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sexual assault (720 ILCS 5/12-13(a)(1) (West 2008)) pursuant to conduct that occurred on February 17, 2010. Both criminal sexual assault charges concerned defendant's fingers. One count charged contact between defendant's fingers and the victim's vagina, and the other count charged intrusion of defendant's fingers into the victim's vagina. After a bench trial, defendant was found guilty of the sexual assault charge based on contact, but found not guilty of the sexual assault charged based on intrusion. Defendant was also found guilty of the unlawful restraint charge and not guilty of the home invasion charge.

¶ 3 Defendant filed a motion to reconsider and a motion for a new trial. The trial court held a hearing on these motions, and it heard testimony in aggravation from the victim. The trial court denied the motions and sentenced defendant to five years in the Illinois Department of Corrections. Defendant appeals the criminal sexual assault conviction based on contact, arguing that the State failed to prove every element of criminal sexual assault. The State concedes that defendant should not have been convicted of criminal sexual assault and argues that we should reduce defendant's conviction to the lesser included offense of criminal sexual abuse and remand for resentencing.

¶ 4 We agree, and we reduce defendant's conviction to the lesser included offense of criminal sexual abuse and remand for resentencing.

¶ 5 **BACKGROUND**

¶ 6 On February 17, 2010, defendant entered the residence of his ex-wife, the victim. The victim claimed that defendant entered without her permission and sexually assaulted her. Defendant was arrested and charged with home invasion, unlawful restraint, and two counts of

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criminal sexual assault. The first count alleged that Jackson "committed an act of sexual penetration upon [the victim], to wit: contact between [defendant's] finger and [the victim's] vagina, by the use of force or threat of force ***." The second count alleged that defendant "committed an act of sexual penetration upon [the victim], to wit: an intrusion in that [defendant] inserted his finger into [the victim's] vagina, by the use of force or threat of force ***." The case proceeded to a bench trial on December 14, 2010, where defendant and the victim gave contradictory testimony about what had happened on February 17, 2010.

¶ 7

I. Evidence at Trial

¶ 8 At the bench trial on December 14, 2010, the victim testified as follows. Defendant entered the residence against her will and forcefully tried to have sex with her. Defendant dragged the victim into the bedroom, threw her on the bed, unhooked her bra, and began kissing and licking her on her face, neck and breasts. Defendant unzipped his pants, removed his erect penis, and put lotion on it. Defendant attempted to remove the victim's pants, but was unable to. When he failed to remove the victim's pants, defendant inserted his hands into her pants and "rammed his fingers inside of [her] vagina." Defendant tried to climb on top of the victim, but she bit his arm and escaped his grasp.

¶ 9 In contrast, defendant testified that he touched her a few times with his fingertips, but he did not grab her. He denied throwing her onto the bed, removing her clothes, performing sexual acts, removing his pants, and inserting his hands into her pants. Defendant testified that he entered the victim's home to erase allegations from the victim's Facebook page that he had assaulted his stepdaughter. Defendant testified that the victim bit him because she did not want

him using her computer and the two of them physically struggled as he tried to use it.

¶ 10 II. Conviction and Sentencing

¶ 11 On December 17, 2010, the trial court found defendant not guilty of both home invasion and criminal sexual assault based on intrusion of defendant's finger into the victim's vagina.

However, the trial court found defendant guilty of both unlawful restraint and of criminal sexual assault based on contact between defendant's finger and the victim's vagina. The trial court found that the State introduced evidence that proved that defendant restrained the victim and made contact between his fingers and the victim's vagina. However, the trial court found that the State failed to prove that defendant's fingers had "intruded" into the victim's vagina.

¶ 12 Defendant made a motion for reconsideration and a motion for a new trial, and the trial court denied the motions on February 9, 2011. The trial court sentenced defendant to five years in the Illinois Department of Corrections for the criminal sexual assault conviction, and two years in the Illinois Department of Corrections for the unlawful restraint conviction, with the sentences to run concurrently. On February 10, 2011, defendant timely filed a notice of appeal, and this appeal followed.

¶ 13 ANALYSIS

¶ 14 Defendant has raised one issue on this direct appeal, asserting that his conviction for criminal sexual assault based on contact between his finger and the victim's vagina must be reversed because the contact did not satisfy the elements of criminal sexual assault. The State concedes and asks us to reduce his conviction to the lesser included offense of criminal sexual abuse. For the reasons set forth below, we find that defendant was not guilty of criminal sexual

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assault and reduce his conviction to the lesser included offense of criminal sexual abuse. As a result, we remand the issue to the trial court for resentencing.

¶ 15 I. Standard of Review

¶ 16 Both parties agree that the sole issue raised by defendant on appeal requires the interpretation of a statute, namely, whether defendant's conduct amounted to criminal sexual assault. 720 ILCS 5/12-12(f) (West 2008). We review questions of statutory interpretation under a *de novo* standard. *People v. Marshall*, 242 Ill. 2d 285, 292 (2011). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011). Neither party has challenged any of the trial court's findings of fact.

¶ 17 II. Sexual Assault

¶ 18 A defendant commits criminal sexual assault when he "commits an act of sexual penetration by the use of force or threat of force[.]" 720 ILCS 5/12-13(a)(1) (West 2008). The Unified Code of Corrections defines "sexual penetration" as follows:

" 'Sexual penetration' means [1] any 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 [2] 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[.]"

720 ILCS 5/12-12(f) (West 2008).

The statute provides two means for penetration to occur: (1) by "contact"; or (2) by "intrusion."

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720 ILCS 5/12-12(f) (West 2008). The trial court found defendant not guilty under the second "intrusion" prong; therefore, we need interpret only the meaning of the first "contact" prong.

¶ 19 On appeal, both parties agree that defendant's conduct did not satisfy the "contact" prong of the statute, and we agree. Sexual penetration based on contact requires contact between the sex organ or anus of one person by an "object, the sex organ, mouth or anus" of another person.

720 ILCS 5/12-12(f) (West 2008). In this case, the trial court found that the contact was between the victim's sex organ and defendant's fingers. Defendant's fingers are not his "sex organ, mouth or anus," and thus we must determine whether fingers qualify as an object under the statute.

¶ 20 Our supreme court has held that the word "object" in the statute does not include parts of the body. *People v. Maggette*, 195 Ill. 2d 336, 350 (2001). In *Maggette*, the State argued that the defendant's finger constituted an object under the definition of the statute. *Maggette*, 195 Ill. 2d at 349. The court stated that, if it were to read the "contact" prong in isolation, it might be persuaded by the State's argument because the legislature did not provide any language to limit the meaning of the word "object" in the "contact" prong. *Magette*, 195 Ill. 2d at 349. However, the court found that, when it read the "contact" and "intrusion" prongs together, the legislature's intended meaning of "object" became clear. *Magette*, 195 Ill. 2d at 349. The "intrusion" prong also included the word "object," and the court held that when the same word is used in different sections of a statute, courts shall presume that the legislature intended to give it the same meaning throughout the statute. *Magette*, 195 Ill. 2d at 349. The "intrusion" prong includes both "body parts" and "objects" among the list of things which may be used to commit sexual assault, which "plainly limits the word 'object' to inanimate objects." *Maggette*, 195 Ill. 2d at 349.

¶ 21 Since our supreme court has limited the word "object" in both the "intrusion" and "contact" prongs to inanimate objects, it cannot include fingers. Therefore, we find that defendant's conviction for criminal sexual assault based on contact between defendant's fingers and the victim's vagina was improper because the State failed to prove the element of sexual penetration.

¶ 22 **III. Criminal Sexual Abuse**

¶ 23 In its brief on appeal, the State asks us to reduce defendant's conviction to criminal sexual abuse, a lesser included offense of criminal sexual assault. 720 ILCS 5/12-15 (West 2008). The State has asked us to reduce the offense pursuant to Illinois Supreme Court Rule 615(b) (eff. Jan. 1, 1967). For the following reasons, we agree and reduce the degree of the offense.

¶ 24 A defendant commits criminal sexual abuse when he "commits an act of sexual conduct by the use of force or the threat of force[.]" 720 ILCS 5/12-15(a)(1) (West 2008). The Unified Code of Corrections defines "sexual conduct" as follows:

" 'Sexual conduct' means any intentional or knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus or breast of the victim or the accused, or any part of the body of a child under 13 years of age, or any transfer or transmission of semen by the accused upon any part of the clothed or unclothed body of the victim, for the purpose of sexual gratification or arousal of the victim or the accused." 720 ILCS 5/12-12(e) (West 2008).

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¶ 25 Illinois Supreme Court Rule 615 grants appellate courts the power to "[r]educe the degree of the offense of which the appellant was convicted." Ill. S. Ct. R. 615(b)(3) (eff. Jan. 1, 1967). Appellate courts may exercise this power when a lesser included offense exists for the offense that the appellant was convicted of. *People v. Raya*, 250 Ill. App. 3d 795, 801 (1993). If an appellate court determines that the evidence at trial proves that the defendant committed a lesser included offense of the offense for which the defendant was convicted, and that the evidence cannot sustain the conviction for the greater offense, the appellate court may enter a judgment on the lesser included offense. *Raya*, 250 Ill. App. 3d at 801.

¶ 26 Criminal defendants have a fundamental due process right to notice of the charges brought against them. *People v. Kolton*, 219 Ill. 2d 353, 359 (2006). Therefore, defendants may not be convicted of offenses they have not been charged with committing, unless the uncharged offense is a lesser included offense of a crime expressly charged in the charging instrument and the evidence adduced at trial rationally supports a conviction of the lesser included offense and an acquittal of the greater offense. *Kolton*, 219 Ill. 2d at 359-60.

¶ 27 In *Kolton*, our supreme court examined the "charging instrument approach" to lesser included offenses. The court adopted the approach in *People v. Novak*, 163 Ill. 2d 93 (1994), as a method of determining whether uncharged offenses could be lesser included offenses of charged crimes. The *Novak* court held that the charging instruments approach required courts to examine the charging instrument to determine whether an uncharged offense is a lesser included offense of a charged offense. *Novak*, 163 Ill. 2d at 107. In other words, the charging instrument must describe the lesser included offense or " 'set out the main outline of lesser offense.' " *Novak*, 163

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Ill. 2d at 107 (quoting *People v. Bryant*, 113 Ill. 2d 497, 505 (1986)).¹

¶ 28 We must determine whether, under the charging instrument approach, the "contact" prong of the sexual assault charge adequately put defendant on notice that he could be convicted of sexual abuse as a lesser included offense. Both sexual assault and sexual abuse require "the use of force or the threat of force," and the charging document alleged that defendant had used force or the threat of force to commit sexual assault against the victim. Therefore, we need determine only whether the charging instrument covered the "sexual conduct" element of sexual abuse.

¶ 29 The charging document alleged that contact between defendant's fingers and the victim's vagina had occurred, satisfying the "touching or fondling" requirement. The charging document in this case did not allege that defendant acted intentionally or for the purpose of sexual gratification or arousal, but the *Kolton* court held that, in some circumstances, missing elements may be inferred. See *Kolton*, 219 Ill. 2d at 364. The court held that both sexual penetration and sexual conduct are intentional acts. *Kolton*, 219 Ill. 2d at 369 (citing *People v. Terrell*, 132 Ill. 2d 178, 209 (1989)). Therefore, because the charging instrument alleged that defendant had performed sexual penetration upon the victim, it also alleged that the action was intentional.

¶ 30 Our supreme court in *Kolton* specifically addressed the "sexual gratification or arousal" element of sexual abuse. *Kolton*, 219 Ill. 2d at 369. The court held that although the charging document did not allege that the acts were done for the purpose of sexual gratification or arousal,

¹ The *Kolton* court upheld the use of the charging instrument approach, but held that the *Novak* court's application of the doctrine has since been eroded, and abrogated the majority decision with regard to whether sexual gratification can be inferred. *Kolton*, 219 Ill. 2d at 364.

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sexual penetration, which was alleged, is "inherently sexual in nature," and courts may infer that a defendant engages in sexual penetration for the purpose of sexual gratification or arousal.

Kolton, 219 Ill. 2d at 369. See also *People v. DeWeese*, 298 Ill. App. 3d 4, 10-11 (1998) (holding that a charging document that did not allege that sexual penetration was intentionally performed for the purpose of sexual gratification or arousal put defendant on notice that he could be convicted of criminal sexual abuse because the use of "threat of force" language indicated the defendant's intent to touch the victim for sexual gratification).

¶ 31 The *Kolton* court acknowledged that not all sexual penetration is done for purposes of sexual gratification or arousal, but concluded that because penetration is inherently intentional and sexual, the legislature did not need to include an intent requirement or a sexual gratification requirement in the definition of sexual penetration. *Kolton*, 219 Ill. 2d at 370. The court distinguished the "touching or fondling" required for sexual conduct because not all touching or fondling is sexual or intentional. *Kolton*, 219 Ill. 2d at 370 (citing *Terrell*, 132 Ill. 2d at 210). The court concluded that the intent requirement and the sexual gratification or arousal requirement were necessary clauses to define a criminal sexual offense which involves acts that are not inherently sexual. *Kolton*, 219 Ill. 2d at 370.

¶ 32 In the case before us, defendant's conduct satisfied the requirements of criminal sexual abuse, and the charging instrument put him on notice that he could be convicted for criminal sexual abuse. The trial court found that defendant forcibly restrained the victim and that his fingers made contact with her vagina. Defendant was charged with sexually penetrating the victim by placing his fingers in contact with her vagina by the use of force or the threat of force.

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This was sufficient to prove criminal sexual abuse because every element of that crime was also proven. Defendant was charged with putting his fingers in contact with the victim's vagina, satisfying the touching or fondling requirement. Our supreme court has held that sexual penetration is an inherently intentional sexual act, so the intent and sexual gratification or arousal requirements were met. *Kolton*, 219 Ill. 2d at 369-70. The force or threat of force requirement of criminal sexual abuse was also satisfied because the charging instrument explicitly alleged that defendant had committed the act by the use of force or the threat of force. Therefore, we exercise our authority to reduce the offense to criminal sexual abuse. Ill. S. Ct. R. 615(b)(3) (eff. Jan. 1, 1967). Based on the trial court's finding of fact that defendant's fingers came in contact with the victim's vagina, which has not been challenged on appeal, the State proved beyond a reasonable doubt at trial that defendant is guilty of criminal sexual abuse.

¶ 33 Defendant argues that we may not reduce the offense to criminal sexual abuse, and cites to various cases to support his argument. For the following reasons, we do not find defendant's arguments persuasive.

¶ 34 Defendant begins by arguing that *Kolton* is distinguishable because, in that case, it was the trial court, not the appellate court, that determined the State failed to prove the charged offense. As a result, it was the trial court that found the State had proven beyond a reasonable doubt that the defendant had committed a lesser included offense. *Kolton*, 219 Ill. 2d at 356-57. Therefore, the *Kolton* court did not rely on a reviewing court's authority pursuant to Illinois Supreme Court Rule 615(b) (eff. Jan. 1, 1967) to reduce the offense. The *Kolton* court determined only whether, in fact, the offense the defendant was convicted of was indeed a lesser

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included offense of the charged offense. *Kolton*, 219 Ill. 2d at 357.

¶ 35 Defendant's argument misses the relation of *Kolton* to this case. Our analysis relies on *Kolton* to determine whether or not criminal sexual abuse is a lesser included offense of criminal sexual assault. The *Kolton* case sets out a formula for determining whether an offense is indeed a lesser included offense of a charged offense. *Kolton*, 219 Ill. 2d at 364-368. We rely on *Kolton* only to find that criminal sexual abuse is a lesser included offense of criminal sexual assault, not to determine whether we have the power, under Illinois Supreme Court Rule 615(b) (eff. Jan. 1, 1967), to reduce defendant's sentence. Therefore, defendant's argument misapprehends the role of *Kolton* in our analysis.

¶ 36 Defendant next argues that Rule 615(b) should be used sparingly and that it is usually invoked by defendants to reduce their convictions to a lesser included offense. Defendant cites *People v. Coleman*, 78 Ill. App. 3d 989, 992-93 (1979), to assert that appellate courts shall use the power granted to them under Rule 615(b) sparingly.

¶ 37 We do not disagree that appellate courts shall use this power sparingly. However, defendant failed to note in his brief that, in the same sentence in which the *Coleman* court advises caution in exercising Rule 615(b) powers, it also states that the existence of the rule "is indicative of the fact that our supreme court recognizes that situations have arisen in the past and will arise in the future where an appellate court must in the interest of fair and uniform administration of justice exercise the powers granted by the rule." *Coleman*, 78 Ill. App. 3d at 992-93.

¶ 38 Other cases cited by defendant are inapposite to the case before us. Defendant relies on

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People v. Munday, 134 Ill. App. 3d 971 (1985), and *People v. Williams*, 222 Ill. App. 3d 129 (1991), to further assert that courts shall use Rule 615(b) sparingly. In both cases, the defendant asked the appellate court to reduce their sentences pursuant to Illinois Supreme Court Rule 615(b) (eff. Jan. 1, 1967). *Williams*, 222 Ill. App. 3d at 138-39; *Munday*, 134 Ill. App. 3d at 977. In both cases, the court refused to do so, finding that the evidence was sufficient to prove the defendants' guilt beyond a reasonable doubt. *Williams*, 222 Ill. App. 3d at 138-39; *Munday*, 134 Ill. App. 3d at 977-78. The *Munday* court specifically found that the purpose of Rule 615(b) is to reduce a conviction when the evidence at trial is too weak to sustain a conviction, and it is not intended to allow a benevolent reviewing court to reduce an offense a defendant has properly been convicted of. *Munday*, 134 Ill. App. 3d at 977-78.

¶ 39 Finally, defendant argues that appellate courts should be very reluctant to exercise their power under Rule 615(b) when it is the State that requests the imposition of a lower charge, rather than the defendant. Although we agree that courts must use this power sparingly, we believe defendant's view of the rule is too narrow. Defendant first cites *People v. Mata*, 243 Ill. App. 3d 365 (1993), to argue that, because the State did not charge him with criminal sexual abuse, he cannot be found guilty of it as a lesser included offense of criminal sexual assault. In *Mata*, the defendant was convicted of residential burglary of an attached garage. *Mata*, 243 Ill. App. 3d at 366. On appeal, this court reversed the conviction, finding that a garage is not a "dwelling," and therefore the State failed to prove an essential element of the charge of residential burglary. *Mata*, 243 Ill. App. 3d at 368-69 (citing *People v. Thomas*, 137 Ill. 2d 500, 519 (1990)). The defendant asked this court, if it did not reverse his conviction, to impose a

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conviction for burglary as a lesser included offense of residential burglary,² pursuant to this court's powers under Rule 615(b). *Mata*, 243 Ill. App. 3d at 371. This court concluded that, because the State did not charge the defendant with burglary, the State could not request the court to impose a conviction for the offense after it failed to prove the greater offense of residential burglary. *Mata*, 243 Ill. App. 3d at 374.

¶ 40 *Mata* predates both *Novak* and *Kolton*, which adopted the charging instrument approach to lesser included offenses. Our supreme court has expressly found that defendants may be convicted of uncharged lesser included offenses, so long as the charging instrument puts defendants on notice of the lesser included offense by adequately setting out the elements of the lesser included offense in the charging instrument. *Kolton*, 219 Ill. 2d at 367. Therefore, we do not find defendant's reliance on *Mata* persuasive.

¶ 41 Defendant also cites *People v. Finn*, 316 Ill. App. 3d 1139 (2000). In *Finn*, the defendant was charged with multiple crimes, including aggravated sexual assault. *Finn*, 316 Ill. App. 3d at 1140. The case proceeded to a bench trial, and the trial court found the defendant not guilty of the charged offenses, but proceeded to find the defendant guilty of aggravated sexual abuse because the trial court believed that it was a lesser included offense of aggravated sexual assault. *Finn*, 316 Ill. App. 3d at 1140. Under *Novak*, this court determined that the charging instrument did not set out the requisite elements of criminal sexual abuse and concluded that it could not sustain a conviction of criminal sexual abuse. *Finn*, 316 Ill. App. 3d at 1141 (citing *Novak*, 163

² This court expressly found that burglary was a lesser included offense of residential burglary. *Mata*, 243 Ill. App. 3d at 374.

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Ill. 2d at 113-14). The State conceded on appeal that aggravated sexual abuse was not a lesser included offense of aggravated sexual assault, but asked this court to exercise its Rule 615 powers to impose a conviction of attempted criminal sexual abuse as a lesser included offense of criminal sexual assault. *Finn*, 316 Ill. App. 3d at 1141. This court found that it could not grant the State's request because Illinois Supreme Court Rule 615(b) (eff. Jan. 1, 1967) allows appellate courts to reduce the degree of the offense for which the defendant was *convicted*. *Finn*, 316 Ill. App. 3d at 1141. The State requested that the court find that attempted criminal sexual abuse was a lesser included offense of criminal sexual assault, and the defendant had been *acquitted* of criminal sexual assault at trial. *Finn*, 316 Ill. App. 3d at 1141. Therefore, this court could not find the defendant guilty of a lesser included offense of a crime he had been acquitted of. *Finn*, 316 Ill. App. 3d at 1141-42.

¶ 42 Since the *Finn* case, our supreme court has expressly found that sexual abuse is a lesser included offense of sexual assault. *Kolton*, 219 Ill. 2d at 371. Furthermore, this court in *Finn* was asked to find a defendant guilty of a lesser included offense to a crime for which he had been acquitted. *Finn*, 316 Ill. App. 3d at 1141-42. That is not the case here. Defendant was convicted of criminal sexual assault, and now the State requests that we find instead that defendant was guilty of the lesser included offense of criminal sexual abuse. Under the application of the charging instrument approach laid out in *Kolton*, which expressly found that criminal sexual abuse is a lesser included offense of criminal sexual assault, we conclude that we have the authority under Rule 615(b) to reduce the charge defendant was convicted of to criminal sexual abuse.

¶ 43

CONCLUSION

¶ 44 For the above-mentioned reasons, we find that defendant's conviction of criminal sexual assault based on the contact between his fingers and the victim's vagina must be reversed.

However, we also conclude that all of the elements of the lesser included offense of criminal sexual abuse were proven at trial, and, pursuant to Illinois Supreme Court Rule 615(b)(3) (eff. Jan. 1, 1967), we reduce defendant's conviction on criminal sexual assault to criminal sexual abuse and remand for resentencing.

¶ 45 Reversed in part and remanded with instructions.