

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

JEREMY ALLEN BURGERT,
Defendant-Appellant.

Clackamas County Circuit Court
CR1500892; A162894

Michael C. Wetzel, Judge.

Submitted May 8, 2018.

Ernest G. Lannet, Chief Defender, Criminal Appellate Section, and David Sherbo-Huggins, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Rolf C. Moan, Assistant Attorney General, filed the brief for respondent.

Before Lagesen, Presiding Judge, and DeVore, Judge, and James, Judge.

PER CURIAM

Affirmed.

PER CURIAM

Appealing a judgment of conviction for multiple sex offenses, defendant assigns error to (1) the trial court's failure to merge his guilty verdict for first-degree sexual abuse on Count 4 into his guilty verdict for first-degree sodomy on Count 5; and (2) the trial court's failure to merge his guilty verdict for first-degree sexual abuse on Count 11 into his guilty verdict for first-degree sodomy on Count 12. Defendant contends that "the version of first-degree sexual abuse at issue in this case does not contain any element that is not also included in the version of first-degree sodomy at issue" and that, therefore, the verdicts must merge under ORS 161.067. That is, defendant argues that first-degree sexual abuse is a lesser-included offense of first-degree sodomy.

Our decision in *State v. Moore*, 185 Or App 229, 58 P3d 847 (2002), necessarily forecloses that argument, as defendant acknowledges. There, we held that sexual abuse is not a lesser-included offense of sodomy because each offense requires proof of an element that the other does not. *Id.* at 230. Although defendant asserts that *Moore* is wrongly decided and should be overruled, we are not persuaded that the rigorous standard for overruling our prior precedent is met. *See generally State v. Civil*, 283 Or App 395, 415-18, 388 P3d 1185 (2017) (discussing circumstances in which our court will overrule prior precedent). Accordingly, we reject defendant's merger arguments on the ground that they are contrary to *Moore*.

In a third assignment of error, defendant contends that his 300-month sentence for his first-degree sodomy conviction, which the trial court imposed under ORS 137.700(2)(b)(E), is unconstitutionally disproportionate under Article I, section 16, of the Oregon Constitution and the Eighth Amendment to the United States Constitution. We are not persuaded that defendant has met his burden of demonstrating that this is one of the rare instances in which the legislatively prescribed sentence violates either constitution. *See, e.g., State v. Ryan*, 361 Or 602, 396 P3d 867 (2017) (discussing framework for determining whether

sentence unconstitutionally disproportionate). Accordingly, we reject defendant's third assignment of error.

Affirmed.