2018 IL App (1st) 161568-U

THIRD DIVISION
November 28, 2018

No. 1-16-1568

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. 14 CR 12194
	)	
JOSE SUAREZ-GOMEZ,	)	The Honorable
	)	Evelyn B. Clay,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court. Justices Ellis and Cobbs concurred in the judgment.

ORDER

HELD: Pursuant to the State's concession, and based upon our review of the evidence, defendant's convictions under counts 2, 3 and 4 and their accompanying sentences are vacated. Additionally, we hold the State proved beyond a reasonable doubt that the victim was unable to give knowing consent to defendant's sexual conduct and, therefore, we affirm defendant's conviction on count 1. However, again pursuant to the State's concession, we modify this conviction to reflect a single conviction for criminal sexual abuse, not aggravated criminal sexual abuse. Defendant's mittimus is adjusted accordingly.

¶ 1 Following a bench trial, defendant Jose Suarez-Gomez (defendant) was convicted of two

counts of aggravated criminal sexual abuse and two counts of aggravated battery. He was sentenced to four concurrent terms of 30 months' probation and 90 days in jail, time considered served. He appeals, contending that his convictions should be reversed because the State failed to prove certain elements of the crimes beyond a reasonable doubt; he further contends that his conviction under count 2 should be reduced because it is an impermissible double enhancement and that his mittimus must be corrected pursuant to the one-act, one-crime doctrine. He asks that we reverse all four of his convictions outright or, alternatively, that we reduce one of his convictions to criminal sexual abuse and/or that we correct his mittimus to reflect a single conviction of aggravated criminal sexual abuse under count 1.

¶ 2 The State, for its part, has on appeal made several concessions, which we will outline more fully in our decision herein. Ultimately, it asks us to vacate three of defendant's convictions and to modify the remaining conviction to reflect a single conviction for criminal sexual abuse, rather than aggravated criminal sexual abuse.

¶ 3 For the following reasons, we vacate defendant's convictions under counts 2, 3 and 4 pursuant to the State's concession; in addition, we affirm defendant's conviction on count 1 with the modification that this conviction is for criminal sexual abuse, and we adjust his mittimus accordingly.

¶ 4 BACKGROUND

¶ 5 Defendant was charged via indictment with two counts of aggravated criminal sexual abuse and two counts of aggravated battery: count 1 alleged he committed aggravated criminal sexual abuse when he transmitted his semen onto the victim's leg knowing she was unable to give

consent and while committing another felony (aggravated battery); count 2 alleged he committed aggravated criminal sexual abuse when he touched his penis to the victim's leg knowing she was unable to give consent and while committing another felony (aggravated battery); count 3 alleged he committed aggravated battery when he knowingly made physical contact of an insulting nature by touching his penis to the victim's leg while on public property; and count 4 alleged he committed aggravated battery when he knowingly made physical contact of an insulting nature by touching his penis to the victim's leg while knowing she was a transit passenger.

¶ 6 At trial, C.C., the victim, testified that on June 24, 2014, at approximately 6:30 p.m., she boarded a CTA brown line train at the Armitage Avenue stop. Once on the train car, she stood, holding a shopping bag in one hand and her work bag in the other, facing the window and looking at her cell phone. She described that, as it was rush hour, the train car was very crowded and she was consistently bumped by other passengers moving throughout the car; she did not see who was bumping her nor did she think anything of it. C.C. stated that as the train approached her stop at the Southport Avenue station, she turned to walk out the car doors and saw defendant, who had been standing behind her. He was dressed in all black clothing, his pants were unzipped and his erect penis was sticking out of his pants underneath his blue boxer shorts. C.C. further noticed that defendant's boxer shorts had wet spots on them. C.C. then looked down and saw a thick white liquid all along the back of her right pant leg, which she believed to be semen. C.C. screamed, "Oh my god," and became "pretty hysterical;" she then heard a male voice from another part of the train car ask, "who?," and she identified defendant, who she saw making his way to the car doors, and yelled out that he was wearing all black.

¶ 7 C.C. further testified that, at this point, she saw defendant being pushed down and then a man pulled him off the train and onto the platform outside, with several other passengers detaining him on a platform bench. C.C. got off of the train, ran to the other end of the platform and called police. She stated that she was "hysterically crying," and that she was "scared," "disgusted" and "terrified." Police arrived and, after taking her statement, escorted her to her nearby residence and collected her pants for inventory and testing. At the conclusion of C.C.'s testimony, a video of the incident, which had been recorded by CTA cameras, was presented. While the exact moment of the transmission of semen cannot be seen on the video due to its angles and the many occupants of the train car, C.C. identified for the court moment by moment what could be seen, which included defendant standing behind her and to her left without anyone else in between them, and when she saw the semen on her pant leg. On cross-examination, C.C. admitted that she did not see the flesh of defendant's penis nor him manipulating his genitals, and she did not know for sure whether it was defendant who had been bumping into her.

¶ 8 Sharief El-Gabri testified that he was on the train car when he heard C.C. scream, "Oh my god." He was standing about 15 feet away from her and was able to see her pant leg, which had a thick white liquid on it. He then heard C.C. say, "get that guy," as a man wearing all black walked by him. El-Gabri grabbed the man, who he identified as defendant, and pulled him down. When they were on the ground, El-Gabri saw that defendant's pants were unzipped and that he was wearing blue boxers; El-Gabri also saw that defendant's penis was erect underneath his boxers. As the doors of the train opened at the Southport stop, El-Gabri and some other passengers detained defendant outside on the platform until police arrived. El-Gabri averred that

he never saw defendant's exposed penis nor did he see defendant grind on C.C. or have any physical contact with her.

¶ 9 Erin Drummond testified that she was seated in the train car and, upon looking back and to her left, she saw C.C. who started screaming, "Oh my god," and "He jerked off on me." Drummond also heard C.C. identify the man who did this as wearing all black and walking towards the doors of the train car; Drummond then identified defendant in court as that man. Drummond described that another man held defendant and then took him off the train car when the doors opened and restrained him on the platform with the help of others. Drummond stated she saw that defendant's pants' zipper was down and his blue boxer shorts underneath exposed. Drummond approached C.C., who was now outside the train car on the platform and stayed with her until police arrived. Drummond averred that there was a thick white liquid, which she believed to be ejaculate, running down C.C.'s entire right pant leg, and that C.C. was "hysterical and distraught," "extremely distressed," and "crying and very, very upset." Drummond admitted that she never saw defendant's exposed penis nor did she see defendant grind on C.C. or have any physical contact with her.

¶ 10 Along with the publication of the CTA surveillance video into evidence, the parties stipulated that the white liquid on C.C.'s right pant leg was semen. The stipulation further described that there were actually two stains on the pants: one on the right hip which was a combination of non-sperm and sperm fraction, and one on the right leg which was also a combination of non-sperm and sperm fraction. The parties further stipulated that the DNA found in both the non-sperm and sperm fractions in both stains matched defendant.

¶ 11 At the close of evidence, the trial court found defendant guilty. In its colloquy, the trial court noted the parties' stipulation that defendant's semen was on the victim's pant leg, the video which showed defendant standing right next to her with no one else between them, and the fact that defendant's zipper was down. Then, the trial court stated that "from all reasonable inferences that can be drawn from this evidence, [d]efendant's penis touched the pant[] leg of the victim" for the purpose of sexual arousal. Accordingly, it found defendant guilty on all four counts and sentenced him to four concurrent terms of 30 months' probation and 90 days in jail, time served.

¶ 12 ANALYSIS

¶ 13 On appeal, defendant challenges several different aspects of his four convictions. First, and most primarily, he contends that the State failed to prove him guilty beyond a reasonable doubt of all his convictions because the evidence at trial did not establish that the victim was unable to give knowing consent or that his penis physically touched the victim. Accordingly, pursuant to this argument, he asks that we reverse all his convictions outright. Second, he contends that count 2, which states he committed aggravated criminal sexual abuse when he touched his penis to the victim's leg knowing she was unable to give consent and while committing an aggravated battery, constitutes an impermissible double enhancement because the aggravated battery upon which it is based is the same act of touching his penis to the victim's leg. Pursuant to this argument, defendant asks that we vacate his conviction for aggravated criminal sexual abuse and reduce it to criminal sexual abuse. And third, he contends that, were we not to vacate his convictions, his mittimus must nonetheless be corrected to reflect only one conviction for aggravated criminal sexual abuse because, as his convictions were all based on the same act,

the one-act, one-crime rule precludes his multiple convictions and sentences.

¶ 14 In response to defendant's contentions, the State has made several important concessions on appeal. Significantly, it agrees with defendant's argument that the evidence presented at trial failed to establish beyond a reasonable doubt that his penis made physical contact with the victim's leg. The State acknowledges that count 2 of aggravated criminal sexual assault and counts 3 and 4 of aggravated battery were all premised on the occurrence of physical contact, namely, defendant actually touching his penis to C.C.'s leg. The State further acknowledges that, in direct contradistinction to the trial court's finding that such touching could be inferred, the evidence did not prove this. For example, it cites C.C.'s testimony that while she could feel people bumping into her on the crowded rush-hour train car, she was unaware of who was doing so and admitted she could not be sure it was defendant. Additionally, both El-Gabri and Drummond testified that they never saw defendant grind on C.C. or have any physical contact with her in any way. And, due to its angles and the crowding, the CTA video did not depict the actual sexual conduct at issue here, nor did it show defendant making any physical contact with C.C. at any time. From all this, and based on the State's concession, counts 2, 3 and 4, and defendant's convictions and sentences thereunder, which were undeniably all premised on defendant's penis touching C.C.'s leg, must, indeed, be vacated.

¶ 15 This leaves, then, count 1, defendant's conviction for aggravated criminal sexual abuse based on the transmission of his semen onto the victim's leg knowing she was unable to give consent and while committing another felony (aggravated battery). See 720 ILCS 5/11.1.60(a)(6) (West 2016). With respect to this count, the State further concedes that, with the vacation of

defendant's aggravated battery convictions, the degree of this conviction must be reduced from aggravated criminal sexual abuse to criminal sexual abuse. We agree. Having admitted that it did not prove beyond a reasonable doubt the underlying aggravated battery, which was based on physical contact here between defendant's penis and C.C.'s leg, the aggravated gradation cannot stand. Thus, defendant's conviction on count 1 must be reduced from the Class 2 felony of aggravated criminal sexual abuse to the Class 4 felony of criminal sexual abuse. See 720 ILCS 5/11.1.60(g) (West 2016); 720 ILCS 5/11-1.50(a)(2), (d) (West 2016); see also *People v. Guerrero*, 2018 IL App (2d) 160920, ¶ 70 (appellate court has clear authority pursuant to Illinois Supreme Court Rule 615(b)(3) (eff. Jan. 1, 1967) to reduce the degree of an offense, as this serves the rights and interests of both parties while also preserving judicial integrity).

¶ 16 Having addressed these matters, we are now left with only one primary issue on appeal, that is, whether the State proved beyond a reasonable doubt that the victim in this cause was "unable to give knowing consent" as required for a conviction for criminal sexual abuse. Defendant argues that the State did not because it never established that C.C. was incapable of consenting to the sexual conduct at issue (the transfer of his semen to her leg). He goes on to claim that her simply being unaware of what was happening is an "overly broad interpretation" of the statutory language defining this crime, and that the State overcharged him using a statute that was "never intended to apply to his behavior" which, at most, falls under the misdemeanor crime of public indecency. The State, meanwhile, contends that it sufficiently proved C.C. was unable to appreciate the nature of the crime at the time it was committed and that defendant knew this at the time he committed the crime. It goes on to note that without knowledge of the sexual

conduct itself, C.C. was not given notice or an opportunity to consent, which essentially constitutes a lack of consent. We agree with the State.

¶ 17 Before turning to the merits, there is one more threshold matter we must address: the standard of review. Defendant claims that because the relevant facts are not in dispute and his "reasonable doubt claim does not entail any assessment of the witnesses's credibility," we must review this issue *de novo*. The State argues that defendant is challenging the sufficiency of the evidence against him and, thus, the traditional standard of viewing the evidence in the light most favorable to the it, with affirmance required when any rational trier of fact can find the essential elements of the crime beyond a reasonable doubt, is the proper one here. See *People v. Smith*, 185 Ill. 2d 532, 542 (1999). The State is correct. *De novo* review applies only when the facts are not in dispute and the defendant's guilt is strictly and solely a question of law. See *People v. Curry*, 2018 IL App (1st) 152616, ¶ 16. Defendant's challenge here, however, is, contrary to his insistence, not a "purely legal inquiry." Rather, he is precisely challenging an element of the crime the victim's inability to consent and whether the State presented evidence to sufficiently prove this element beyond a reasonable doubt. See *Curry*, 2018 IL App (1st) 152616, ¶ 16 (a defendant's guilt is not a question of law when he is challenging the sufficiency of the evidence to prove an element of the crime charged). Moreover, whether there was consent and the nature of a defendant's intent in relation to that are, inherently, questions of fact for the trier of fact, who is called upon to resolve conflicts or inconsistencies in the evidence and to whom deference in these matters should be given. See *People v. Steidl*, 142 Ill. 2d 204, 226 (1991); see also *People v. Patterson*, 314 Ill. App. 3d 962, 969 (2000), citing *People v. Cosby*, 305 Ill. App. 3d 211, 219

(1999). Accordingly, the applicable standard here is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. See *Curry*, 2018 IL App (1st) 152616, ¶ 16; see also *People v. Deenadayalu*, 331 Ill. App. 3d 442, 450 (2002) (where the defendant argues on appeal that the State did not prove that the victim was unable to consent to sexual conduct at issue, this is a challenge to the sufficiency of the evidence).

¶ 18 Turning now to the merits of the instant cause, under the portion of the statute applicable here, a person commits criminal sexual abuse when he "commits an act of sexual conduct and knows that the victim *** is unable to give knowing consent." 720 ILCS 5/11-1.50(a)(2) (West 2016). Again, defendant challenges only the second element of the offense, namely, whether the State proved beyond a reasonable doubt that C.C. was unable to give knowing consent to his (conceded) sexual conduct of the transmission of his semen upon her leg. See, *e.g.* 720 ILCS 5/11-0.1 (West 2016) ("sexual conduct" includes the transfer or transmission of semen upon any part of the clothed or unclothed body of another for the purpose of sexual gratification or arousal). The crux of defendant's argument on appeal is his characterization that the legislature intended to only apply this portion of the statute in two circumstances: when the victim suffers from a type of mental incapacitation, such as intoxication, unconsciousness or a mental disability, and when the accused deliberately uses fraud or deceit to render the victim unable to make a voluntary, reasoned or intelligent choice. From this, defendant concludes that, because C.C. was not suffering from mental incapacitation and was not subjected to fraud or deceit during the commission of the crime, she could not have been found to have been unable to give knowing

consent as the statute requires. However, defendant's characterization of the law and the attendant facts is wholly unavailing.

¶ 19 First, with respect to the law, defendant is correct that many cases involving criminal sexual crimes and the issue of consent have focus on a victim's ability to consent in situations where something affecting the victim's mental state has happened. For example, and as defendant cites in his brief, our supreme court in *People v. Lloyd*, 2013 IL 113510, ¶ 39, commented that victims in previous cases to that one prosecuted under a particular subsection of our criminal sexual assault statute "were typically severely mentally disabled, highly intoxicated, unconscious, or asleep." It went on to list several of these, noting that in each, the victim was clearly unable to give knowing consent due to some sort of mental incapacity. See *Lloyd*, 2013 IL 113510, ¶ 39.

¶ 20 However, *Lloyd* does not stand for defendant's proposition here that our sexual crimes laws involving the question of consent are limited only to those situations where the victim is mentally incapacitated in some respect or was defrauded. Defendant takes *Lloyd*'s citation of a few cases where such has occurred and makes a tremendous, and completely unsupported, legal leap. Nowhere in our law, and in particular, in the criminal sexual abuse law under which defendant here was convicted (720 ILCS 5/11-1.50(a)(2) (West 2016)), do we find any such limitation.

¶ 21 Significantly, our supreme court in *Lloyd* went further in its commentary with respect to those cases where a victim has suffered some sort of mental incapacitation. *Lloyd* itself involved a prosecution for criminal sexual assault where the victim was 13 years old, and the State

charged that, because of her age, the victim had been unable to give knowing consent. The defendant challenged his conviction, arguing that the State failed to show he knew of some fact other than her age which prevented her from giving knowing consent. Our supreme court agreed, holding that in prosecutions for criminal sexual assault under section 12-13(a)(2) of the Criminal Code of 1961 (720 ILCS 5/12-13(a)(2) (West 2008)), the State must show that a defendant knew some fact, other than evidence that he knew the victim's young age, prevented the victim's ability to give knowing consent. See *Lloyd*, 2013 IL 113510, ¶¶ 39-40. It then conducted an examination of the totality of the evidence presented under a sufficiency of the evidence standard, ultimately finding there that, due to a lack of evidence, the State could not establish that the defendant knew the victim had been unable to give knowing consent "*for any reason other than her age*." *Lloyd*, 2013 IL 113510, ¶¶ 42, 44 (emphasis in original).

¶ 22 Thus, while *Lloyd* is factually distinguishable in that it involved a different crime and a victim's age considerations, it does prove instructive in one critical sense. That is, in examining the element of consent, our supreme court explicitly undertook a review of the totality of the evidence presented and declared that, in doing so, it was looking for "any reason" (other than age) demonstrating the victim had been unable to knowingly provide it. See *Lloyd*, 2013 IL 113510, ¶¶ 42, 44. Contrary to defendant's insistence, our supreme court did not limit such a potential reason to a mental incapacity or deficiency, nor to fraud or deceit. Again, such scenarios, while they may be present in some published cases, do not limit the statutory law with respect to consent.

¶ 23 Rather, *Lloyd* is directly in line with what we find the general law with respect to consent

to be. In fact, our own court, in addressing the legal concept of "unable to give knowing consent," recently stated:

> " ' "Consent" implies a willingness, voluntariness, free will, reasoned or intelligent choice, physical or moral power of acting, or an active act of concurrence (as opposed to a passive assent) unclouded by fraud, duress or mistake. [Citation.] The ability to give knowing consent should involve more than measuring complainant's IQ or ability to physically resist [the] defendant. Knowing consent requires us to examine all of the circumstances to see if [the] defendant knowingly exercised such control over complainant that a trier of fact could find that complainant did not submit to the sexual advances of [the] defendant voluntarily, intelligently, and by an active concurrence.' " *People v. Vaughn*, 2011 IL App (1st) 092834, ¶ 39, quoting *People v. Whitten*, 269 Ill. App. 3d 1037, 1044 (1995).

Thus, consent requires a "freely given agreement" to the sexual conduct at issue. *People v. Beasley*, 314 Ill. App. 3d 840, 845 (2000). And, "[l]ack of verbal or physical resistance does not constitute consent." *Beasley*, 314 Ill. App. 3d at 845. Ultimately, in the most general legal sense, whether consent was voluntarily given is, axiomatically, a question of fact to be determined from the totality of the circumstances. See *Vaughn*, 2011 IL App (1st) 092834, ¶ 39; see, *e.g.*, *Lloyd*, 2013 IL 113510, ¶¶ 42, 44; *Deenadayalu*, 331 Ill. App. 3d at 451-52; *People v. Prinzing*, 389 Ill. App. 3d 923, 932 (2009).

¶ 24 Let us, then, examine the totality of the circumstance in the instant cause with regard to the victim's ability to consent to defendant's sexual conduct. C.C. testified that as she was

standing in the train car, she was facing the window. She had a shopping bag in one hand and her work bag in the other, and she was looking at her phone. She stated that she was completely unaware of what was going on behind her; she felt being bumped by other passengers on the crowded rush-hour train, but did not know who, or how many people, bumped her. The first, and only, moment she became aware of defendant was when she turned to exit the car at her stop. At this moment, defendant's pants were unzipped, his penis erect under his underwear, and he had already ejaculated his semen onto her pant leg. C.C. further testified, and El-Gabri and Drummond corroborated, that she immediately became hysterical, scared and terrified and began screaming and crying out at the sight of the crime.

¶ 25 Clearly, from this testimony, the trier of fact could easily conclude that C.C. was unable to give knowing consent to defendant's sexual conduct, *i.e.*, the transmission of his semen onto her leg. See *Deenadayalu*, 331 Ill. App. 3d at 450 (conviction for criminal sexual abuse can be upheld based on positive and credible testimony of single witness). Not only did she not want such sexual conduct, she was not aware or put on notice that it was occurring. That is, while she may not have been suffering a mental disability, nor was she asleep, intoxicated or drugged, she nonetheless did not know what was happening. She did not notice defendant come through the train car and position himself directly behind her with no one in between them, nor did she notice his act of transmission until it was complete; she was facing away from him and looking at her phone. And, once she realized defendant's sexual conduct, she became hysterical. Simply put, she had no knowledge of what defendant was doing behind her until she turned around and realized what he had done. With no knowledge of his sexual conduct, she was not given notice

or an opportunity to consent. There surely was no willingness, voluntariness or active act signifying an intelligent choice on C.C.'s part to submit to defendant's sexual conduct and, as we have already mentioned, her lack of verbal or physical resistance does not constitute consent. See *Vaughn*, 2011 IL App (1st) 092834, ¶ 39*; Beasley*, 314 Ill. App. 3d at 845. Ultimately, by the very fact that she was unaware of what was going on, she was incapable and, thus, unable to give consent.

¶ 26 Moreover, and as we have discussed at several points herein, consent requires an examination of totality of the circumstances presented. Here, this would most definitely include consideration of defendant's conduct and actions. See *Vaughn*, 2011 IL App (1st) 092834, ¶ 39; accord *Lloyd*, 2013 IL 113510, ¶¶ 29-32 (we examine all the facts to see if the defendant knew the victim was unable to consent). Defendant was in the same train car as C.C., a rush-hour train that the video evidence at trial showed was crowded with people. The video also showed that, in all of the train car, defendant chose to stand directly behind C.C. and to her left, exactly in a position and at an angle where C.C., facing the window with her hands full of bags and attuned to her cell phone, could not see him. Defendant stood close enough to her so that no one was between them, and C.C. had her back to defendant and was clearly distracted. At some point, defendant unzipped his pants and pulled them down somewhat to expose his underwear, which contained his erect penis, visible by several witnesses after he committed the sexual conduct and he separated from C.C. The stipulated evidence made clear that there was not one, but two, semen stains on C.C.'s pant leg, and that this semen undeniably belonged to defendant. And, C.C., El-Gabri and Drummond all testified that immediately after C.C. turned and saw defendant

as the train pulled into the station, defendant began to make his way to the train car doors to get away. See, *e.g.*, *People v. Robinson*, 391 Ill. App. 3d 822, 838 (2009) (evidence of flight is admissible as a circumstance tending to show consciousness of guilt). From all this, it is obvious that defendant knew C.C. was unable to give knowing consent to his sexual conduct.

¶ 27 In a final attempt here, defendant cites *Lloyd*, 2013 IL 113510, ¶ 38, again and argues that, at most, his actions amounted to public indecency and, as such, the legislature could not have intended to criminalize sexual conduct where it has included the same conduct in another statute as a misdemeanor. A person commits public indecency when he performs an act of sexual penetration or sexual conduct, or he lewdly exposes his body with the intent to arouse or satisfy sexual desire, in a public place. See 720 ILCS 5/11-30 (West 2016). Public indecency and criminal sexual abuse do share some of the same elements. Compare 720 ILCS 5/11-1.50(a)(2), (d) (West 2016) with 720 ILCS 5/11-30 (West 2016). However, other than that, there is nothing to indicate, and defendant provides us with no legal support to verify, that his assertion that the legislature could not have intended to criminalize the instant sexual conduct is correct. To the contrary, we have already noted that what occurred here clearly fits what the legislature codified as criminal sexual abuse in the statute it established. See 720 ILCS 5/11-1.50(a)(2) (West 2016).

¶ 28 What is more, *Lloyd* does not aid defendant's assertion but, rather, contradicts it. *Lloyd* does note that a proposed construction by the State of a our criminal sexual assault statute (which differs significantly from the criminal sexual abuse statute pertinent to instant cause) to allow for the defendant's knowledge of a victim's minor status to be the only element required to prove the

victim's inability to consent would be improper because it would criminalize conduct that would otherwise be a misdemeanor. See *Lloyd*, 2013 IL 113510, ¶¶ 38. Defendant here is clever to cite this paragraph of *Lloyd* to support his public indecency argument, but he fails to move beyond the hypothetical conversation of that portion of *Lloyd* which discussed a proposed interpretation advanced by the State (which the court did not accept), and to address what actually occurred in that case. The actual holding of *Lloyd* saw our supreme court forced to reverse that defendant's convictions for criminal sexual assault because the State, which chose to pursue those charges, failed to show a required element of that crime. See *Lloyd*, 2013 IL 113510, ¶ 44. In reversing, the *Lloyd* court commented that the State had presented sufficient evidence from which a rational trier of fact could have concluded that the defendant committed aggravated criminal sexual abuse, but, "[u]nfortunately, the State chose not to charge him with that offense and, instead, decided to go forward only on the criminal sexual assault charges." *Lloyd*, 2013 IL 113510, ¶ 45. Because the court's hands were tied to "only consider the evidence regarding the actual charges the State chose to bring against him, and not the fact that he may be guilty of [an] uncharged offense," it obviously could not find him guilty of that other crime. *Lloyd*, 2013 IL 113510, ¶ 45. And, having failed to prove the required elements of the crime charged, it had no option than to reverse and vacate the defendant's sentences. See *Lloyd*, 2013 IL 113510, ¶ 46 ("[d]ue to the significant consequences of the State's charging decision in this case, we stress the importance of the State carefully considering the offenses that it chooses to charge and prosecute in the future").

As in *Lloyd*, we have no control over what charges and under what statutes of the criminal code the State chooses to pursue against a defendant. In the instant cause, while

defendant's sexual conduct might well be contemplated under the misdemeanor public indecency statute, it surely, and nonetheless, fit the requirements for a prosecution under the criminal sexual abuse statute. It was the State's decision under which of these statutes to pursue charges against defendant, and it chose the latter one that was, perhaps, harder to prove. This was the risk the State took and, unlike in *Lloyd*, this time, and under these facts, it paid off. The State clearly and sufficiently proved, beyond a reasonable doubt, all the elements required for a conviction for criminal sexual abuse.

¶ 29 Ultimately, based on the totality of the circumstances presented in this cause, we find that C.C. was unable to consent to something she had no reason to expect, and defendant had reason to know that she would be unable to give knowing consent. Contrary to defendant's main contention here, it is irrelevant that C.C. was otherwise alert and aware and not mentally incapacitated or deceived. The point is, she was completely unaware of his sexual conduct and, thus, was unable to consent to it and, as the evidence showed, he knew, in light of her obvious distraction and inattentiveness to her surroundings, that she was unable to consent. Accordingly, viewing the evidence in the light most favorable to the State, we find the evidence sufficient for a rational trier of fact to find defendant guilty of criminal sexual abuse beyond a reasonable doubt.

¶ 30 CONCLUSION

¶ 31 For all the foregoing reasons, we vacate, pursuant to the State's concession, defendant's convictions under counts 2, 3 and 4 and their accompanying sentences; we affirm defendant's conviction on count 1 with the modification, again pursuant to the State's concession, that this conviction reflect a single conviction for criminal sexual abuse pursuant to 720 ILCS 5/11-

1.50(a)(2), (d) (West 2016); and, we adjust his mittimus accordingly.

¶ 32 Vacated in part; affirmed in part with modification; mittimus adjusted.