

C.C. (the victim). The count alleging aggravated criminal sexual assault alleged that the defendant "placed his finger in the vagina of" the victim. One count alleging aggravated criminal sexual abuse alleged that the defendant fondled the victim's breasts, while the other count alleged that the defendant forced the victim to fondle his penis. At trial, the victim testified that the defendant abducted her at gunpoint from the parking lot of a bar and grill in East St. Louis, drove her to a nearby isolated area, then sexually assaulted her, all the while threatening to kill her. In her initial statements to police and medical personnel, on the night of the attack, the victim had stated that the defendant fondled her breasts and forced her to fondle his penis, but she had denied that any penetration, including penetration of her vagina by the defendant's finger, had occurred. At trial, she testified that what she meant in her earlier statements was that no penile penetration had occurred, and that because of the trauma of the event, she had not understood that she was being asked about the penetration of her vagina by the defendant's finger as well. She testified at trial that, her initial statements to police and medical personnel notwithstanding, during the attack the defendant had both rubbed her clitoris and penetrated her vagina with his finger before she managed to push his hand away.

¶ 5 In a recorded statement given to police shortly after the attack and played for the jury at trial, the defendant admitted to abducting the victim at gunpoint, fondling the victim's breasts, and forcing her to fondle his penis, but denied that he penetrated the victim's vagina with his finger, claiming instead that he was trying to rub on her "privacy part" but failed, because the victim pushed his hand away. During closing argument, the State argued that both the defendant's touching of the victim's clitoris and his digital penetration of her vagina constituted the penetration necessary to prove the defendant had committed aggravated criminal sexual assault. The defense countered, in its closing argument, that although the defendant admitted to fondling the victim's breasts, forcing her to fondle his penis, and

attempting to penetrate the victim, he denied penetrating her, and the jury should believe both his statement and the victim's initial statements to police and medical personnel, rather than her testimony at trial. The defense also argued that "the touching and the rubbing" of the victim's clitoris "might work for some kind of sexual conduct but not for penetration." Accordingly, the defense contended, the jury should find the defendant guilty of two counts of aggravated criminal sexual abuse, but should acquit him of the far more serious charge of aggravated criminal sexual assault. The defense did not tender instructions for lesser-included offenses with regard to the charge of aggravated criminal sexual assault.

¶ 6 During its deliberations, the jury sent a note to the judge asking for help "on the defense challenge that touching the clitoris is not penetration." Defense counsel argued that because the relevant jury instructions left the question unanswered, only the jury could decide if touching the clitoris could constitute penetration; the judge agreed, and the jury was told that it would receive no additional instructions. The jury later requested the opportunity to again review the victim's initial statements, wherein she denied that the defendant's finger penetrated her vagina, and that request was granted. The jury subsequently sent out a note stating that it was undecided as to one count, but was instructed to continue to deliberate. Ultimately, the jury convicted the defendant of one count of aggravated criminal sexual assault and two counts of aggravated criminal sexual abuse. The defendant filed a posttrial motion, which was denied, and this timely appeal followed.

¶ 7 ANALYSIS

¶ 8 On appeal, the defendant raises the following two¹ claims of error: (1) he was denied

¹In his opening brief, counsel for the defendant raised three claims of error; however, in his reply brief he withdrew the third claim, recognizing that a decision of the Illinois Supreme Court that was filed subsequent to counsel's filing of his opening brief effectively resolved the claim in the State's favor. We agree and do not address the claim the defendant

a fair trial because "the State was allowed to argue, and the jury was instructed, on alternative separate sufficient acts in the disjunctive *** as being sufficient to establish guilt on a single count, when only a single act of digital insertion was specified in that count," and (2) he received ineffective assistance of trial counsel because trial counsel did not tender instructions on a lesser-included offense.

¶ 9 With regard to the first claim, the defendant does not contend, as did trial counsel, that the defendant's rubbing of the victim's clitoris cannot constitute the penetration necessary to prove the charge of aggravated criminal sexual assault, and we would reject such a contention in any event. See, e.g., *People v. W.T.*, 255 Ill. App. 3d 335, 347 (1994) (in Illinois, sexual penetration means "any intrusion, however slight, of any part of the body of one person into the sex organ of another person" and because "the female 'sex organ' is not limited to the vagina but also includes the labia majora and labia minor, the outer and inner folds of skin of the external genital organs," it follows that "vaginal penetration is not necessary to constitute sexual penetration under Illinois law"). Instead, the crux of the defendant's contention is that although the information charging the defendant with aggravated criminal sexual assault alleged that the defendant committed the offense when he "placed his finger in the vagina of" the victim, the defendant was denied a fair trial because the State was allowed to argue to the jury at trial that the offense could also have been committed when the defendant rubbed the victim's clitoris with his finger, an act not charged in the information. Thus, the defendant posits, it is possible that the jury did not believe that the defendant placed his finger in the victim's vagina, but did believe that he rubbed her clitoris, and that accordingly he may have been convicted of aggravated criminal sexual assault on the basis of an "alternative[,] uncharged" act.

¶ 10 In support of this proposition, the defendant cites cases in which Illinois courts have

has withdrawn.

held that a charging instrument is void as duplicitous where, in a single count, it alleges alternate and disparate acts, each of which is sufficient for conviction of the offense charged. See, e.g., *People v. Capitol News, Inc.*, 137 Ill. 2d 162 (1990). The defendant concedes that in the case at bar, the information itself is not duplicitous—as it clearly charges only that the defendant "placed his finger in the vagina of" the victim—but contends that he was denied a fair trial because the effect of allowing the State to argue the alternative, uncharged act of rubbing the victim's clitoris was to "effectively amend *** the charge indirectly ***", a tactic that [the State] would be barred from doing openly in the charging instrument." The defendant points to a line of federal cases that prohibit such action on the part of the prosecution.

¶ 11 The State responds that none of the cases cited by the defendant are directly on point, because none deal with offenses involving sexual penetration, offenses for which this court has held, on multiple occasions, that the specific type of penetration is not an element of the offense, but is instead mere surplusage when included in the charging instrument, and that therefore the State need not prove the specific type of penetration alleged in the charging instrument, as long as it proves, beyond a reasonable doubt, that some type of penetration occurred. See, e.g., *People v. Harper*, 251 Ill. App. 3d 801, 806-07 (1993). Thus, the State contends, although the defendant's contention is as a general proposition a sound one, it is simply not applicable to offenses such as the one at issue in this case. We agree with the State and hold that the long line of cases supporting the State's position clearly demonstrates that the defendant in this case was not deprived of a fair trial merely because the jury might have found the penetration necessary for conviction occurred as the result of the defendant rubbing the victim's clitoris, rather than placing his finger in her vagina.

¶ 12 The defendant's second claim of error is that he received ineffective assistance of trial counsel because trial counsel did not tender instructions on a lesser-included offense.

Specifically, the defendant contends his trial counsel should have requested an instruction or instructions based upon the defendant's admitted acts of engaging in sexual conduct with the victim by fondling the victim and unsuccessfully attempting to "rub [the victim's] sex organ with his fingers." The defendant posits that had an instruction or instructions been given, the jury might have found some kind of sexual contact short of penetration and thus might have convicted the defendant of a lesser offense. The State responds by pointing to *People v. Medina*, 221 Ill. 2d 394, 409-10 (2006), wherein the Supreme Court of Illinois held that when counsel does not tender a lesser-included offense instruction—and therefore does not subject the defendant to the potential additional criminal liability that always accompanies such an instruction—"it may be assumed that the decision not to tender was defendant's, after due consultation with counsel." The defendant counters that in the case at bar, "the record is replete with statements that [the defendant] was not contesting his guilt, *per se*, but was contesting his guilt as to the greater offense only," and that accordingly we should assume that he did not and would not, after due consultation with counsel, waive his right to tender instructions on a lesser-included offense. We do not agree that on the basis of the record before this court it would be appropriate to make such an assumption. Instead, we agree with the State, and with decisions we have issued in the past, that the defendant's argument is one that must be raised in a collateral proceeding. See, *e.g.*, *People v. Moore*, 358 Ill. App. 3d 683, 689-90 (2005) (where record is silent as to whether defendant was given the opportunity to decide if instruction on lesser-included offense was to be tendered, issue cannot be decided on direct appeal and must be raised in collateral proceeding). Accordingly, we decline to address the defendant's ineffective assistance of counsel claim in this appeal.

¶ 13

CONCLUSION

¶ 14 For the foregoing reasons, the defendant's convictions and sentences are affirmed.

¶ 15 Affirmed.