted by the voters in 1986, as part of Ballot Measure 10. Or Laws 1987, ch 2, §12. Although the statute was enacted by voters, this court uses the same analytical framework that it does when construing a statute "by looking at the text, context and legislative history of the [provision] to determine the intent of the voters." *State v. Sagdal*, 356 Or 639, 642, ___ P3d ___ (2015).

The plain text of ORS 137.123(5) reveals that the voters did not intend that provision to require formal findings. ORS 137.123(4) provides that:

> When a defendant has been found guilty of more than one criminal offense arising out of a continuous and uninterrupted course of conduct, the sentences imposed for each resulting conviction shall be concurrent unless the court complies with the procedures set forth in subsection (5) of this section.

In turn, and as relevant here, ORS 137.123(5)(b) provides that:

> The court has discretion to impose consecutive terms of imprisonment for separate convictions arising out of a continuous and uninterrupted course of conduct only if the court finds:
>
> * * * * *
>
> The criminal offense for which a consecutive sentence is contemplated caused or created a risk of causing greater or qualitatively different loss, injury or harm to the victim or caused or created a risk of causing loss, injury or harm to a different victim than was caused or threatened by the other offense or offenses committed during a continuous and uninterrupted course of conduct.

The foregoing sections contain no language that requires trial courts to make express findings. Rather, ORS 137.123(5) provides that a trial court "has discretion to impose consecutive terms of imprisonment for separate convictions arising out of a continuous and uninterrupted course of conduct *only if* the court *finds*" that certain circumstances exist. (Emphasis added). A "finding" is merely a determination that is supported by the record; nothing in the meaning of that term necessarily requires that the determination must be made on the record. *See Black's Law Dictionary* 707-08 (9th ed 2009) ("to

find" means "[t]o determine a fact in dispute by verdict or decision"; "finding of fact" means "[a] determination by a judge * * * of a fact supported by evidence in the record"). Indeed, when the legislature intends to require express sentencing findings, it uses specific directory language to achieve that end.[1]

Defendant urges this court to find implicit in the statute a requirement of formal findings before a court may impose a consecutive sentence. But his argument in that regard contravenes a fundamental principle of statutory construction—that reviewing courts shall "not insert what has been omitted" when construing a statute. ORS 174.010. *State v. Hart*, 329 Or 140, 145, 985 P2d 1260 (1999), is instructive.

In *Hart*, this court examined *former* ORS 137.106 (1998), which provided that, "'[i]n determining whether to order restitution * * * the court shall take [certain factors] into account.'" 329 Or at 144. In doing so, this court observed that that statute "does not require expressly that the court make

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[1] *See, e.g.*, ORS 137.712(1)(b) (providing that "the court must make [certain] findings *on the record*" to impose dispositional departure sentence (emphasis added)); ORS 137.750(1) (when sentencing a defendant court shall order that the defendant is eligible for certain programs "unless the court *finds on the record in open court* substantial and compelling reasons to order that defendant not be considered for such [programs]" (emphasis added)); ORS 161.625(5) (providing that "the court shall *make a finding*" as to the amount of a defendant's gain from a crime when imposing fine for a felony (emphasis added)).

findings of any kind," and to read such a requirement into the statute would improperly "insert what has been omitted" from the statute. *Id.* at 146. The same reasoning applies here. The lack of specific language requiring express findings reveals that the voters did not intend for ORS 137.123 to include such a requirement.

Context reinforces the point. A comparison of ORS 137.123 with its statutory predecessor provides contextual evidence demonstrating that express findings are not required under ORS 137.123. *See State v. McDowell*, 352 Or 27, 30-31, 279 P3d 198 (2012) ("Context may include * * * prior versions of the same statute). Oregon's previous consecutive sentencing statute was *former* ORS 137.122 (1985), which contained essentially the same features of ORS 137.123, except that *former* ORS 137.122(6) provided that:

> "'Whenever the court imposes a consecutive sentence under this section, it shall state its reasons for doing so and make all required special findings on the record at the time of sentencing.'"

See State v. Racicot, 106 Or App 557, 559 n 1, 809 P2d 726 (1991) (quoting *former* ORS 137.122(6) (1985)). When the voters passed section 12 of Ballot Measure 10—later codified at ORS 137.123—section 12 superseded *former* ORS 137.122 (1985). *Id.* at 562 (Deits, J., dissenting). The only major change between the voters' enactment of the law that became ORS 137.123, and *former* ORS 137.122 (1985) was "[t]he deletion of the findings requirement of subsection (6)." *Id.* The voters' enactment of ORS 137.123 without the

"special findings on the record" requirement contained in *former* ORS 137.122(6) (1985) reveals that they intended that no such requirement apply to the new consecutive sentencing statute, ORS 137.123. *See Sagdal*, 356 Or at 642 ("Context for a referred constitutional amendment includes the historical context against which the text was enacted—including preexisting * * * statutory framework").

For the reasons just discussed, the text and context of ORS 137.123(5) demonstrate that the statute does not require a trial court to make formal, on-the-record findings before imposing a consecutive sentence. The state is unaware of any relevant legislative history indicating that the voters intended otherwise. It is not necessary for the court to resort to any "third-level" maxims, but in any case, the canons of construction support the state's construction of ORS 137.123(5). The most pertinent such canon here is the "avoidance doctrine"—the rule that this court should avoid construing a statute in a way that casts doubt on its constitutionality. *See Bernstein Bros. v. Dept. of Rev.*, 294 Or 614, 621, 661 P2d 537 (1983) ("It is axiomatic that we should construe and interpret statutes in such a manner as to avoid any serious constitutional problems."). That rule is pertinent here because construing ORS 137.123(5) as requiring a trial court to make formal, on-the-record findings before it can impose a consecutive sentence would bring the statute into direct conflict with Article I, section 44(1)(b) of the Oregon Constitution.

Article I, section 44(1)(b) sets forth an unambiguous command: "No *law* shall *limit* a court's authority to sentence a criminal defendant consecutively for crimes against different victims." (Emphasis added). A statute is "law." *See Webster's Third New Int'l Dictionary* 1279 (unabridged ed 1993) (defining "law" as "a rule of mode or conduct" that includes a "statute"). To "limit" means "to curtail or reduce in quantity or extent." *Id.* at 1312. And, notably, the phrase "[n]o law shall limit" situates those operative terms in in sweeping, unqualified language—demonstrating the voters' intent to broadly proscribe any legislative encroachment on judicial authority to impose consecutive sentences for crimes committed against different victims.

Construing ORS 137.123(5) as requiring *formal* findings would "limit" the trial court's authority to impose consecutive sentences for crimes against different victims. It would be a modest procedural limit, to be sure, but a "limit" nonetheless: having determined that a defendant committed crimes against different victims, the trial court would nevertheless lack authority to impose consecutive sentences without making formal findings. Indeed, defendant's argument here that the trial court lacked authority to impose a consecutive sentence for racketeering depends entirely on the idea that the trial court's authority is so limited. But the existence of such a limitation would fly in the face of Article I, section 44(1)(b). If a defendant has committed crimes

against different victims, Article I, section 44(1)(b) allows for no such limitation.

2. Under ORS 137.123(5)(b), the "victim" of racketeering is the State of Oregon and thus—as a matter of law—is a different victim from the individual victims of a predicate crimes underlying the racketeering offense.

For the reasons just described, ORS 137.123(5) does not require a trial court to make express findings before it may impose consecutive sentences based on a determination that the offenses involved different victims. Of course, there must be evidence in the record to support such a determination. But when—as here—the crime of conviction is racketeering based on predicate property crimes against individuals, the record will—as a matter of law—support that determination. That is because, as explained below, the "victim" of racketeering, for purposes of ORS 137.123(5), is the State of Oregon, which is a different entity than the individuals who are the victims of the predicate property offenses.

Who constitutes a "victim" for purposes of ORS 137.123(5)(b) depends on who is the victim for purposes of the substantive offense for which a court is imposing sentence. *See State v. Glaspey*, 337 Or 558, 100 P3d 730 (2009) (identity of a victim in merger context is the individual or entity who suffered the harm contemplated by the substantive crime). The person who is the victim of the substantive offense is the person "who suffers harm" from the element

"that is the gravamen of the crime." *Glaspey*, 337 Or at 565-66. As applied to racketeering, the "victim" of racketeering is the State of Oregon.

The racketeering statute, ORS 166.720(3) provides:

> It is unlawful for any person employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt.

In turn, ORS 166.715(6)(a) defines "[r]acketeering activity" as including "[a]ny conduct that constitutes a [statutorily enumerated] crime * * *." And ORS 166.715(4) defines a "[p]attern of racketeering activity" as

> engaging *in at least two incidents of racketeering activity* that have the same or similar intents, results, accomplices, victims or methods of commission or otherwise are interrelated by distinguishing characteristics, including a nexus to the same enterprise, and are *not isolated incidents* * * * *.

(Emphasis added). Together, those provisions demonstrate that the defining characteristic of racketeering is that it is an organized, patterned criminal activity, and not merely a series of "isolated" criminal "incidents" committed against individuals. Put differently, the harm of the crime occurs in the aggregate, exceeding the sum of its parts, not from the discrete crimes that comprise the offense as a whole. As such, that harm accrues to the public at large—and is qualitatively different from a discrete harm to any one person.

The legislative history of the racketeering statutes confirms that understanding. As this court recently explained, "[t]he key feature of the

legislation was that it focused on the patterned character of crimes, rather than, as the law traditionally had done, on crimes committed as a single act on a single day by a single person acting alone." *State v. Walker*, 356 Or 4, 18, 333 P3d 316 (2014). During the enactment of the bill that became Oregon's racketeering statutes, the architect of the federal racketeering statute, Professor Blakey, testified on that point:

> "Traditionally we have thought of crimes as a single incident on a single day and a single person engaged in it. For most crimes, street crimes, that is the whole story[.] [B]ut for organized crime the important things are the things that are not included in the current code. That is the relationship between this crime this day and this crime[ ] the next day. That is, this crime is part of a pattern. Almost as important as its being part of a pattern is that there is an organization involved. The statute calls it an enterprise. * * * What RICO does is look to the organized character of the crime and makes that an element of the offense and it looks to the patterned character of the criminal behavior and makes than an element of the [offense [.] [It] imposes on the government [the burden] of proving those elements and once those elements are proven it then warrants the treatment of that crime in a different fashion."

Id. (quoting statement of Professor Blakey; alterations in original).[2] That legislative history reinforces that the victims of racketeering are those who suffer from the aggregate harm resulting from the organized nature of the crime.

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[2] Defendant's brief on the merits provides even further examples of legislative history explaining that the harm of racketeering lies in its patterned structure of criminal conduct. (*See* Pet Br 34-35).

In sum, the text, context, and legislative history of Oregon's racketeering statutes demonstrates that the harm caused by racketeering results from its patterned structure of criminal conduct. As such, the gravamen of the offense is the aggregate harm to society at large, not to any specific individual. Therefore, the State of Oregon is the victim of racketeering for the purpose of the ORS 137.123(5)(b).

3. In this case, the trial court properly imposed a consecutive sentence for racketeering.

In light of the foregoing principles, this court should affirm the trial court's imposition of a consecutive sentence for racketeering. The trial court did not expressly find that defendant's racketeering crime involved a different victim than the predicate property crimes on which the racketeering conviction was based. But for the reasons discussed above, it did not need to. A reviewing court assumes that the trial court made factual findings that are consistent with its ultimate legal conclusion, and it will affirm where there is evidence in the record to support those findings. *Ball v. Gladden*, 250 Or 485, 443 P2d 621 (1968).

Here, evidence in the record demonstrates that the victims of the predicate property offenses were individuals.[3] Since the victim of the

[3] In four different cases, the state charged defendant with committing a variety of theft and property crimes (forgery, identity theft, and theft) against

Footnote continued…

racketeering conviction was the State of Oregon, the record thus compels the determination that the racketeering offense involved a different victim than its predicate offenses. It follows that the trial court properly imposed a consecutive sentence on the racketeering conviction.

(…continued)
numerous victims. (ER 1-19). The indictment in one of those cases, case no. 12CR0029, charged defendant with racketeering, alleging 26 predicate offenses. (ER 7-13). Some of the predicate offenses for the racketeering were the theft and property crimes separately charged in the other cases, and some were newly alleged crimes. Defendant pleaded guilty to all of those crimes. (Tr 12-22).

The sentencing court imposed the prescribed presumptive sentence on each of the felony convictions, and it ordered defendant to serve most of the sentences concurrently.

13 months for identity theft in case no. 11CR0869 (Count 1) committed against Karen Alves;

13 months for identity theft in case no. 11CR0874 (Count 1) committed against Hansen Recycling;

25 months for racketeering in case no. 12CR0029 (Count 1);

13 months for identity theft in case no. 12CR0029 (Count 2) committed against Carl Elzy;

13 months for identity theft in case no. 12CR0029 (Count 5) committed against Robin McElhaney;

13 months for identity theft in case no. 12CR0029 (Count 8) committed against Briana Wheeler;

13 months for identity theft in case no. 12CR0029 (Count 11) committed against Emily Camden; and

25 months for witness tampering in case no. 12CR0381 (Count 2).

(Tr 123; ER 3, 5, 7-8, 13-15).

B. Even if the trial court were required to make express factual findings, because defendant failed to request findings under ORS 137.123(5) at the time of sentencing, *State v. Bucholz* forecloses review.

For all the reasons discussed above, the trial court did not need to make express findings to impose a consecutive sentence for racketeering. But even if ORS 137.123(5) does require express findings on the record at the time of sentencing, there is no basis for reversing the trial court in this case. Under *Bucholz*, a defendant cannot obtain appellate review of a claim that a trial court erred by failing to make express findings under ORS 137.123(5) if the defendant did not object to the lack of findings at the time of sentencing. Here, as discussed below, defendant did not object to the absence of findings when the trial court imposed his consecutive racketeering sentence. His claim is thus unreviewable.[4]

To understand why defendant's argument is foreclosed by *Bucholz*, it is important to understand how the issues were framed and argued in the trial court.

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[4] Although the state conceded preservation in the Court of Appeals, (Resp Br 1), that concession does not preclude this court from considering whether defendant's statutory claim was preserved. *See State v. Wyatt*, 331 Or 335, 346, 15 P3d 22 (2000) (explaining that this court will consider preservation even where it was not raised in the Court of Appeals and in "cases in which the opposing party wrongly conceded that the issue had been preserved in the trial court").

At sentencing, the state submitted a memorandum that relied on three sources of law in support of its request that the court impose consecutive sentences on some of defendant's convictions. First, the state cited Article I, section 15, of the Oregon Constitution, which provides that "[l]aws for the punishment of crime shall be founded on * * * principles [of] protection of society, personal responsibility, [and] accountability for one's actions and reformation." (Trial Court File (State Sentencing Memorandum at 8)). Second, the state pointed to the trial court's authority under ORS 137.123(2) to impose consecutive sentences for "criminal offenses that do not arise from the same continuous and uninterrupted course of conduct," and its authority under ORS 137.123(5)(b) to impose consecutive sentences for crimes causing, or risking causing harm, to different victims even if the crimes occurred during the same course of conduct. (*Id.*). Third, in a section of the memorandum with the heading "Racketeering Issues," the state noted the racketeering charge and cited *State v. Blossom*, 88 Or App 75, 744 P2d 281 (1987), *rev den*, 305 Or 22 (1988),[5] a case holding that racketeering may should be sentenced consecutively to its predicate offenses. (*Id.* at 9).

[5] Although *Blossom* predated ORS 137.123, the Court of Appeals has cited the case with approval following the enactment of ORS 137.123 in *State v. Lyons*, 161 Or App 355, 364, 985 P2d 204 (1999), and *State v. Gleason*, 141 Or App 485, 493-94, 919 P2d 1184 (1996).

Defendant made only one argument against a consecutive sentence for racketeering: that the court should not impose a consecutive sentence for racketeering because the racketeering and its predicate offenses were "one criminal episode." (Tr 99).

When the trial court imposed sentence, it emphasized that defendant's persistent criminal activity harmed the community by causing "two big losses" to the people of Josephine County, the "loss of money" and the "upset and concern and difficulty" resulting from identity theft. (Tr 113-16). The court further stated that in imposing sentence, it was "mindful" of the "protection of society, those people who are not here in Court but who have been violated." (Tr 115-16). The court explained that it was following the state's sentencing recommendation:

> I'm going to give the sentences I'll impose, and then at the very end I'll tell you what extent they're gonna be concurrent and what extent they're gonna be consecutive. And for the most part I'll be following the recommendations of the State. I won't be following the recommendations of the State precisely with respect to the total amount of the sentence but * * * if there's a misunderstanding you can refer back to the State's sentencing memorandum.

After imposing the sentence, including the consecutive sentence for racketeering at issue here, the trial court asked parties if it had "missed" anything. (Tr 123). Defense counsel clarified that the total sentence was 141 months and said nothing more. (Tr 123-24).

On review, defendant argues that the trial court erroneously imposed a consecutive sentence for racketeering without making findings required under ORS 137.123(5). His entire argument rests on the presumption that the trial court decided this case under *State v. Blossom*, and that the trial court must have concluded that *Blossom* stands for the proposition "that racketeering could be sentenced consecutively as a matter of course and it did not need to make findings" under ORS 137.123(5). (Pet Br 39). But the record does not support that presumption.

Admittedly, the state did cite *Blossom* in its memorandum. But the state also cited a number of other authorities, including ORS 137.123(5). And the trial court's comments during sentencing demonstrated that it was aware that the pattern of defendant's racketeering activity harmed the community as a whole. Thus, although it is possible that the trial court imposed a consecutive sentence on defendant's racketeering conviction without making a determination that the offense involved a different victim, it is not clear from the record that it did so. And to the extent that it is unclear, it was incumbent on defendant to object to preserve the argument he now makes on review. Defendant, however, did not do so.

Defendant made no attempt to clarify the basis for the trial court's imposition of the consecutive racketeering sentence. And, he certainly did not argue that the enactment of ORS 137.123 overruled *Blossom*. The sole

argument that he advanced was that the court should not impose a consecutive sentence for racketeering and its predicates because the offenses were "one criminal episode." (Tr 99). The trial court even invited defendant to respond after it imposed the sentence and defendant said nothing. Defendant's failure to seek clarification about the legal basis on which the trial court relied when imposing the consecutive racketeering sentence should preclude him from speculating on that basis now.

An unpreserved claim is unreviewable on appeal unless it is "plain error." *State v. Serrano*, 355 Or 172, 179, 324 P3d 1274 (2014). For plain error to occur, "the error must be one 'of law'; * * * it must be 'apparent,' * * * and * * * it must appear 'on the face of the record.'" *Id.* (quoting *Ailes v. Portland Meadows, Inc.*, 312 Or 376, 381-82, 823 P2d 956 (1991)). As this court explained in *Bucholz*, a trial court's failure to make an express finding under ORS 137.123 does not qualify as plain error, because it is not an error of law and does not appear on the record. Under *Bucholz*, a defendant cannot challenge the absence of express findings under ORS 137.123(5) on appeal without having asked the court to make statutory findings in the first instance.

In *Bucholz*, the defendant was charged in two separate indictments for a variety of offenses, including theft and delivery of methamphetamine. 317 Or at 311. The defendant pleaded guilty to those crimes, and the trial court imposed consecutive sentences on all of the convictions. *Id.* On appeal, relying

on ORS 137.123, the defendant claimed that the trial court erred by imposing the consecutive sentence because the offenses arose "out of a continuous and uninterrupted course of conduct" and the trial court failed to make the required statutory findings. *Id.* at 320.

This court declined to consider the claim because the defendant did not request findings under ORS 137.123, noting that "the record discloses that a consecutive sentence was being imposed, but that no objection to lack of findings or request for findings was entered by defendant." *Id.* That preservation failure precluded appellate review, because the absence of an express finding can easily be remedied:

> Defendant would have an appellate court reverse for absence of findings even though, had the matter been called to the sentencing court's attention, applicability of [the statute] might easily have been established. To preserve an error in the face of *the possibility* that the statute expressly permits consecutive sentencing in the situation at hand, a defendant who objects to lack of express findings * * * must place that objection on the record at the time of sentencing. The Court of Appeals was not required to consider the error and should not have done so.

Id. at 321 (citations omitted and emphasis added).

Bucholz controls. As in *Bucholz*, here "the record discloses that a consecutive sentence was being imposed, but that no objection to lack of findings or request for findings was entered by defendant." *Id.* at 320. Moreover, the record in this case establishes "the possibility that the statute expressly permits consecutive sentencing in the situation at hand[.]" *Id*. at 321.

Under ORS 137.123(5)(b), a trial court may impose consecutive sentences for offenses that "arise from the same continuous and uninterrupted course of conduct" if it finds that the offenses "caused or created a risk of causing loss, injury or harm" to "different victim[s]." Here, as detailed above, racketeering—a crime committed against the State of Oregon—has a different victim than its predicates. Given that fact, the absence of express findings cannot be plain error under *Bucholz*.[6]

In summary, ORS 137.123(5)(b) authorized the trial court to impose a consecutive sentence for racketeering and its predicate offenses because racketeering "caused or created a risk of causing loss, injury or harm to" a different victim, the State of Oregon, than the predicate offenses committed against specific victims. The fact that the trial court did not make formal, express findings on the existence of different victims under section (5)(b) is of no moment because the statute does not require such express findings. But even if the statute did require express findings, under this court's decision in

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[6] The Court of Appeals has taken a different view of the failure to make express findings. In *State ex rel. Dep't of Human Services v. J.N.*, 225 Or App 139, 144-45, 200 P3d 615 (2009), the Court of Appeals concluded that *Bucholz* stands for the proposition that the appellate court should not exercise its discretion to reach an error when a trial court fails to make express findings, but that plain error nonetheless occurs. If this court addresses defendant's statutory claim, it should take the opportunity to correct the Court of Appeals' misreading of *Bucholz*.

State v. Bucholz, defendant cannot complain about the absence of such findings for the first time on appeal.

CONCLUSION

This court should affirm the decision of the Court of Appeals, and affirm the judgment of the circuit court.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on February 6, 2015, I directed the original Brief on the Merits of Respondent on Review, State of Oregon, to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Peter Gartlan and Zachary L. Mazer, 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 5,470 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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