IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
DONALD A. MATZKE,
Defendant-Appellant.

Linn County Circuit Court
14CR05679; A159691

David E. Delsman, Judge.

Submitted September 27, 2017.

Ernest G. Lannet, Chief Defender, and Zachary Lovett Mazer, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Susan G. Howe, Assistant Attorney General, filed the brief for respondent.

Before Ortega, Presiding Judge, and Garrett, Judge, and Powers, Judge.

PER CURIAM

Conviction on Count 4 reversed; remanded for resentencing; otherwise affirmed.

PER CURIAM

Defendant appeals a judgment of conviction for murder, second-degree theft, second-degree abuse of a corpse, and tampering with physical evidence. In his first two assignments of error, he argues that the trial court erred by denying motions for judgment of acquittal for murder. We reject those assignments without written discussion. In his third assignment of error, defendant asserts that the trial court plainly erred by not entering a judgment of acquittal on the tampering with physical evidence count. He complains that the state failed to introduce any evidence from which a reasonable juror could have found beyond a reasonable doubt that defendant knew that an official proceeding was pending or about to be initiated when he destroyed physical evidence that linked him to the victim's murder. The state concedes that such evidence was not introduced and was necessary to convict defendant of tampering with physical evidence. *See* ORS 162.295(1). Accordingly, the state agrees with defendant that we should reverse the judgment of conviction for tampering with physical evidence and remand for resentencing.

We agree that the trial court plainly erred by failing to enter a judgment of acquittal on the tampering with physical evidence count. Nevertheless, we must determine whether to exercise our discretion to correct the plain error. *See State v. Lusk*, 267 Or App 208, 211-12, 340 P3d 670 (2014) (noting that "we have often declined to exercise our discretion to correct a plain error when the defendant failed to move for a judgment of acquittal" but explaining that we exercise our discretion if there are "sound reasons" to do so). We exercise our discretion to review and correct the error in this case for reasons similar to those expressed in *State v. Reynolds*, 250 Or App 516, 522, 280 P3d 1046, *rev den*, 352 Or 666 (2012). In *Reynolds*, we observed that entry of a criminal conviction without sufficient proof was of "constitutional magnitude," and a defendant "has a strong interest in having a criminal record that accurately reflects the nature and extent of [his] conduct." *Id.* at 522. Moreover, this is not a case where correction of the error would undermine the important policies behind the preservation rule because it is not a case where, if the error had been timely raised, the

state could have reopened its case and corrected the deficiency in its proof, *id.* at 523-24, and defendant gained no strategic advantage from failing to act. *State v. Strouse*, 276 Or App 392, 404-05, 366 P3d 1185, *rev den*, 360 Or 236 (2016). Accordingly, exercising our discretion to correct the error will not undermine the preservation rule's policy interest in the "full development of the record." *Reynolds*, 250 Or App at 524.

Conviction on Count 4 reversed; remanded for resentencing; otherwise affirmed.