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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 Lake County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 98-CF-1994
)	
TIMOTHY F. LUNDON, a/k/a Timothy)	
Lunden,)	Honorable
)	Daniel B. Shanes,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Presiding Justice Jorgensen and Justice McLaren concurred in the judgment.

ORDER

¶1 *Held:* The trial court properly dismissed defendant’s section 2-1401 petition, which alleged that one of his two convictions and sentences for aggravated criminal sexual assault was void because the State did not apportion two offenses from two instances of penetration in a single course of conduct: the charges and the State’s conduct at trial (partially induced by defendant) apprised defendant that he was charged with two acts.

¶2 In his appeal from the dismissal of his “Motion to Vacate Void Judgment,” defendant, Timothy F. Lunden (a/k/a Timothy Lunden) asserts that one of the two consecutive sentences he received for two convictions of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(1) (West

1998)) is void because the State did not adequately apportion the charged acts to the two counts. Thus, he argues, under the facts, the law authorized only one sentence. We hold that the State sufficiently distinguished the two acts to the jury, such that two convictions and two sentences were proper. We therefore affirm the dismissal of defendant's "Motion."

¶ 3

I. BACKGROUND

¶ 4 In 1998, a grand jury indicted defendant on two counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(1) (West 1998)); both counts were based on use of a dangerous weapon, namely a knife, but the first was based on penis/mouth penetration and the second on penis/vagina penetration. A third aggravated criminal sexual assault count (720 ILCS 5/12-14(a)(2) (West 1998)) charged penis/mouth penetration based on defendant's striking the victim, T.S., in the head with his hand. A fourth charged penis/vagina penetration and bodily harm (720 ILCS 5/12-14(a)(2) (West 1998)). There were also two counts charging criminal sexual assault (penis/mouth penetration and penis/vagina penetration (720 ILCS 5/12-13(a)(1) (West 1998)) as alternate charging of the aggravated criminal sexual assault counts, and one count of aggravated unlawful restraint (720 ILCS 5/10-3.1(a) (West 1998)).

¶ 5 Defendant had a jury trial. In its opening statement, the State said that the evidence would show three instances of forced sexual penetration:

“[Defendant] got a knife out of the kitchen drawer and he held that knife to [T.S.’s] throat and he ordered her back into the living room area where *** he commanded her to perform oral sex on him ***. ***

The defendant then commanded [T.S.] into the bedroom, still wielding a knife. ***
Once they reached the bedroom area, the defendant again commanded that the victim perform oral sex upon him, which the victim did again do. ***

At that point in time, while the defendant was holding the knife to her throat, the victim was forced against her will *** to have intercourse with him on the bed in the room that they shared together.”

¶ 6 The State’s evidence was essentially consistent with the opening statement, with minor variations. For instance, T.S. described defendant as holding the knife to her head. The charges that went to the jury were aggravated criminal sexual assault (knife, penis/mouth), aggravated criminal sexual assault (knife, penis/vagina), criminal sexual assault (knife, penis/mouth), criminal sexual assault (knife, penis/vagina), and aggravated unlawful restraint.

¶ 7 The conference on jury instructions took place during the defense’s case. This conference is at the core of defendant’s claim of error. The relevant discussion is as follows:

“[The State]: The only thing is that, see, we have two counts of aggravated criminal sexual assault and we have two counts of criminal sexual assault, but we don’t really have two separate instructions for them because the instruction itself doesn’t delineate whether it was the type of penetration; either mouth or vagina.

I don’t know if the Court wants me to delineate them. I end up with separate instructions.

THE COURT: No—well, I should ask you.

[Defense counsel]: I think I want them delineated if we’re going to have six verdicts.

[The State]: Then we’ll have instead of six verdict forms, we will have ten.

THE COURT: And then in the forms of verdict, it will be, ‘We the jury, find the, defendant, Timothy Lundon, Not guilty of Aggravated Criminal Sexual Assault.’

[The State]: And the I.P.I. doesn’t—all the I.P.I. says is that the defendant committed an act of sexual penetration.

THE COURT: You’ve charged them separately and counsel is asking that he wants them delineated separately.

So my suggestion is, as long as this is with the defense’s agreement, that I’d rather have the ten forms of verdict. And then I’m just trying to put in brackets—

[The State]: So it would read, for example, first proposition, that the defendant committed an act of sexual penetration upon [T.S.] in that he placed his penis in her vagina; and the that other one, it would read, the defendant committed an act of sexual penetration upon [T.S.] in that he placed his penis in her mouth?

THE COURT: That’s what I think counsel’s indicated he wishes. Yes, sir?

[Defense counsel]: That’s correct. And that’s on the two criminal sexual assault charges.

[The State]: And the two aggravated criminal sexual assault charges?

THE COURT: Right. Which means there’s more than ten forms of verdict.

[The State]: Then there would be—there would be five—the aggravated unlawful restraint, two crim. sex. assaults, and two agg. crim. sex assaults, that would be five, which would be ten forms of verdict.

So I have to go back and change—I mean I have to do some serious changes in regards to that.

THE COURT: Right, and that's what counsel is asking. That's what you want, correct, sir; you want the ten forms of verdict? You want it delineated?

[Defense counsel]: Yes.”

¶ 8 In its closing statement, the State largely focused on the relative credibility of defendant and the victim, but did describe each charge, explicitly noting that the proof had to be of different types of penetration.

¶ 9 During deliberations, the jury sent a note asking which act of penis/mouth penetration the court was asking it to consider. The court told it to deliberate on the instructions (which defined the offense at issue). The jury found defendant guilty on all counts. The verdict forms clearly stated different forms of penetration.

¶ 10 On May 26, 1999, the court sentenced defendant to consecutive terms of 24 years' and 18 years' imprisonment for the two aggravated criminal sexual assault convictions. (The court ruled that the other convictions merged.) The court found that defendant's demeanor in court toward the victim showed that long terms were necessary to protect her and society. Both defense counsel and the State agreed that section 5-8-4(a) of the Unified Code of Corrections (Code) (730 ILCS 5/5-8-4(a) (West 1998)) required consecutive sentences because of the specific offenses and because they were part of a single course of conduct. (Defense counsel had suggested that the court could rule that the two acts were two separate courses of conduct and impose concurrent sentences, but did not argue at any length for such a ruling.)

¶ 11 Defendant appealed, asserting that the proof was insufficient and that the sentences were too long. This court affirmed the convictions but reduced the sentences to 20 years and 10 years—it did

not explicate its reasoning. *People v. Lundon*, No. 2-99-0614 (2000) (unpublished order under Supreme Court Rule 23).

¶ 12 Defendant next filed a postconviction petition, the contents of which are not relevant here. Ultimately, the trial court dismissed an amended version of the petition, and defendant appealed. This court upheld the dismissal. *People v. Lundon*, No. 2-03-0712 (2004) (unpublished order under Supreme Court Rule 23).

¶ 13 On February 2, 2010, defendant filed a “Motion to Vacate Void Judgment” in which he asserted that both sentences were based on what was effectively a single act, so that only one sentence was authorized. Based on the discussion at the instructions conference, he asserted that the court, rather than the State, had made the decision to ask for separate convictions. “[T]he verdict forms presented by the State did not differentiate the types of alleged penetration, however, the trial court requested separate verdict forms that delineate[d] the types of penetration.” “[A]t no time before trial did the State express an intent to seek separate convictions based on each type of penetration.” He further argued that, because the charged acts were one “transaction,” they could be only one act. Moreover, different types of penetration do not create different offenses of sexual assault, so that one continuous course of conduct could only be one sexual assault.

¶ 14 He asserted that, because “nothing would have prevented the jury from expressing whether it found defendant guilty of two Acts, Crim. Sexual Assault, (penis-mouth),” it must have found that only one of the acts that the victim described had occurred, and thus it must have found him not guilty of the other. Therefore, the court might have imposed a sentence based on an act of which the jury tried to acquit defendant.

¶ 15 The court entered an order dismissing the “Motion” explicitly treating it as a petition under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)). The court assumed that the petition was based entirely on a voidness claim and thus needed to state neither diligence in raising the claim in the initial proceeding nor diligence in bringing the petition. It held that the indictments and other actions of the State adequately apprised defendant that he was being charged with two acts and that, once the jury had convicted him of both, the sentencing law of the time required consecutive sentences. The court therefore dismissed defendant’s petition.

¶ 16 Defendant moved to reconsider. He asserted that the State’s original proposed instructions had only one verdict form each for the aggravated criminal sexual assault and criminal sexual assault charges, and that this showed that the State had intended to charge only one offense. The court denied the motion, and defendant filed a timely notice of appeal.

¶ 17

II. ANALYSIS

¶ 18 On appeal, defendant again asserts that one of his sentences is void because it was not authorized under the facts. He argues that, because the State has sole authority to decide the charges, the court was bound to the structure of the charges in the draft instructions, as those expressed the State’s intentions. He asserts that the court ordered the State to change its theory from two separate charging theories for the same act to two acts, but also reasserts his claim that different types of penetration are not “separate offenses.”

¶ 19 We address *de novo* whether an order is void; because relief from void orders is available in any court with proper jurisdiction—even if a party raises an issue for the first time on appeal—the trial court’s treatment of defendant’s petition has no effect on whether we can give relief. See *People v. Schlabbach*, 2012 IL App (2d) 100248, ¶ 13 (noting that actions in the trial court were not

relevant to whether relief was available for a void judgment). We assume here for the sake of argument that, for two sentences to be within the court's authority (and thus not void), the proof must meet the standards of *People v. Crespo*, 203 Ill. 2d 335 (2001), for the proof of two separate acts.

¶ 20 In *Crespo*, the supreme court initially noted that it had, in past cases, rejected the idea that a continuous course of conduct had to be treated as one act. As an example, it noted that, in *People v. Dixon*, 91 Ill. 2d 346 (1982), it had “rejected the argument that striking the victim several times with a club constituted a continuous beating and therefore a single physical act. Rather, [it] held that the separate blows, although closely related, constituted separate acts which could properly support multiple convictions with concurrent sentences.” *Crespo*, 203 Ill. 2d at 341-42. However, it held that multiple stab wounds would not support multiple convictions where “[n]owhere in [the] charges [did] the State attempt to apportion [the] offenses among the various stab wounds” (*Crespo*, 203 Ill. 2d at 343) and the State had argued that the three wounds together caused great bodily harm (*Crespo*, 203 Ill. 2d at 343). It would not allow the State to change its theory of the case on appeal, as this would be manifestly unfair to the defendant. “[T]he State’s theory at trial, as shown by its argument to the jury, amply supports the conclusion that the intent of the prosecution was to portray defendant’s conduct as a single attack.” *Crespo*, 203 Ill. 2d at 343-44.

¶ 21 Here, the charging instrument and the opening statement did apportion the offenses by describing the types of penetration. The forms of verdict also did so; defendant concedes this by his argument that the court forced the State to alter them to charge two acts. Thus, by the *Crespo* standards, it is clear that the statements of the charges were easily sufficient to apportion the instances of penetration to different offenses.

¶ 22 Defendant argues that, at the instructions conference, the court somehow usurped the State's role in deciding the charges. Looking at the record of the dialog, we see that that is not so. One thing is striking: defense counsel was the one asking for the changes in the forms of verdict; the court and the State both acceded to that request. Thus, defendant *himself* was the one who caused the change in the charging theory. Clearly, defense counsel took the charging instruments and opening argument to express the State's intent to charge two acts. Defense counsel, by asking for an alteration of the instructions and forms of verdict, was simply asking for technical clarifications.

¶ 23 Defendant's last claim is that different forms of penetration are not "separate offenses" and thus cannot support two sentences. This argument relies on an equivocation. It functions by shifting the meaning of "different offenses" from different crimes under the law (such as theft and robbery) to different instances of an offense (such as the theft of two distinct objects). Our criminal law does not contain separately defined forms of aggravated criminal sexual assault based on the type of penetration. However, as here, specification of different forms of penetration (like specification of the theft of different objects) allows clear apportionment of instances of an offense between acts.

¶ 24

III. CONCLUSION

¶ 25 For the reasons stated, we affirm the dismissal of defendant's "Motion to Vacate Void Judgment."

¶ 26 Affirmed.