

No. 2—09—0542
Order filed April 7, 2011

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kane County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 07—CF—638
)	
CEDRIC L. BOUCHEE,)	Honorable
)	Timothy Q. Sheldon,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Bowman and Burke concurred in the judgment.

ORDER

Held: Under the applicable abstract-elements test, criminal sexual assault was not a lesser included offense of home invasion, as defendant committed multiple acts (entry into the victim's home and then sexual penetration) and the criminal sexual assault contained an element not included in the home invasion (use of force).

Following a bench trial, defendant, Cedric L. Bouchee, was convicted of home invasion (720 ILCS 5/12—11(a)(6) (West 2006)) and criminal sexual assault (720 ILCS 5/12—13(a)(1) (West 2006)). He received consecutive prison sentences of six and four years, respectively. Defendant appeals, contending that his criminal sexual assault conviction must be vacated because, as charged, criminal sexual assault is a lesser included offense of home invasion. We affirm.

Counts 1 and 2 of an indictment charged defendant with home invasion, in that he entered the dwelling of T.C., knowing her to be present, “and while within said dwelling, committed a criminal sexual assault against T.C. in that he put his penis in the vagina of T.C.” Counts 3 and 4 charged defendant with criminal sexual assault in that “by the use of force said defendant placed his penis in the vagina of T.C.” The State dismissed counts 2 and 4.

Evidence at trial showed that on March 7, 2007, defendant and Mychal Postlewaite went to the home of T.C., a high school classmate. Defendant forced his way inside T.C.’s house, pushed her down a hallway and into a bedroom and forcibly had sex with her.

A jury found defendant guilty of both counts. The trial court sentenced him to six years’ imprisonment for home invasion and four years’ imprisonment for criminal sexual assault. The sentences had to be consecutive. See 730 ILCS 5/5—8—4(a)(i), (a)(ii) (West 2006). Defendant timely appealed.

Defendant argues that his conviction and sentence for criminal sexual assault must be vacated because, as charged in the indictment, criminal sexual assault is a lesser included offense of home invasion. He contends that both charges were based on the same physical act: placing his penis in the victim’s vagina.

The supreme court established the one-act, one-crime rule in *People v. King*, 66 Ill. 2d 551 (1977). *King* provided that a criminal defendant may not be convicted of, or sentenced for, more than one offense carved from a single physical act. *King*, 66 Ill. 2d at 566. “Multiple convictions and concurrent sentences should be permitted in all other cases where a defendant has committed several acts, despite the interrelationship of those acts.” *King*, 66 Ill. 2d at 566. “Act” is intended

to mean any “overt or outward manifestation which will support a different offense.” *King*, 66 Ill. 2d at 566.

Previously, courts had used two different approaches in deciding one-act, one-crime issues: the charging-instrument approach and the abstract-elements approach. Under the charging-instrument approach, an offense is a lesser included offense if it is described in the charging instrument. *People v. Novak*, 163 Ill. 2d 93, 107 (1994). Defendant’s argument is based on this approach. However, after defendant filed his brief, the supreme court held in *People v. Miller*, 238 Ill. 2d 161 (2010), that courts should use the abstract-elements approach to decide if one of multiple charged offenses is a lesser included offense of another. This is a two-step process:

“First, the court must determine whether the defendant’s conduct involved multiple acts or a single act. Multiple convictions are improper if they are based on precisely the same physical act.” *Miller*, 238 Ill. 2d at 165.

If the convictions are based on multiple acts, the court should proceed to the second step, which the *Miller* court described: “If all of the elements of one offense are included within a second offense and the first offense contains no element not included in the second offense, the first offense is deemed a lesser-included offense of the second.” *Miller*, 238 Ill. 2d at 166. Whether one charge is a lesser included offense of another is a legal question that we review *de novo*. *People v. Nunez*, 236 Ill. 2d 488, 493 (2010).

Here, defendant cannot overcome the first prong of the abstract-elements test, as it is clear that defendant’s conduct involved multiple acts. The home invasion count alleged that defendant entered T.C.’s home. The criminal sexual assault count charged that he placed his penis in T.C.’s vagina. While the home invasion count alleged that defendant committed a sexual assault while in the home, it alleged the additional act of entering the home. Thus, defendant’s convictions were

based on two separate acts. See *People v. Rodriguez*, 169 Ill. 2d 183, 188-89 (1996) (defendant properly convicted of aggravated criminal sexual assault and home invasion where, although both counts alleged a sexual assault, defendant's unlawful entry into victim's bedroom was a separate act supporting a second conviction).

Moreover, defendant cannot meet the second prong of the abstract-elements test as defined in *Miller*. Only if the less serious offense contains all of the elements of the greater offense, and includes no element not contained in the greater offense, will it be deemed a lesser included offense. Home invasion, as charged here, requires that a defendant “without authority *** knowingly enters the dwelling place of another when he or she knows or has reason to know that one or more persons is present *** and *** [c]ommits, against any person or persons within that dwelling place,” criminal sexual assault. 720 ILCS 5/12—11(a)(6) (West 2006). Criminal sexual assault, as charged here, requires that a defendant commit “an act of sexual penetration by the use of force or threat of force.” 720 ILCS 5/12—13(a)(1) (West 2006).

Here, the criminal sexual assault count alleged that defendant placed his penis in T.C.'s vagina by the use of force. The use of force during the criminal sexual assault is not included as an element of the home invasion count. Thus, criminal sexual assault is not a lesser included offense of home invasion because it contains an additional element. See *People v. Garrett*, 281 Ill. App. 3d 535, 544 (1996) (pain caused by separate physical act of a criminal sexual assault based upon vaginal penetration could form the injury element for home invasion based upon bodily injury, which was based upon not only injury to the victim, but also the unauthorized entry into her home).

In his reply brief, defendant acknowledges that *Miller* prescribed the abstract-elements approach, but insists that criminal sexual assault is a lesser included offense under that test.

However, in contending that the home invasion statute includes all the elements of criminal sexual assault, defendant cites only to subsection (a)(6), while ignoring the rest of the statute. Section 12—11(a) sets out the general elements of home invasion, including entering the dwelling of another. Subsections (a)(1) through (a)(6) merely specify additional acts committed after the entry. 720 ILCS 5/12—11(a) (West 2006). When read as a whole, the home-invasion statute does not specifically require proof of a sexual assault accompanied by the use of force.

Given our disposition of the primary issue, we do not consider the State's alternative argument that section 5—8—4(a)'s requirement of consecutive sentences (730 ILCS 5/5—8—4(a)(i), (a)(ii) (West 2006)) evidences a clear legislative intent that home invasion and criminal sexual assault be considered separate offenses with distinct punishments.

The judgment of the circuit court of Kane County is affirmed.

Affirmed.