

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2015 IL App (3d) 130510-U

Order filed June 5, 2015

---

IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 9th Judicial Circuit, Knox County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-13-0510
CODY J. THOMAS,	)	Circuit No. 11-CF-517
Defendant-Appellant.	)	Honorable Scott Shipplett, Judge, Presiding.

---

JUSTICE SCHMIDT delivered the judgment of the court.  
Justices Holdridge and O'Brien concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The State presented sufficient evidence to support finding defendant guilty of attempted aggravated criminal sexual assault. The court erred in sentencing defendant on two counts of attempted aggravated criminal sexual assault where the State alleged only one act of attempted penetration.
- ¶ 2 The trial court found defendant guilty of aggravated battery and two counts of attempted aggravated criminal sexual assault. The court sentenced defendant to consecutive terms of 5 years' imprisonment on the aggravated battery conviction and 10 years' imprisonment for each count of attempted aggravated criminal sexual assault.

¶ 3 Defendant appeals, arguing that the State failed to present sufficient evidence to prove that he acted with the specific intent to commit a sexual act at the time he struck Sophia. Alternatively, defendant argues that the trial court erred in convicting and sentencing him on both counts of attempted aggravated criminal sexual assault where the State alleged only one attempted act of penetration.

¶ 4 For the following reasons, we affirm in part and remand for further proceedings.

¶ 5 **BACKGROUND**

¶ 6 The State charged defendant with three counts of attempted first-degree murder, one count of aggravated battery, and two counts of attempted aggravated criminal sexual assault. The State filed an amended information, charging defendant with attempted first-degree murder of Sophia Interrial, aggravated battery, attempted aggravated criminal sexual assault while possessing a dangerous weapon, and attempted aggravated criminal sexual assault during the commission of the forcible felony of aggravated battery. The State filed a second amended charging information and presented the court with a partially negotiated plea. Ultimately, Judge Mangieri rejected the plea agreement and recused himself from the case. Judge Scott Shiplett presided over the case. Ultimately, the State proceeded on the first amended charging information.

¶ 7 The matter proceeded to a bench trial. The State presented the following evidence.

¶ 8 Sophia's stepfather, Mark Johnson, testified that he knew Sophia for 13 years. Sophia lived with Mark and Mary, Mark's wife and Sophia's mother, at 560 Liberty Street in Galesburg, Illinois. Thanksgiving of 2011 was on November 24. The Johnsons hosted Thanksgiving dinner at their house around noon or 12:30 p.m. After dinner, Mark drove Sophia to a friend's house.

She returned an hour later. Around 8 p.m., Mary drove Sophia to LaMesa, a bar owned by Sophia's uncle.

¶ 9 Mark woke up around 2:11 a.m. to his dog barking and someone yelling outside the house. He went downstairs, opened the front door, and walked out onto the front porch. As he peered over the edge, he saw defendant kneeling over someone and yelling "help, help, help" into a cell phone. An 8 to 12-inch pool of blood surrounded the person's head. Mark ran inside and dialed 911. He yelled for Mary to come downstairs and said someone was injured on the sidewalk.

¶ 10 When Mark returned outside, he saw defendant trying to pick up the person. Defendant told the person that she was going to be all right. Mark identified defendant in court. Mark recognized the person's shirt as the same shirt Sophia wore at dinner. He told defendant to get away from his stepdaughter. Defendant yelled, "It's a dude." Mark also noticed that a landscaping brick from the front yard flowerbed was lying near Sophia. Prior to that night, the brick has been along the flowerbed for at least 10 years.

¶ 11 The police arrived and moved defendant away from Sophia. Mark noticed that Sophia's pants were down below her crotch area. He told the officers that something was not right. Sophia was gay and he had never known her to date a man. Sophia was unconscious and unable to tell Mark, Mary, or the officers what happened. Sophia received treatment at various hospitals and long-term care facilities. Nine months after the incident, Mark and Mary brought Sophia back to their house. Sophia continues to live with them as she can no longer care for herself.

¶ 12 Mary testified that she lives at 560 Liberty Street with Mark and Sophia. She hosted Thanksgiving dinner at her house on November 24, 2011. Visitors left around 6 p.m. That

afternoon, Mark drove Sophia to a friend, Tony Asencio's, house. Tony dropped Sophia off at the Johnson's about an hour later. At 8 p.m., Mary drove Sophia to LeMesa.

¶ 13           Around 2 a.m., Mary heard the dog barking and a moaning or groaning sound. Mary thought that Sophia had fallen and asked Mark to investigate. Mark called out that someone was hurt. Mary went downstairs while Mark called 911. Mary went onto the porch and saw defendant, Mark, and a third person. Mary knew that defendant used to work with Sophia. Mary had never known Sophia to date defendant. Sophia was gay and only dated women. Mary identified defendant in court. Defendant attempted to pick Sophia up. Mark said that the person had on the same shirt that Sophia wore to Thanksgiving dinner and the victim was Sophia. Mary told defendant to stop moving Sophia. Defendant shouted, "It's a dude." Defendant walked away after emergency personnel arrived.

¶ 14           Mary noticed that Sophia's pants were partway down below her belly button. Mark showed the police the landscaping brick. The brick was an irregular size because Mark had to cut it to fit between two other bricks. Prior to that night, the brick had been part of a border around the flowerbed. Sophia was unable to speak and gurgled on her blood. Sophia laid face-down; a pool of blood surrounded the right side of her head. Mary heard an officer ask defendant what he did. The officer said, "We just seen you 20 minutes ago." Defendant said that he did not do anything. He walked by and saw her lying there.

¶ 15           Doctors treated Sophia at numerous hospitals and long-term care facilities. Sophia was in a coma until February 11, 2012. She suffered extensive brain injuries. Sophia finally recalled the events that transpired on Thanksgiving in March 2012. Prior to her recollection of the events, neither Mark nor Mary discussed the incident with her. Sophia returned home on August

31, 2012. She still lives with Mark and Mary. Mary continues to assist Sophia with routine activities.

¶ 16 Dawn Garcia, the Johnson's neighbor, testified that she knew Sophia for most of Sophia's life. Dawn lives at 546 Liberty Street. On Thanksgiving of 2011, she went shopping and returned home around 1 a.m. As she drove toward her house, she noticed a cab outside of the Johnson's house. Sophia and defendant were in the backseat of the cab gathering money together to pay the cabdriver. She had never met defendant, but had seen him on prior occasions at LaMesa.

¶ 17 Dawn went into her home and cleaned. Her 15-year-old son told her that someone was hollering outside. Dawn saw shadows in front of the Johnson's front porch and heard a loud groaning sound. Outside, Dawn saw defendant sitting over a person. Dawn realized the person was Sophia. Defendant repeatedly said, "That's a dude." Defendant had blood on his hands. Sophia's pants were down past her waist and her hair was matted. Blood pooled on the sidewalk around Sophia's head.

¶ 18 Susan Wilder previously lived near the Johnsons and knew Sophia since Sophia's birth. Susan stayed with her parents at 570 Liberty Street over Thanksgiving of 2011. Her father recently suffered a stroke and she was up with him several times during Thursday evening into early Friday morning. At some point, she heard screaming and a man yelling, "Get up. Get up. Oh, my God. What's going on? Oh, my God. Get up. Get up." Susan went outside and saw a man on top of another person. Susan asked him if he needed her to call 911; he said yes. She went inside and made the call.

¶ 19 After calling 911, Susan went back outside and walked over to the Johnson's house. She saw Sophia lying on her stomach. Her pants were pulled down "a ways." Sophia's head was

bloody and her hair was matted. Susan saw blood everywhere. The man standing over her kept saying, “It’s a dude, it’s a dude.” Mark told the man it was his daughter.

¶ 20 Heidi McFadden testified that she knew Sophia for about 20 years. They dated on and off for the last several years. Their last relationship ended on Thanksgiving in 2011. Heidi spoke with Sophia several times that day before leaving for Iowa to visit family. She returned home around 10 p.m. Between 10 p.m. and 2 a.m., Heidi spoke to Sophia on the phone several times and received several text messages from her. Heidi last spoke with Sophia between 1 a.m. and 1:45 a.m. Sophia called her three or four times after that, but Heidi did not answer. Sophia last called Heidi at 1:57 a.m. Sophia was at LaMesa that night. She told Heidi that she was having trouble with another female in the bar, but did not refer to defendant. Sophia was intoxicated when she called Heidi. Heidi knew that Sophia and defendant were friends and got along with each other. Heidi told the police that Sophia was angry with her for talking to a guy after he hit on her. Heidi testified that Sophia had a history of excessive drinking.

¶ 21 Officer Kyle Winbigler testified that on November 25, 2011, at approximately 2:12 a.m. he responded to a call regarding a pedestrian down on 560 Liberty Street. Upon arriving, Winbigler observed Sophia lying on the ground and defendant kneeling over her. Winbigler identified defendant in court. Defendant was distraught, screaming for help and had tears in his eyes. Defendant stepped away pursuant to Winbigler’s request. Winbigler noticed a large pool of blood surrounding Sophia’s head. Sophia’s pants were pulled down, exposing her buttocks and her coat and shirt were up above her navel. Sophia did not respond. He observed a brick near Sophia and noticed that the brick belonged to a row of landscaping blocks approximately one foot from Sophia’s head.

¶ 22 Winbigler asked defendant what happened. Defendant responded that he did not know. He handcuffed defendant and searched him. Defendant's pant zipper was down and his belt was unbuckled, but his button was done. Winbigler placed defendant in the squad car and read defendant his *Miranda* rights. Defendant said he understood his rights and agreed to speak with the officer. Defendant, again, said that he did not know what happened. Winbigler told defendant that he knew defendant was lying. Defendant responded that he was walking by, found her like that, and tried to help her. Winbigler, again, told defendant that he knew defendant was lying; Winbigler interacted with defendant and Sophia approximately 24 minutes earlier at Quick Sam's. Winbigler asked defendant why Sophia's pants were down. Defendant did not know. Winbigler then asked why defendant's zipper was down. In a sarcastic tone defendant stated, "Yes. I tried to have sex with her and beat her. Is that what you're trying to say to me? Come on, Man. Everybody knows she doesn't like guys." Defendant then admitted that he has been with Sophia earlier that night.

¶ 23 Detective Todd Olinger testified that on November 25, 2011, he responded to a call about a person down at 560 Liberty Street. An officer advised him that Sophia had been located on the sidewalk. At the scene, Olinger noticed a brick missing from one row of the flower garden border and a brick consistent with those in the border was lying on the sidewalk. Olinger interviewed defendant at the station. Defendant did not claim that he acted in self-defense. Olinger interviewed Sophia on two different occasions. During the first interview, Sophia was coherent, but slurred her speech. She did not remember the events surrounding the attack. During the second interview, Sophia recalled some of the events and told him what she could remember.

¶ 24 The State also called numerous doctors, all of whom testified to the substantial brain injuries Sophia suffered. We need not go into detail about such testimony as defendant is not appealing his aggravated battery conviction.

¶ 25 Sophia testified that she lives with her mother and stepfather. She used to work with defendant at Derby Industries in Galesburg. Sophia identified defendant in court. On Thanksgiving Day of 2011, she ate dinner at home with Mark, Mary, her aunt, and her cousin. After dinner, Mark drove her to visit her friends Tony and Jessica Wallace. They chatted and smoked outside. Someone drove her home. Sophia borrowed \$20 from Mary so she could go to LaMesa. Mary dropped Sophia off at the bar. Sophia had not planned on meeting anyone at the bar. Before arriving at the bar, she talked with defendant on the phone, but could not recall whether she called him or he called her. Defendant later showed up at the bar.

¶ 26 Sophia drank beer and a few shots. She had quite a few drinks while at LaMesa. Defendant drank one mixed drink and beer. Defendant complained about the mother of his children. Sophia let him vent. Defendant kissed Sophia on the mouth. Sophia told defendant that she was gay and “I don’t get down like that.” Defendant knew Sophia was gay; Sophia’s girlfriend worked at Derby with Sophia and defendant. Sophia denied that she ever tried to kiss defendant or hit on him.

¶ 27 Sophia and defendant took a cab to Mark and Mary’s house. Cody ingested something in the cab, which he said was crystal meth. When they arrived at the house, neither defendant nor Sophia had money to pay the cabdriver. The cabdriver called the police. Defendant and Sophia got back into the cab and went to Quick Sam’s. Defendant went inside, got money and paid the driver. The police arrived and talked to defendant and Sophia about the dispute.

¶ 28 Sophia and defendant walked two or three blocks back to Sophia's house. While they walked, defendant tried to grab her hand. She told him she was gay and he backed off. When they arrived at the house, they sat on the front porch swing. Defendant asked for a beer, but Sophia did not have any. He kissed Sophia. Sophia pushed him away. Defendant continued to complain about the mother of his children. Defendant jumped down and picked up a brick from the flowerbed. She jumped down to see what he was doing. She testified, "I must have turned my back towards him because I — — you know, I didn't see him throw it at me, but no one else was there, but I do remember like him lifting — — like chalking it up, you know." Sophia only remembers feeling pain and seeing blood. She denied that she ever hit or pushed defendant off of the porch. Sophia only pushed him away when he tried to kiss her.

¶ 29 Sophia did not remember what happened that night until months after the incident. No one told her what happened. She did not remember everything that happened that evening; she drank quite a bit of alcohol during the day and at LaMesa. She did not recall defendant trying to undo her pants. Sophia knew defendant for years and drank with him before.

¶ 30 The court also admitted and viewed a security video from Knox College. The video depicts defendant urinating by a tree. Sophia walks in front of defendant and also urinated. After urinating Sophia fell over, stood up and pulled up her underwear and pants.

¶ 31 Debra Milton testified that she is a forensic scientist with the Morton Forensic Science Laboratory specializing in DNA analysis. The blood on the brick matched Sophia's DNA profile; it did not match defendant's DNA profile. Milton used a swab taken from Sophia's right breast to obtain a DNA profile from which defendant could not be excluded. The major DNA profile obtained from chewing gum from under Sophia's fingernails matched Sophia's profile. Milton could not rule out defendant from contributing to the minor DNA profile.

¶ 32 At the close of the State's case, the trial court granted defendant's motion for a directed finding of not guilty on the charge of attempted murder, but denied the motion as to the remaining charges. The court found that defendant hit Sophia with the brick because she would not have sex with him. The court stated that defendant tried to beat Sophia into submission by hitting her in the back of the head with a brick.

¶ 33 Defendant testified that he lived with his girlfriend and their three children. He knew Sophia since 2005 when they worked together at Derby. Defendant was friends with Sophia and considered her "one of the guys." He knew Sophia was gay and had never been romantically involved with her.

¶ 34 On Thanksgiving 2011, defendant visited his mother and then went to his house. He started drinking at home around 9 p.m. He left his house around midnight and walked to LaMesa, where he continued to drink. He ran into Sophia at the bar. Defendant had not talked to Sophia in years. They drank beer and shots together. They both were drunk.

¶ 35 Sophia behaved differently toward defendant than she had before. She flirted with him and tried to hit on him. Defendant went into the bathroom and Sophia came up behind him and said, "Fuck me, Cody." Defendant said, "You're drunk; you're drunk. You're gay. You know, come on." He denied trying to have sexual relations with Sophia that night.

¶ 36 At closing time, Sophia suggested that they take a cab to her house; defendant had planned on walking home. Defendant figured he could take a cab to her house and then walk to his house from there. He denied ingesting any drugs during the cab ride. When they arrived at Sophia's house, Sophia did not have money to pay the cabdriver. He also did not have any change. The cabdriver drove them to Quick Sam's, where defendant got money and paid the driver. Defendant and Sophia walked to the Johnson's house. Defendant stopped near Knox

College to urinate by a tree. Sophia walked around in front of him, dropped her pants, and urinated.

¶ 37 Upon arriving at Sophia's house, defendant and Sophia sat on the steps in front of the porch. At some point, defendant passed out on the porch. He remembered waking up and being surprised or startled. Defendant did not recall his pants being undone when he woke up. He acknowledged that the police said his belt buckle and zipper were undone. Defense counsel asked, "Do you have an explanation for that?" He stated, "The only thing I can think of is that's what, I guess, you know, startled me, what woke me up was her, you know, messing with my pants or, you know what I'm saying, trying to get my pants undone or whatever."

¶ 38 After waking up, defendant jumped up to leave and started to walk down the sidewalk. Defendant stopped and called his girlfriend. Sophia came around in front of him and said something like, "Just stay, just wait." She asked him not to leave. As he turned away to leave he felt something hit him. Defendant testified that it was a "heavy, hard pain that hit me in the — — kind of almost the center of my mid-back but a little bit to the right." As he turned around, he observed a brick and Sophia on the ground. When asked what happened next, defendant responded that, "I guess, basically in my anger or drunkenness I basically picked it up and then hit her with it." He saw the blood and tried to call 911, but could not dial correctly. He heard Sophia making gurgling noises. He dropped his phone, ran over to her, held her head, and screamed for help. Defendant did not recall Sophia's pants being down after she fell. He also did not remember saying, "It's a dude." After police arrested him, defendant did not tell the police that he was hit by a brick, nor did he seek medical attention for his back. He also did not observe any blood on the jacket he was wearing.

¶ 39 The State called various witnesses in rebuttal. Sophia denied that she attempted to unbuckle defendant’s belt and unzip his zipper. Further, she testified that defendant never passed out while they sat on the porch. She, again, stated that defendant kissed her and wanted to have sex with her. Defendant told her that he could “straighten her out.” Other rebuttal witnesses’ testimony related to defendant’s battery conviction and Sophia’s head injuries. Again, we need not go into detail as defendant is not appealing his aggravated battery conviction.

¶ 40 The court found defendant guilty of aggravated battery and both counts of attempted aggravated criminal sexual assault. The court sentenced defendant to 5 years’ imprisonment on the aggravated battery conviction and 10 years’ imprisonment for each attempted aggravated criminal sexual assault conviction to be served consecutively. Defendant filed a motion to reduce his sentence, arguing that the court cannot convict and sentence him on both aggravated criminal sexual assault charges where the State alleged only one attempted act of penetration. The court denied defendant’s motion.

¶ 41 Defendant appeals, we affirm in part and remand for further proceedings.

¶ 42 ANALYSIS

¶ 43 I. Sufficiency of the Evidence

¶ 44 Defendant argues that the State failed to prove beyond a reasonable doubt that defendant struck Sophia with a brick with the intent to commit a sexual assault against her.

¶ 45 When a defendant challenges the sufficiency of the evidence, we must determine whether, viewing the evidence in light most favorable to the prosecutor, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Ross*, 229 Ill. 2d 255, 272 (2008).

The State bears the burden to prove all elements of a crime beyond a reasonable doubt. *People v. Layhew*, 139 Ill. 2d 476, 485 (1990). The burden remains on the State throughout the entire case. *Id.* Here, the State had the burden of proving each element, beyond a reasonable doubt, of attempted aggravated criminal sexual assault. The relevant statute states:

“(a) A person commits criminal sexual assault if that person commits an act of sexual penetration and:

(1) uses force or threat of force;\*\*\*.” 720 ILCS 5/11-1.20 (West 2010).

“(a) A person commits aggravated criminal sexual assault if that person commits criminal sexual assault and any of the following aggravating circumstances exist during the commission of the offense \*\*\*:

(1) the person displays, threatens to use, or uses a dangerous weapon, other than a firearm, or any other object fashioned or used in a manner that leads the victim, under the circumstances, reasonably to believe that the object is a dangerous weapon;

\* \* \*

(4) the person commits the criminal sexual assault during the course of committing or attempting to commit any other felony; \*\*\*.” 720 ILCS 5/11-1.30 (West 2010).

“A person commits the offense of attempt when, with intent to commit a specific offense, he or she does any act that constitutes

a substantial step toward the commission of that offense.” 720

ILCS 5/8-4(a) (West 2010).

¶ 47 After reviewing the evidence we find that a reasonable trier of fact could have found that defendant acted with the intent to commit a sexual assault against Sophia.

¶ 48 Evidence established that defendant attempted to make sexual advances toward Sophia throughout the entire evening. Sophia testified that defendant kissed her while they were at LaMesa and while they sat on the front porch. Further, defendant indicated that he wanted to have sex with Sophia and told her that he could make her straight. Defendant tried to hold her hand while they walked to her house from Quick Sam’s. Defendant backed off only after Sophia told him she was gay. We acknowledge that defendant testified that Sophia made sexual advancements toward him. However, it is not our task to determine the credibility of the witnesses: where witnesses present conflicting testimony, the trial court is in a better position to determine the credibility of such witnesses and weigh the evidence. *Marth v. Illinois Weather-Seal, Inc.*, 50 Ill. App. 3d 577, 581 (1977) (citing *Schulenburg v. Signatrol, Inc.*, 37 Ill. 2d 352 (1967)); *Terminal-Hudson of Illinois, Inc. v. Goldblatt*, 51 Ill. App. 3d 199, 205 (1977). The court credited Sophia over defendant. The court found that defendant hit Sophia with the brick because she would not have sex with him. We will not reverse simply based on the court’s determination to credit one witness and not the other witness. *Terminal-Hudson*, 51 Ill. App. 3d at 205.

¶ 49 Evidence, including defendant’s own testimony, established that defendant lied to the police. Defendant told the police *twice* that he did not know what happened; he found Sophia on the ground when he walked by. Sophia and defendant testified that defendant and Sophia hung out at LaMesa earlier that evening. The video recordings also showed that defendant and Sophia

walked from Quick Sam's to the Johnson's house. Winbigler knew that defendant and Sophia were together that evening; he interacted with both of them regarding the cab fare issue at Quick Sam's just 24 minutes prior. The third time Winbigler asked defendant what happened, defendant responded that Sophia tripped and fell. Furthermore, despite testifying that defendant felt a hard, heavy pain in his back, he did not inform the police that he had been hit with a brick. He never sought medical treatment for his back. He first mentioned that a brick struck him in the back on the witness stand at trial.

¶ 50 Moreover, witnesses observed that Sophia's pants were down when she was lying on the ground. Mark came outside after hearing defendant scream for help. He realized Sophia was hurt and told defendant to move away. Defendant kept saying, "It's a dude." Defendant obviously knew that it was not a "dude" as he had been with Sophia at LaMesa and walked home with her. When police arrived and moved defendant away from Sophia, Mark noticed that Sophia's pants were down below her crotch area. Mark told the police that Sophia's pants were down and something was not right; Sophia was gay and he never knew her to date a man. Mary also went outside and saw Sophia's pants partway down below her belly button. Further, Susan testified that when she went outside, she noticed that Sophia's pants were pulled down "a ways." Dawn also observed that Sophia's pants were down past her waist. Winbigler arrived on the scene and found Sophia lying on the ground and defendant kneeled over her. Winbigler testified that Sophia's pants were pulled down exposing her buttocks. Sophia's shirt and coat were up above her navel. Winbigler handcuffed and searched defendant. During the search, he noticed that defendant's zipper and belt were undone, but the button to his pants was closed. Defendant told the police that he did not know why Sophia's pants were down. The video recordings

establish that Sophia pulled up her pants after urinating by the tree. She walked a couple blocks after urinating.

¶ 51 The fact that her pants were down, coupled with Sophia’s testimony that defendant made sexual advances toward her, supports a reasonable trier of fact’s finding that defendant intended to commit a sexual assault against Sophia.

¶ 52 II. One-Act, One-Crime

¶ 53 Alternatively, defendant argues, and the State concedes, that court violated the one-act, one-crime principal by convicting and sentencing him on two counts of attempted aggravated criminal sexual assault. The State alleged only one attempted act of penetration, but listed two different aggravating factors—defendant committed the attempt while possessing a dangerous weapon, and that defendant committed the attempt during the course of the felony of aggravated battery. Defendant requests this court to vacate one of the convictions and sentences, or remand the cause to the trial court. The State requests that we remand the cause to the trial court to determine which conviction is the less serious offense.

¶ 54 The issue of whether more than one conviction and sentence violated the one-act, one-crime principal is a question of law. *People v. Artis*, 232 Ill. 2d 156, 161 (2009). We review *de novo* questions of law. *Id.*

¶ 55 The court may not convict a defendant of multiple offenses when such offenses are based on the same physical act. *People v. King*, 66 Ill. 2d 551, 556 (1977). Where the State alleges one act of penetration or attempted penetration, the court may enter only one conviction and sentence even if the State alleges more than one aggravating factor. *People v. McColler*, 363 Ill. App. 3d 81, 90-91 (2005).

¶ 56 Here, the State concedes that it alleged only one act of attempted penetration, but alleged two different aggravating factors. The trial court erred in convicting and sentencing defendant twice, where the State proved only one attempted act of penetration. When the classification of offenses and their sentencing ranges are identical, we may consider which of the offenses has the more culpable mental state. *People v. Artis*, 232 Ill. 2d at 170-71. If we are unable to make such a determination, we will remand the case and direct the trial court to determine which of the two convictions should be vacated. *Id.* at 172. Here, both convictions are Class 1 felonies and carry the same sentencing range. The aggravating factors do not reveal which charge is more serious. We accordingly remand the cause for a determination by the trial court as to which conviction constitutes the less serious offense. The trial court is to then vacate the conviction and sentence on the less serious offense.

¶ 57 CONCLUSION

¶ 58 For the foregoing reasons, the judgment of the circuit court of Knox County is affirmed in part and this cause is remanded with directions consistent with this order.

¶ 59 Affirmed in part; cause remanded with directions.