

No. 1-10-2359

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 09 CR 9024
)	
VICTOR SHORTERS,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Karnezis concurred in the judgment.

ORDER

¶ 1 **HELD:** Defendant's convictions for criminal sexual assault and unlawful restraint were supported by evidence proving his guilt beyond a reasonable doubt. However, defendant's conviction and sentence for unlawful restraint must be vacated as a lesser-included offense under the principles of the one-act, one-crime doctrine.

¶ 2 Following a bench trial, defendant Victor Shorters, was convicted of two counts of criminal sexual assault and one count of unlawful restraint. He was, thereafter, sentenced to a total of 17 years' imprisonment. On appeal, defendant asserts: (1) his guilt was not proven beyond a reasonable doubt; and (2) his conviction for unlawful restraint should be vacated as it is a lesser included

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offense of his other convictions. For the following reasons, we find that defendant was proven guilty beyond a reasonable doubt, but that his conviction and sentence for unlawful restraint must be vacated.

¶ 3

I. BACKGROUND

¶ 4 Defendant was arrested on April 23, 2009, and a grand jury returned a five-count indictment against him on May 19, 2009. The indictment generally alleged that, on or about January 18, 2009, defendant committed the offenses of aggravated criminal sexual assault (two counts), criminal sexual assault (two counts), and unlawful restraint (one count). The matter proceeded to a bench trial in June of 2010.

¶ 5 The State's first witness at trial was the victim, J.B., who testified that she was 34-years old, the mother of two sons, and had been employed for 12 years as a correctional officer for Cook County. J.B. lived in a house on the far south side of Chicago, along with her ailing father and her two children.

¶ 6 In January 17, 2009, J.B. attended a birthday party for one of her sisters at the nearby Posen Pub, arriving around 10 p.m. She spent the night dancing with her family and friends. At some point during the evening, J.B. was approached by defendant. J.B. was happy to see him, and the two exchanged a hug. J.B. testified that defendant was an old friend, though she had not seen him in 20 years. Specifically, J.B. testified that she recalled defendant as being a good friend of her older brother when she was a child, and further described defendant as being "like my brother." J.B. denied that she and defendant ever had any kind of romantic relationship.

¶ 7 The party continued into the early hours of the following morning, when the pub closed

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shortly before 3 a.m. At that time, J.B.'s sisters asked her if the group could continue the party at J.B.'s home and she agreed. Defendant, along with his cousin, Myron Fleming, were also invited to J.B.'s home. After J.B. gave defendant directions, Mr. Fleming began driving himself and defendant to J.B.'s home. J.B. drove home in her own car, and on the way she called her boyfriend on her cell phone and stopped to get some food. As she was talking to her boyfriend, she got a call from defendant in which he indicated that he and Mr. Fleming were waiting at her home. J.B. told defendant that she would be there soon. J.B. then called her boyfriend again, and was talking to him on the phone at the time she arrived home, and escorted defendant and Mr. Fleming inside.

¶ 8 Once inside, J.B. directed the two men to the basement while she went to her bedroom. At the party, J.B. was wearing a sleeveless dress, stockings and boots. Now at home, J.B. testified she donned pajama pants, a sweatshirt, and gym shoes over her party outfit. She then returned to the basement. Defendant needed to use the restroom, so J.B. escorted him upstairs. While there, she reintroduced him to her father, who had known defendant from the time he was a child. When the two returned to the basement, Mr. Fleming indicated he was going to leave but would return. Mr. Fleming soon left.

¶ 9 At this point, J.B. still expected the rest of the party to join them at her home. She and defendant talked for some time, and she also introduced him to her eldest son before sending her son to bed. After J.B. exchanged a few more phone calls with her sisters and friends, it became clear that plans had changed and the party at her home had been cancelled. J.B. asked defendant to call Mr. Fleming for a ride. When defendant could not reach him, J.B. offered to drive defendant home herself. Defendant said it was too late for him to arrive at his grandmother's home, and asked if he

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could stay at J.B.'s home. J.B. agreed, on the condition that defendant accompany her to church the next morning. J.B. then provided defendant with blankets, a remote control for the television, and prepared a couch in the basement for defendant. J.B. testified that she had no concerns about allowing defendant to spend the night at that point because, again, he "was like my brother. He had stayed a lot of times when we were younger."

¶ 10 However, just as J.B. turned to go back upstairs and to her own bedroom, defendant "tried" to wrap his arms around J.B. and kiss her neck. J.B. pulled away from defendant, saying that his actions made her "uncomfortable because I looked at him like my brother, and I told him I didn't see him like that." Defendant apologized, and J.B. then told him that it was "okay" and that the two could just "move on in the morning."

¶ 11 When J.B. again started to head toward the stairs, however, defendant grabbed her by the arm and "slung" her onto the couch. J.B. tried to get up, but defendant held her down with his hands and struck the left side of her face with his right fist. He tore at her clothes before ordering J.B. to remove her clothes or face further harm. Defendant, thereafter, forced J.B. to engage in vaginal and oral sex, alternately choking her with his hands, and holding her down with his arms and his knee. During the attack, defendant also hit J.B. in the face again, and verbally threatened both J.B. and her family. When she reminded him of her job as a correctional officer, defendant said that if he found her gun he would shoot everyone in the home. When J.B. asked defendant why he was raping her, defendant made reference to J.B.'s brother and said, "wait until [he] finds out about this, we will see how he feels about this."

¶ 12 The attack continued until defendant attempted to force J.B. to engage in oral sex a second

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time. At that point, J.B. told defendant "no, death before dishonor." J.B. testified that she recalled this phrase to be one that defendant and her brother used to say when she was a child. Indeed, J.B. testified that she heard them say it "[a]ll the time. It was a creed that they lived by." At that point, defendant stopped, began apologizing, and ran out of the house. Defendant left his t-shirt on the floor.

¶ 13 After the attack, J.B. put on some clothes, went to her room, and sat on the floor crying. She then made several attempts to contact her cousin, Alyssa Joyner, and her boyfriend, Earl Greer. However, due to reception problems with her cell phone and her inability to get her boyfriend on the phone, J.B. sent text messages to both Ms. Joyner and Mr. Greer. J.B. finally spoke with Ms. Joyner around 6 a.m., and spoke with Mr. Greer after 10 a.m. Though still crying and upset, J.B. was able to relate to both what had happened.

¶ 14 J.B. testified that she did not initially call the police because she was in shock and was afraid that—in light of her employment as a correctional officer—her coworkers would question why she did not take more actions to stop defendant's attack. Nevertheless, around 2 p.m. on January 18, J.B. did go to the police station. She brought with her several articles of clothing she had been wearing during the attack. The police interviewed her, took her to the hospital, and took photographs of her face. The police subsequently came to her home to take pictures and collect some additional clothing that J.B. was wearing during the attack, as well as the shirt defendant left behind. J.B. testified that the bruising on her face got worse in the days after the photos were taken.

¶ 15 The State then presented the testimony of Dr. Carlito Javier, the emergency room doctor who treated J.B. when the police brought her to the hospital. Dr. Javier testified that J.B. was sad

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and tearful at the time, and that the redness on her left cheek was consistent with having been punched in the face. While he would have expected to see some more bruising to have developed in the 11 hours since the attack, the redness he did observe could have developed into bruises later. He also indicated that the fact that he did not observe any vaginal trauma was not unusual, given the fact that J.B. was a sexually active adult and had previously delivered two children. Dr. Javier testified that J.B. indicated defendant did not wear a condom, but that she was not sure if he had ejaculated. A sexual assault kit was prepared at the hospital.

¶ 16 Ms. Joyner testified that she and J.B. were best friends and had grown up together. She also testified that she awoke around 6:30 a.m. on January 18 to a phone call from J.B., who was crying hysterically and explaining that defendant had raped her. Ms. Joyner was ultimately able to calm J.B. down, and she told J.B. to go to the police. Ms. Joyner further testified that she later realized she had also received a text message from J.B. around 4:30 a.m., in which J.B. had indicated that she had been raped by defendant.

¶ 17 Mr. Greer testified that he was employed as a sergeant by the Cook County Sheriff's Department and worked the night shift at the county jail. At the time of the trial, he was J.B.'s fiancé, while at the time of the incident, the two were dating. On the night of the incident, he was working and received a number of text messages and phone calls from J.B. over the course of his shift. Specifically, he received two phone calls from J.B. between 3 a.m. and 4 a.m., and in those conversations she seemed "[h]er normal self," and she explained that she was going to have some company over. After Mr. Greer's shift ended at 10 a.m., he noticed that he had missed a text and a phone call from J.B. to his cell phone. He called J.B., but she was very upset and it was hard to

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understand her. He, therefore, immediately drove to her home, where he found J.B. "curled up in like a fetal like position," wearing several layers of clothes, and crying. Her face was puffy, her cheek swollen, and a small mark was under her left eye. The two had a conversation, and Mr. Greer told J.B. that she needed to report the incident to the police and to go to the hospital. While Mr. Greer had to leave to attend to his children, he did subsequently meet up with J.B. at the police station. In the days after the incident, Mr. Greer observed that J.B.'s cheek remained swollen and the mark under her eye turned into a dark bruise.

¶ 18 Chicago police Detective Derail Easter testified that after a warrant was issued for defendant's arrest, he and his partner placed defendant under arrest on April 23, 2009. The arrest was made in Michigan, as defendant was on parole at the time, and was arrested at a correctional center there.

¶ 19 The State concluded its initial case-in-chief by entering a series of stipulations and a number of exhibits into the record as evidence. First, the parties stipulated that J.B.'s cell phone records reflected a series of text messages and phone calls on the night of the incident between J.B. and both Ms. Joyner and Mr. Greer. They also showed that J.B. received a single call from defendant. The parties also generally stipulated that the DNA testing results from the sexual assault kit did not include any evidence of semen, and was otherwise inconclusive, while three DNA profiles were recovered from the t-shirt recovered from J.B.'s home. J.B. could not be excluded from one of those profiles, and defendant was a match for one of the three profiles recovered. The State also entered into evidence photos of J.B. and defendant, photos of the basement of J.B.'s home, J.B.'s clothes, and defendant's t-shirt.

¶ 20 The defense began by presenting the testimony of Mr. Fleming. In general, Mr. Fleming confirmed much of the testimony offered by J.B. Specifically, he confirmed that he and defendant attended the party at the Posen Pub, that J.B. was introduced as an old friend of defendant, that he and defendant drove to J.B.'s home from the pub for what they believed to be a continuation of the party, that defendant called J.B. when they had arrived, and that J.B. ultimately arrived and they all went inside to the basement. However, it was at this point that Mr. Fleming's rendition of events began to diverge from the one offered by J.B. at trial.

¶ 21 For example, Mr. Fleming testified that he was still at J.B.'s home when her son came into the basement and when it became clear that no other guests would be making it to the party. Indeed, the fact that there was effectively not going to be a "party" at all was the reason he decided to leave. He also testified that J.B. never changed clothes while he was there, and his description of her dress was different than the one offered by J.B. and did not match the dress that was received into evidence. Additionally, Mr. Fleming testified that defendant had to help him push his car out of the snow when he left, while J.B. denied that this occurred. Mr. Fleming did testify that when he woke up later that morning, he noticed that he had missed a call from either J.B., or defendant.

¶ 22 Defendant also testified at trial, with his testimony about his prior relationship with J.B. and the events leading up to arriving at J.B.'s home being largely similar to the testimony of J.B. and Mr. Fleming. However, defendant's testimony about what happened at J.B.'s home was much different from the testimony of J.B. To begin with, defendant did not recall if J.B. was on the phone when she arrived home. He also testified that J.B. changed into a new dress when she got home, and he denied that he ever asked to use the bathroom. It was defendant's testimony that Mr. Fleming did

not leave until after it was clear that there would be no other guests at the party, and defendant said that he did, in fact, help push Mr. Fleming's car out of the snow.

¶ 23 After Mr. Fleming left, defendant and J.B. returned to the basement. Defendant had started playing some music, and the two began to dance. However, the two soon began arguing when defendant made reference to a threat J.B.'s brother had made against defendant's brother. That argument evolved into a physical altercation when defendant struck J.B. once in the face, pinned her down on the couch, and threatened her. The incident stopped after defendant accepted J.B.'s assertion that defendant was punishing her for something her brother said.

¶ 24 While defendant testified that he then apologized to J.B. and told her she should call the police, he also testified that J.B. very shortly recovered from the fight, and soon began making sexual advances upon him. In fact, the two soon were engaged in vaginal and oral sex, with J.B. taking the lead and "running the show." Defendant testified that the two stopped their sexual activities after J.B. achieved an orgasm, but he did not ejaculate during the encounter.

¶ 25 J.B. then went upstairs and changed clothes. When she returned, she asked him if he was ready to leave, but indicated that she would not be driving defendant home. Defendant then left and found his own ride. He was subsequently arrested in Michigan when he went to his parole office to check in pursuant to a prior conviction for armed robbery. In rebuttal, the State introduced a certified copy of defendant's prior felony conviction for purposes of challenging his credibility.

¶ 26 Following oral argument, the trial court announced its ruling. The trial court first noted that there was no dispute with respect to much of the facts surrounding this matter, including the fact that J.B. and defendant engaged in sexual activity. As the trial court recognized, "[t]he issue that this trial

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is about, the issue that the court must resolve is whether this was a consensual encounter or was it a criminal encounter." The trial court ultimately found that J.B. was a more credible witness than defendant. However, the trial court also noted that defendant was charged with two counts of aggravated criminal sexual assault, and that it did not find that the evidence supported a finding of bodily harm beyond a reasonable doubt. Thus, the trial court discharged those two counts. The court did find defendant guilty of two counts of criminal sexual assault (one count involving vaginal sex, and one count involving oral sex) and a single count of unlawful restraint.

¶ 27 The matter proceeded to a sentencing hearing, where the trial court considered argument and evidence in aggravation and mitigation. That evidence included J.B.'s victim impact statement and defendant's prior felony convictions for armed robbery and aggravated discharge of a firearm. The trial court sentenced defendant to eight years' imprisonment on each of the sexual assault counts, and one year of imprisonment for the unlawful-restraint count. The sentences were ordered to be served consecutively. Defendant now appeals.

¶ 28 **II. ANALYSIS**

¶ 29 As noted above, on appeal defendant contends that his guilt was not proven beyond a reasonable doubt, and alternatively asserts that his conviction for unlawful restraint should be vacated as a lesser-included offense. We review each argument in turn.

¶ 30 **A. Reasonable Doubt**

¶ 31 We first address defendant's challenge to the sufficiency of the evidence supporting his convictions.

¶ 32 When presented with such a challenge, it is not the function of this court to retry defendant

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and we review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the elements of the crime proven beyond a reasonable doubt. *People v. Evans*, 209 Ill. 2d 194, 209 (2004). The trier of fact's findings are entitled to great weight, given that it is in the best position to judge the credibility and demeanor of the witnesses. *People v. Wheeler*, 226 Ill. 2d 92, 114-15 (2007). As such, a reviewing court will not substitute its judgment for that of a trier of fact on issues involving the weight of evidence or the credibility of witnesses. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224-25 (2009). A reversal is warranted only if the evidence is so improbable or unsatisfactory, it leaves a reasonable doubt regarding the defendant's guilt. *Evans*, 209 Ill. 2d at 209.

¶ 33 Defendant's sexual assault convictions required proof that he committed an act of sexual penetration upon J.B. by the use of force or the threat of force. 720 ILCS 5/12-13(a)(1) (West 2008). As charged, the acts of sexual penetration alleged included contact between defendant's penis and both J.B.'s vagina and mouth. "Sexual penetration" means:

"[A]ny contact, however slight, between the sex organ or anus of one person by an object, the sex organ, mouth or anus of another person, or any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person, including but not limited to cunnilingus, fellatio or anal penetration. Evidence of emission of semen is not required to prove sexual penetration." 720 ILCS 5/12-12(f) (West 2008). "Force or threat of force," for purposes of defendant's sexual assault charges, means: "the use of force or violence, or the threat of force or violence, including but not limited to the following situations:

- (1) when the accused threatens to use force or violence on the victim or on any other person, and the victim under the circumstances reasonably believed that the accused had the ability to execute that threat; or
- (2) when the accused has overcome the victim by use of superior strength or size, physical restraint or physical confinement[.]" 720 ILCS 5/12-12(d) (West 2008).

¶ 34 Defendant's unlawful-restraint conviction required proof that he knowingly and without legal authority detained J.B. 720 ILCS 5/10-3(a) (West 2008). As courts have recognized, the "gist of unlawful restraint is the detention of a person by some conduct which prevents [her] from moving from one place to another. [Citation.] The detention must be wilful, against the victim's consent, and prevent movement from one place to another. [Citation.] Actual or physical force is not a necessary element of unlawful restraint as long as an individual's freedom of locomotion is impaired." *People v. Bowen*, 241 Ill. App. 3d 608, 627-28 (1993).

¶ 35 Here, J.B. testified that when she tried to leave the basement and go upstairs to bed, defendant grabbed her, threw her on the couch, pinned her down and refused to allow her to get up, verbally threatened her and her family if she did not comply with his demands, hit her in the face, choked her, and ultimately forced her to engage in non-consensual vaginal and oral sex. This testimony alone contained evidence of all of the necessary elements for the offenses defendant was found guilty of committing. Moreover, this testimony alone, deemed to be credible by the trial court, was sufficient to support defendant's convictions. *People v. Courtney*, 288 Ill. App. 3d 1025, 1036 (1997) ("In a sexual assault case, the victim's testimony alone, if positive and credible, is sufficient to sustain a conviction."); *Siguenza-Brito*, 235 Ill. 2d at 228 (More generally, "the testimony of a

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single witness, if positive and credible, is sufficient to convict, even though it is contradicted by the defendant.").

¶ 36 Nevertheless, on appeal defendant raises several challenges to the trial court's finding that J.B. was a credible witness, asserting that her testimony either did not comport with the other evidence produced at trial or that it was inherently unbelievable. We reject defendant's specific arguments, as well as his general assertion that the evidence produced at trial leaves any reasonable doubt regarding his guilt.

¶ 37 For example, defendant asserts that J.B.'s description of a violent attack is called into question by the fact that the photos of her face taken at the hospital and her physical examination did not demonstrate significant injuries, Dr. Javier testified he would have expected more bruising to have occurred in the time before he examined J.B., and the trial court ultimately found defendant not guilty of aggravated criminal sexual assault on the grounds that proof of bodily harm had not been sufficiently established. Defendant contends that these facts call J.B.'s entire testimony into question and raise serious doubts about his guilt.

¶ 38 As an initial matter, we reiterate that proof of bodily harm was wholly unnecessary to establish defendant's guilt of criminal sexual assault, as opposed to aggravated criminal sexual assault. As noted above, all that was required was proof of "the use of force or violence, *or the threat of force or violence.*" (Emphasis added.) 720 ILCS 5/12-12(d) (West 2008); *People v. Le*, 346 Ill. App. 3d 41, 50 (2004) (there is no "requirement that a victim's testimony be corroborated by physical or medical evidence in order to sustain a conviction for criminal sexual assault."); *Bowen*, 241 Ill. App. 3d at 620 ("[T]he lack of medical evidence of physical injury does not establish the

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victim consented to have sexual intercourse. Physical injury or resistance is not necessary to prove a victim was forced to have sexual intercourse."). Thus, defendant's contentions on this matter are, in some sense, irrelevant.

¶ 39 We also note that Dr. Javier did testify that J.B. might well have developed additional bruising after his examination, and both J.B. and Mr. Greer testified that such bruising did indeed materialize. Moreover, we do not read the trial court's decision to find defendant not guilty of aggravated criminal sexual assault to reflect any sort of doubts about J.B.'s testimony regarding the incident. Indeed, the trial court *never* questioned her credibility, and specifically found her to be "credible and compelling." What the trial court *did* find was that the State simply had not proven, beyond a reasonable doubt, that J.B. had suffered "bodily harm" as a result of defendant's actions. In essence, defendant asks this court to find that J.B.'s overall credibility is called into question because his actions did not cause her more significant, demonstrable physical injuries. We decline to do so.

¶ 40 Defendant next contends that the clothes J.B. testified she was wearing at the time of the incident, introduced as exhibits at trial, also cast doubt on her testimony. Specifically, defendant argues that while the sweatshirt introduced at trial does contain a rip in the front consistent with J.B.'s testimony about the attack, that rip "appears to be a very clean, smooth, straight cut, such as *might* be made by scissors." (Emphasis added.) Similarly, noting that J.B.'s pajama pants and pantyhose are torn on the right side—as J.B. testified had happened when defendant initially tried to undress her—defendant complains that the damage is not located in exactly the same place on each article of clothing. Defendant also complains that the rest of the clothes that J.B. says she was

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wearing during the incident display no damage or, at most, damage that is minimal. Defendant, thus, concludes that this physical evidence indicates that J.B. herself damaged some of these articles of clothing in order to manufacture physical evidence to corroborate her testimony.

¶ 41 We do not accept defendant's line of argument on this issue. There was *absolutely* no evidence presented at trial that could possibly support defendant's contention that J.B. manufactured evidence. Indeed, defendant's cite to nothing but the clothes themselves to support this argument. After reviewing that evidence, however, we do not find that the condition of the clothes actually supports defendant's assertions in any way. Moreover, there is simply *no* evidence in the record to support defendant's contention that the clothes could not have been damaged in just the way J.B. testified. Far from viewing the evidence in the light most favorable to the State, defendant asks this court to view this evidence in his favor on the basis of unsupported speculation. We again refuse to do so, as "mere possibilities or speculation are insufficient to raise reasonable doubt." *People v. Phillips*, 215 Ill. 2d 554, 574 (2005).

¶ 42 Defendant makes additional arguments with respect to the DNA evidence. However, as even defendant himself states in his brief, "the DNA added little to the State's case." Indeed, it was undisputed that J.B. and defendant engaged in vaginal and oral sex, and it was undisputed that defendant did not ejaculate. The DNA evidence taken from the sexual assault kit did nothing to contradict these facts. Defendant does contend that the fact that a DNA pattern consistent with J.B. was found on the t-shirt he left in the basement, was consistent with his version of events. Specifically, he contends that J.B. left this DNA on his shirt when she kissed it during consensual sex. However, this evidence was certainly not conclusive. The DNA pattern was not a complete

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match and, even assuming it was J.B.'s DNA, defendant has not demonstrated why it is so improbable that her DNA was left on his shirt in some other fashion during the course of the sexual assault. *People v. Baskerville*, 2012 IL 111056, ¶ 31 ("[A]ll reasonable inferences from the evidence must be allowed in favor of the State.").

¶ 43 Defendant further notes that the parties stipulated that J.B.'s cell phone records reflected a number of text messages and phone calls on the night of the incident between J.B., and both Ms. Joyner and Mr. Greer. Defendant then complains that J.B.'s testimony that she also made numerous phone calls to her sisters and her friends before the party was cancelled, is called into question by the fact that those phone calls are not included in the stipulation. However, the stipulation does not indicate that it represented all of J.B.'s cell phone history on the night of the incident, only that her cell phone records did include the specifically identified phone calls. Moreover, defendant himself testified at trial that J.B.'s phone "kept ringing and she kept going back and forth out of the room to answer her phone."

¶ 44 Nor are we swayed by defendant's attacks on the inherent believability of J.B.'s testimony. For example, defendant contends that—in light of J.B.'s experience and training as a correctional officer—her failure to more forcefully resist defendant's attack or to call out for help during the incident, renders her testimony unbelievable. However, "[t]here is no definite standard establishing the amount of force which the State is required to prove to show rape. If circumstances show resistance to be futile or life endangering or if the victim is overcome by superior strength or fear, useless or foolhardy acts of resistance are not required." *People v. Vaughn*, 2011 IL App (1st) 092834, ¶ 33 (quoting *People v. Bolton*, 207 Ill. App. 3d 681, 686 (1990)). Moreover, "[m]erely

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because a victim does not cry out for help or try to escape at the slightest opportunity is not determinative on the issues of whether she was being forced to have sexual intercourse, or whether she consented to having sexual intercourse, especially if she was threatened or in fear of being harmed [citation], overcome by the superior strength of the assailant, or paralyzed by fear." *Bowen*, 241 Ill. App. 3d at 620.

¶ 45 Defendant also complains that J.B.'s delay in reaching out to anyone following her attack raises doubts about her version of the incident. However, "[a]lthough a failure to speak when it is natural to do so under the circumstances discredits the credibility of the claimant and may amount in effect to an assertion of the nonexistence of that fact [citation], a delay in reporting incidents of sexual abuse may be reasonable where the victim's silence can be attributed to fear of the offender or to shame, guilt, and embarrassment." *People v. Duplessis*, 248 Ill. App. 3d 195, 199 (1993). Here, J.B. testified that she felt just such shame and embarrassment. Moreover, we do not perceive any delay in this case to have been particularly significant. J.B. tried to reach out to Ms. Joyner and Mr. Greer via text messages within hours, actually spoke to them a few hours later, and reported the incident to police within no more than 10 to 12 hours. We do not find these facts to diminish J.B.'s credibility in any way.

¶ 46 Furthermore, the trial court itself specifically addressed and rejected such attacks on J.B.'s credibility, stating that she was:

"[A] women that for the most part has been a strong woman, what for some women may be a difficult, demanding job working as a jail guard in the Cook County Department of Corrections. I have seen a side of her that was evidenced when she testified and evidenced

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when she explained her feelings now, that whatever strengths she may have, she has also been pummeled and humiliated and hurt badly by what happened here. I believe her words are sincere."

We find no reason to disturb this finding.

¶ 47 In sum, in all of defendant's arguments on appeal, he essentially requests that this court substitute its judgment for that of the trial court as to the weight of the evidence or the credibility of J.B. as a witness. Yet, this is exactly what we are not permitted to do. *Siguenza-Brito*, 235 Ill. 2d at 224-25. Moreover, to the extent that there are any contradictions or inconsistencies in the evidence produced at trial, it "is not the role of this court to reevaluate the credibility of witnesses in light of inconsistent testimony and ostensibly retry the defendant on appeal. [Citation.] Whether minor inconsistencies in testimony irreparably undermined the credibility of the State's witnesses was a matter for the trier of fact to decide." *People v. Howard*, 376 Ill. App. 3d 322, 329 (2007). As such, a "reviewing court will not reverse a conviction simply because the evidence is contradictory ***." *Siguenza-Brito*, 235 Ill. 2d at 228. In the end, defendant's arguments on appeal have not demonstrated that the evidence is so improbable or unsatisfactory, that it leaves a reasonable doubt regarding his guilt. *Evans*, 209 Ill. 2d at 209.

¶ 48 **B. One Act, One Crime**

¶ 49 We next address defendant's contention that his conviction for unlawful restraint must be vacated on the grounds that it violates the one-act, one-crime doctrine. We agree.

¶ 50 As an initial matter, we note that defendant never raised this argument in the trial court. However, we will review defendant's contentions on this issue, as "a violation of the one-act,

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one-crime doctrine affects the integrity of the judicial process, thus satisfying the second prong of the plain-error analysis." *People v. Span*, 2011 IL App (1st) 083037, ¶ 81.

¶ 51 In *People v. King*, 66 Ill. 2d 551 (1977), our supreme court set forth what has since come to be known as the one-act, one-crime doctrine. *Id.* at 566. As originally formulated, that doctrine concerned the potential for prejudice in the imposition of multiple convictions, and specifically provided:

"Prejudice results to the defendant only in those instances where more than one offense is carved from the same physical act. Prejudice, with regard to multiple acts, exists only when the defendant is convicted of more than one offense, some of which are, by definition, lesser included offenses. 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. 'Act,' when used in this sense, is intended to mean any overt or outward manifestation which will support a different offense. We hold, therefore, that when more than one offense arises from a series of incidental or closely related acts and the offenses are not, by definition, lesser included offenses, convictions with concurrent sentences can be entered." *Id.*¹

As our supreme court has more recently noted:

"Decisions following *King* have explained that the one-act, one-crime doctrine involves a two-step analysis. [Citation.] First, the court must determine whether the

¹ The one-act, one-crime doctrine was subsequently extended to the imposition of sentences, such as the ones imposed here, that are to run consecutively. *People v. Artis*, 232 Ill. 2d 156, 165 (2009) (citing *People v. Rodriguez*, 169 Ill.2d 183, 187 (1996)).

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defendant's conduct involved multiple acts or a single act. Multiple convictions are improper if they are based on precisely the same physical act. Second, if the conduct involved multiple acts, the court must determine whether any of the offenses are lesser-included offenses. If an offense is a lesser-included offense, multiple convictions are improper." *People v. Miller*, 238 Ill. 2d 161, 165 (2010).

Thus, even where "the convictions were based on interrelated acts rather than the same act, we proceed to the second prong [and ask]: are any of the offenses lesser-included offenses?" *People v. Peacock*, 359 Ill. App. 3d 326, 333 (2005).

¶ 52 Turning to that issue, we note that our courts "have identified three possible methods for determining whether a certain offense is a lesser-included offense of another: (1) the 'abstract elements' approach; (2) the 'charging instrument' approach; and (3) the 'factual' or 'evidence' adduced at trial approach." *Miller*, 238 Ill. 2d at 166. Nevertheless, in *Miller* our supreme court has made it clear that in situations—such as the one presented here—where a defendant is *charged* with multiple offenses and the question is whether one of those *charged* offenses is a lesser-included offense of another *charged* offense, courts must apply the "abstract elements" approach. *Id.* at 174-75. As our supreme court has explained, under that approach:

"[A] comparison is made of the statutory elements of the two offenses. 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. [Citations.] Although this approach is the most clearly stated and the easiest to apply [citation], it is the strictest approach in the sense that it is formulaic and rigid, and

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considers 'solely theoretical or practical impossibility.' In other words, it must be impossible to commit the greater offense without necessarily committing the lesser offense. [Citations.]" *Id.* at 166; see also *People v. Novak*, 163 Ill. 2d 93, 106 (1994).

One-act, one-crime challenges are reviewed *de novo*. *People v. Stanford*, 2011 IL App (2d) 090420, ¶ 33.

¶ 53 Defendant contends on appeal that pursuant to *Miller*, his conviction for unlawful restraint must be vacated because it is, by definition, a lesser-included offense of his criminal sexual assault convictions. In turn, the State suggests that the acts which supported defendant's unlawful-restraint conviction—defendant's initial efforts to keep J.B. from leaving the basement—"were separate and distinct from the actual force and threat of force used to accomplish the sexual assaults." The State, thus, contends that "[n]either *King* nor *Miller* is implicated," and the unlawful-restraint conviction is therefore valid. In response to this argument, defendant has asserted that defendant's initial efforts to detain J.B. were insufficient to support a conviction for unlawful restraint, and his conviction for that offense must be based upon the detention of J.B. that was inherent in his convictions for sexual assault.

¶ 54 While neither defendant nor the State has completely followed the outlines of the legal framework discussed above (*Miller*, 238 Ill. 2d at 165), we find that the proper application of those principles to this case mandates that defendant's unlawful-restraint conviction be vacated. First, we briefly address the first step of the one-act, one-crime analysis; *i.e.*, determining the number of "acts" at issue. We note that were we to conclude that the conduct underlying defendant's conviction for both unlawful restraint and either of his sexual assault convictions comprised a single physical act,

defendant could not properly be convicted of two offenses for that single act. *Id.* ("Multiple convictions are improper if they are based on precisely the same physical act.")

¶ 55 Moreover, if we viewed defendant's actions as comprising more than one physical act, we must initially reject the State's apparent suggestion that this fact would end our analysis. While the State asserts that defendant's various actions during the incident "were separate and distinct," the State also recognizes that they were also "brief and closely related in time." Indeed, the incident in question here involved acts on the part of the defendant which all occurred in one place—J.B.'s basement—and all occurred within moments of each other. There can be no question that defendant's actions, even if viewed as separate acts, comprised "a series of incidental or closely related acts." *King*, 66 Ill. 2d at 566. Thus, we must proceed with the second step of the one-act, one-crime analysis, and determine whether unlawful restraint is, by definition, a lesser-included offense of criminal sexual assault such that multiple convictions are improper. *Miller*, 238 Ill. 2d at 165.

¶ 56 As discussed above, defendant's sexual assault convictions required proof that he committed an act of sexual penetration upon J.B. by the use of force or the threat of force. 720 ILCS 5/12-13(a)(1) (West 2008). His unlawful-restraint conviction required proof that he knowingly and without legal authority detained J.B. 720 ILCS 5/10-3(a) (West 2006). Courts have long recognized—in the context of one-act, one-crime challenges—that commission of the offense of unlawful restraint is inherent in the commission of the offense of sexual assault. *People v. Daniel*, 311 Ill. App. 3d 276, 290 (2000) (conduct charged as unlawful restraint "was the same conduct inherent in every case of criminal sexual assault, that being the use of force to detain the victim in order to effectuate the sexual act."); *Bowen*, 241 Ill. App. 3d at 628 ("The unlawful restraint charged

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in the indictment was that which the legislature addressed in the criminal sexual assault statute and is conduct inherent in every case of criminal sexual assault by force."); *People v. Wrightner*, 219 Ill. App. 3d 231, 234 (1991) ("Rape cases present a special situation in that the physical restraint of the victim against her will is an essential element of the crime of rape, and a judgment of conviction may not be entered for lesser included offenses."); *People v. McCann*, 76 Ill. App. 3d 184, 187 (1979) ("All the elements of unlawful restraint are necessarily present in rape and, therefore, defendant's conviction of unlawful restraint must be reversed.").

¶ 57 Pursuant to the applicable "abstract elements" test, it is, therefore, both theoretically and practically impossible "to commit [criminal sexual assault] without necessarily committing [unlawful restraint]." *Miller*, 238 Ill. 2d at 166. As such, and even if decedent's actions in this case are viewed as separate, interrelated acts, the conviction and sentence for unlawful restraint must be vacated as a lesser-included offense under the principles of the one-act, one-crime doctrine. *Id.*

¶ 58 In so ruling, we necessarily reject the State's reliance upon prior decisions affirming convictions for both sexual assault and unlawful restraint. As an initial matter, we note that none of the cases cited by the State applied the two-step analysis or the "abstract elements" test required by *Miller*, and are therefore of limited value.

¶ 59 Moreover, we also have other concerns about the value of the authority cited by the State. For example, the State cites to *People v. Rodriguez*, 364 Ill. App. 3d 304 (2006), and *People v. Hermosillo*, 256 Ill. App. 3d 1020 (1993), as examples of instances where both sexual assault and unlawful restraint convictions were upheld. However, in both cases the issues on appeal were wholly unrelated to the challenge defendant raises here and neither decision contains any one-act, one-crime

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analysis. While defendant also cites to *People v. Jackson*, 203 Ill. App. 3d 1, 11 (1990), we note that the court's analysis in that case: (1) was *dicta*, as it had found the one-act, one-crime issue waived, (2) again, did not apply the *Miller* analysis set out above, and (3) appears to include a finding that the defendant's actions were in fact separate and unrelated. Finally, both *People v. Weatherspoon*, 265 Ill. App. 3d 386, 396 (1994), and *People v. Alvarado*, 235 Ill. App. 3d 116, 117 (1992), included specific findings that the defendant's acts were, respectively, either "separable although occurring during a brief time span" or "separate [and] independent." In contrast, we have specifically concluded that the convictions here arose out of a series of incidental or closely related acts.

¶ 60

III. CONCLUSION

¶ 61 For the foregoing reasons, the judgment of the circuit court is affirmed in part and vacated in part. Specifically, the judgments for criminal sexual assault are affirmed, while defendant's conviction and sentence for unlawful restraint is vacated.

¶ 62 Affirmed in part; vacated in part.