

No. 1-12-0507

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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. 10 CR 12681
)	
VINCENT CARTER,)	Honorable
)	Nicholas R. Ford,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's conviction for aggravated criminal sexual assault is affirmed, but his conviction for unlawful restraint is vacated, where: (1) defendant was proven guilty beyond a reasonable doubt; (2) his conviction and sentence for unlawful restraint must be vacated under the principles of the one-act, one-crime doctrine; (3) defendant forfeited, and indeed was estopped, from raising any argument that one of the trial court's instructions to the jury improperly coerced a verdict; and (4) the trial court did not improperly ignore a posttrial claim of ineffective assistance of counsel.

¶ 2 After a jury trial, defendant-appellant, Vincent Carter, was convicted of aggravated criminal sexual assault and unlawful restraint and was thereafter sentenced to, respectively, consecutive terms of 10 and 2 years' imprisonment. On appeal, defendant contends: (1) he was not proven guilty beyond a reasonable doubt of committing these two offenses; (2) his conviction and sentence for unlawful restraint must be vacated under the principles of the one-act, one-

crime doctrine; (3) one of the trial court's instructions to the jury improperly coerced a verdict, and (4) the trial court improperly ignored a posttrial claim of ineffective assistance of counsel, such that this matter should be remanded for further inquiry pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). For the following reasons, we vacate defendant's conviction and sentence for unlawful restraint, but otherwise affirm the judgment of the circuit court.

¶ 3

I. BACKGROUND

¶ 4 Defendant was charged by information with four counts of aggravated criminal sexual assault, one count of aggravated unlawful restraint, and one count of unlawful restraint. The sexual assault charges generally alleged that, on or about June 20, 2010, defendant sexually assaulted P.P. by making contact between defendant's penis and P.P.'s vagina and her anus. These actions were statutorily aggravated by the further allegations that, at the same time, defendant: (1) was armed with a cutting instrument; or (2) caused bodily harm by striking P.P. about the body with his fists. Defendant was also alleged to have unlawfully restrained P.P. at that same time, and with respect to the aggravated unlawful restraint charge, to have done so while armed with a cutting instrument.

¶ 5 The matter proceeded to a jury trial, held in December of 2011. At trial, P.P. generally testified that in June of 2010, she lived in a second-floor apartment on the south side of the city of Chicago. P.P. lived there with her son, Julian. P.P.'s landlord, Charlotte McPherson, lived on the first floor, and Ms. McPherson's brother, Larry McPherson, lived in the basement of the building. P.P. knew defendant, as he played chess with Mr. McPherson. Sometime in June 2010, P.P. had also given defendant a dollar to buy beer at a local store when defendant had dropped his change on the floor.

¶ 6 On June 19, 2010, P.P., defendant, Mr. McPherson, and some other individuals all attended a barbeque behind the building where P.P. lived. P.P. testified that she drank one beer at the barbeque. After dark, defendant told Mr. McPherson that he had to "make a run," but would be back. P.P. returned to her apartment. Her son Julian was there with a friend. P.P. watched television, and her son and his friend left around midnight.

¶ 7 Shortly thereafter, P.P.'s doorbell rang. P.P. "buzzed" the person ringing her doorbell inside, assuming it was her son, who often forgot his keys. When P.P. opened the door to her apartment, she saw defendant walking up the stairs. Defendant indicated that he wanted to give P.P. some beer to thank her for her previous help at the store. The two then sat on the steps outside P.P.'s apartment and had a beer. While the two had a "normal" conversation at first, P.P. told defendant she was tired and wanted to go inside after defendant began to ask "personal questions." P.P. agreed to allow defendant to use her bathroom, and the two entered her apartment. Defendant went to the bathroom, while P.P. placed the remaining beer into her refrigerator.

¶ 8 When P.P. returned from her kitchen and reached for the front door knob, defendant was behind her. P.P. heard defendant say something approximating: "You are not going to leave me like this," before defendant put his arm around her throat and threw her, head-first, into the wall. P.P. fell down and was in pain from the blow. As she tried to get up, she fell again into her nearby bedroom. Defendant then began punching her in the face, repeatedly. P.P. testified that it felt like her face was caving in.

¶ 9 P.P. tried to crawl away, but defendant grabbed her, threw her onto her bed, and continued to hit her. Defendant then pinned P.P. to the bed and began to pull her pants down. Despite P.P.'s attempts to resist, defendant forced her legs open, and placed his penis inside her

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vagina. P.P. did not know if defendant ejaculated because he kept hitting her. Her eyes were also filling with blood, which made it difficult to see.

¶ 10 P.P. was able to crawl away from defendant, but he soon grabbed her again, pulled her back into the bedroom, and threw her, face down, on the corner of her bed. Defendant then told P.P. that she was "going to do something" for him, before he placed his penis against her anus. P.P. then defecated on defendant. After defendant realized what happened, he called P.P. a "nasty bitch," and started to hit her again. Defendant then threw P.P. against a wall and she landed face up. P.P. then put up her hands in front of her face, and defendant cut her hands with a knife or other form of "cutting instrument." P.P. never actually saw the knife or cutting instrument.

¶ 11 P.P. was again able to crawl away from defendant, but he soon grabbed her again and said, "you're going to do something for me." Defendant then unsuccessfully attempted to place his penis in P.P.'s mouth before she struck him in his crotch. P.P. then crawled to her son's room. Defendant pursued her, and P.P. pushed an air conditioning unit out of a window, and it crashed to the ground. She then leaned out the window and screamed for help. P.P. did not see defendant again that night, and did not see how he left her apartment.

¶ 12 P.P. recalled calling 911 and then speaking with Ms. McPherson. Paramedics arrived and took her to Jackson Park Hospital. P.P. testified that she was in a great deal of pain at that time, with head injuries, swollen eyes, loose teeth, and cuts on her hands. She was treated for her injuries and given a physical examination. Vaginal and rectal swabs, blood samples, hair samples, and samples from under P.P.'s fingernails were obtained. P.P. also spoke with a police detective at the hospital.

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¶ 13 On June 21, 2010, P.P. viewed a lineup and identified defendant as the person who assaulted her. At trial, P.P. also identified various photographs taken of her apartment and of the injuries she sustained in the assault. P.P. indicated that one of the photos of her bedroom showed where defendant "tried to insert his penis into my anus and that's where I defecated." When during cross examination P.P. was asked about various statements she had purportedly made to the paramedics, hospital personnel, the police, and at a prior court hearing, she stated that she did not "remember."

¶ 14 Ms. McPherson testified that in the late hours of June 19, 2010, or the early-morning hours of June 20, 2010, she was in her first-floor apartment when she heard a loud commotion above her bedroom, which would have been the bedroom upstairs in P.P.'s apartment. It sounded like someone was moving furniture and that someone was crawling on the floor. After P.P. did not answer her phone, her doorbell, or a knock on her apartment door, Ms. McPherson headed back downstairs. She then heard P.P. say "please, no, please, no" in a tone of voice that suggested that P.P. was "begging, you know, for her life." After Ms. McPherson, thereafter, heard P.P. say, "I have to go to the washroom," Ms. McPherson went inside her apartment to tell her husband that something was wrong.

¶ 15 Shortly thereafter, Ms. McPherson heard someone hurry down the stairs of the apartment building. Out of her front window, Ms. McPherson saw a black man run away from the building, naked, except for some footwear. P.P. called Ms. McPherson on the phone, and the two met on the back porch of the building. P.P. was "all bloody," she had bruises across her forehead and underneath her eye, and her lip was also bloody. P.P. was crying, upset, and incoherent. Ms. McPherson stayed with P.P. until the police arrived, and she was taken away in an ambulance. Ms. McPherson testified that she did not hear anyone speaking in the stairway of

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her building that night, and she would have heard any such conversation. Finally, Ms. McPherson testified that Julian returned home sometime later that morning.

¶ 16 Glory Pickens testified that she was walking past P.P.'s apartment building in the early morning hours of June 20, 2010. She heard a woman screaming from that location, and dialed 911. Ms. Pickens never saw a naked man running down the street.

¶ 17 Chicago police officer Kill responded to P.P.'s residence after being dispatched to that location. P.P. was on the back porch, and she was bloody, injured, and distraught. P.P. took Officer Kill through her apartment, and Officer Kill followed when she was taken to the hospital in an ambulance. In conversations at the scene and at the hospital, P.P. indicated that she had been raped by a man named Vincent who had come to her apartment to use the telephone. P.P. also told Officer Kill that the assault had begun in her kitchen, and that both P.P. and her assailant had used knives or cutting instruments during the initial altercation in the kitchen. P.P. stated that both she and her assailant were cut during that initial altercation, and she also indicated that her assailant held a sharp object to her neck before he raped her vaginally. Finally, P.P. stated that her assailant had also placed his penis in her mouth.

¶ 18 Chicago Fire Department paramedic David Daugherty testified that he arrived at P.P.'s apartment building around 2 a.m. on June 20, 2010. P.P. had bruises on her face, as well as cuts and blood on her face and hands. She was crying, agitated, and distressed, and Mr. Daugherty smelled alcohol on her breath. P.P. was not wearing any pants, and she indicated that she had been raped by a man that had broken into her house. P.P. was transferred by ambulance to Jackson Park Hospital.

¶ 19 Angela Heads testified that she was a nurse at Jackson Park Hospital, and treated P.P. around 2:45 a.m. on June 20, 2010. P.P. was wearing a shirt but no underclothes, she had blood

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on her face, hands, and legs, her face was swollen, and there were bruises on her jaw and forehead. P.P. indicated that, after she had asked a friend that she had been drinking with to leave, she had been physically and sexually assaulted. A sexual assault examination was completed. No vaginal or anal trauma was observed, and swabs of P.P.'s vaginal and rectal areas were obtained. P.P. smelled of alcohol.

¶ 20 Chicago police officer Clarence Jordan testified that he was an evidence technician, and that he processed the scene of the incident on June 20, 2010. He took photos of the air conditioner behind the building, noting that there was blood on and around it. There were also blood stains throughout P.P.'s apartment, and Officer Jordan took photos of those as well. P.P.'s bedroom was in "upheaval." Officer Jordan took photos of P.P.'s bedroom, specifically noting a brown stain on the floor and a vodka bottle. Officer Jordan did not observe any fecal matter in P.P.'s apartment. He, thereafter, went to Jackson Park Hospital and took pictures of P.P.'s injuries.

¶ 21 With respect to the remaining forensic and medical evidence, the State's evidence established that no semen was obtained from any of the swabs and, although male DNA was obtained from the vaginal swab, no DNA profile suitable for comparison could be obtained. Tests of the blood stains from P.P.'s apartment matched P.P.'s DNA profile.

¶ 22 Finally, Amy Hedges testified that in 1989, she was a high school student in Ohio taking classes at a local college. Defendant was a student at the college, and the two had friends in common. After a party, defendant took Ms. Hedges back to his room so that she could sleep. Defendant left, and Ms. Hedges went to sleep.

¶ 23 Ms. Hedges woke up when defendant returned. Defendant ultimately grabbed her from behind, held a knife to her throat, and directed her back to the bed. Ms. Hedges was then

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vaginally raped by defendant at knife-point. Within a few weeks, defendant pleaded guilty to the charge of gross sexual imposition. The State then rested its case in chief.

¶ 24 Defendant's motion for a directed verdict was denied, and defendant presented the testimony of Chicago police detectives Thomas Downes and Constance Besteda. Detective Downes testified that he interviewed P.P. at the hospital following the incident. She stated that a man named Vincent had knocked on her rear door and asked to use the telephone. The two shared a beer in the kitchen, before the man said "I know you want me." P.P. asked the man to leave, and he then raped P.P. vaginally and anally. The man also placed his penis in P.P.'s mouth. P.P. stated that she believed the man ejaculated at least once. P.P. stated that she cut defendant with a steak knife that had been located in her bedroom. P.P. stated that defendant left the apartment through the front door, while she left through the rear door. While P.P. was clearly distraught and had been through an ordeal, she did not appear to be intoxicated.

¶ 25 Detective Besteda testified that she interviewed P.P. at a police station the day after the incident. P.P.'s statement, at that time, was generally consistent with her trial testimony, except that P.P. indicated she drank both beer and wine at the barbeque and, specifically, indicated that her assailant left through the front door of the apartment after the attack. Detective Besteda testified that she could not recall if P.P. told her that she defecated during the assault, but the detective understood that fecal matter was found at the scene.

¶ 26 The parties then stipulated that a doctor at Jackson Park Hospital would testify that P.P. exhibited no vaginal or anal trauma, nor any bodily abnormalities. P.P. indicated to the doctor that she had been vaginally and anally penetrated and that her assailant had "ejaculated inside her body orifices." The parties also stipulated that no medical or police records related to the prior incident involving Ms. Hedges could be located.

¶ 27 Defendant then testified in his own defense, stating that he lived with his wife of three years in the same neighborhood as P.P., and that he knew P.P. from that neighborhood. Defendant confirmed P.P.'s account of how she had previously bought defendant a beer. Defendant then acknowledged attending the barbecue on June 19, 2010. Defendant testified that he spent much of the time talking with P.P., and while he was drinking beer she was drinking beer and whisky.

¶ 28 Around 8 p.m., P.P. asked defendant to buy her some vodka. Defendant did so and, when he returned with a pint of vodka, P.P. let him into her apartment. Defendant had a beer, while P.P. mixed the vodka with a beer. This occurred in P.P.'s kitchen. P.P., who knew that defendant was a married father, told defendant that she liked him. The two decided to play a gambling game involving flipping quarters that P.P. had previously seen defendant play. Because P.P. did not have any money, the two played for clothes. Defendant and P.P. then played the "strip quarter game" until P.P. was totally naked and defendant was only clothed in his boxers and an undershirt. P.P. had consumed the vodka at this point, and asked defendant to get more. Defendant agreed, and the two put their clothes back on. Before defendant could leave, P.P.'s son came home with one of his friends. Defendant gave the two a cigarette, and they soon left. Defendant then also left, purchased another pint of vodka, and returned to P.P.'s apartment.

¶ 29 P.P. then removed her clothes and defendant removed all but his shorts, boxers, and a t-shirt. The two resumed playing the strip quarter game in the kitchen. Defendant was still drinking his beer, while P.P. poured herself another drink. When defendant said that he should probably leave, P.P. said, "I got something for you," and then indicated she wanted to give defendant oral sex. While defendant admitted to being tempted, he realized that it was late, his

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wife was going to be mad, and that he had to go to work soon. Defendant told P.P. this, and an obviously intoxicated P.P. became enraged and started yelling at defendant. P.P. accused defendant of "playing" her, and when defendant picked up his shorts and shirt, P.P. stood in front of the front door and would not let him leave.

¶ 30 Defendant testified that he, therefore, "mugged her in the face," which he described as smashing her face with the palm of his hand. When he did so, P.P. fell into the wall. Defendant then walked—not ran—down the stairs and away from the building. Defendant testified that he put his clothes on at the bottom of the stairs and just outside the front door of the building before he walked away. Finally, defendant testified that he and P.P. never went inside her bedroom, never hugged or kissed, and never engaged in any kind of sexual activity.

¶ 31 With respect to Ms. Hedges, defendant admitted to having sex with her, but testified that it was consensual. After he had been incarcerated for a week, he agreed to plead guilty in exchange for 18-months' probation. Defendant testified that he did so because it was an "all white town."

¶ 32 In rebuttal, the State presented the testimony of Detective Besteda and Julian. Detective Besteda testified that she interviewed defendant twice following the incident. In those interviews, defendant stated that he had kissed and hugged P.P., and that she had actually begun to perform oral sex on defendant before he left. Detective Besteda did not notice any fresh marks or wounds on defendant. Julian testified that he never came home on the night of the incident and met defendant, and defendant never gave him a cigarette. He also testified that the air conditioner in his room was in place when he left and that there was not any blood in his room.

¶ 33 At the conclusion of all the evidence and closing arguments, the jury retired to deliberate. During the course of its deliberations, the jury sent out a note indicating that they were deadlocked on two of the charges. Without objection, the trial court responded by informing the jury that they had received all the instructions and evidence, and that they should continue to deliberate in reaching a verdict on all the counts. The jury, ultimately, found defendant not guilty of all the counts against him, except count 4, which alleged defendant committed aggravated criminal sexual assault by making contact between defendant's penis and P.P.'s anus while causing bodily harm, and count 6, which alleged unlawful restraint.

¶ 34 Defense counsel filed a written posttrial motion for a new trial which, in part, included a contention that defendant felt he was "ill advised" by counsel with respect to the decision not to ask the trial court to instruct the jury on the lesser-included offenses of aggravated battery and battery. Defendant did not file a separate *pro se* posttrial motion alleging ineffective assistance of counsel. Defendant's posttrial motion for a new trial was denied in its entirety.

¶ 35 Thereafter, the trial court sentenced defendant to concurrent terms of 10 and 2 years' imprisonment, respectively, for aggravated criminal sexual assault and unlawful restraint. Defendant's motion to reconsider that sentence was denied, and he filed a timely appeal.

¶ 36 **II. ANALYSIS**

¶ 37 On appeal, defendant raises four separate challenges to his convictions. We address each in turn.

¶ 38 **A. Sufficiency of the Evidence**

¶ 39 Defendant first contends that he was not proven guilty beyond reasonable doubt of committing the offenses of aggravated criminal sexual assault and unlawful restraint. We disagree.

¶ 40 It is not the function of this court to retry defendant; rather, we review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the elements of the crime proven beyond a reasonable doubt. *People v. Evans*, 209 Ill. 2d 194, 209 (2004); *People v. Collins*, 106 Ill. 2d 237, 261 (1985). The trier-of-fact's findings are entitled to great weight, given that it is in the best position to judge the credibility and demeanor of the witnesses. *People v. Wheeler*, 226 Ill. 2d 92, 114-15 (2007). As such, a reviewing court will not substitute its judgment for that of a trier of fact on issues involving the weight of evidence or the credibility of witnesses. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224-25 (2009). A reversal is warranted only if the evidence is so improbable, or unsatisfactory, it leaves a reasonable doubt regarding defendant's guilt. *Evans*, 209 Ill. 2d at 209.

¶ 41 A person commits aggravated criminal sexual assault when he commits an act of sexual penetration by the use of force or threat of force and causes bodily harm to the victim. 720 ILCS 5/12-13(a)(1), 12-14(a)(2) (West 2010). Defendant was convicted of this offense pursuant to count 4, which alleged that the act of sexual penetration consisted of contact between defendant's penis and P.P.'s anus.

¶ 42 " 'Sexual penetration' means 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 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, including but not limited to cunnilingus, fellatio or anal penetration. Evidence of emission of semen is not required to prove sexual penetration." 720 ILCS 5/12-12(f) (West 2010). " 'Force or threat of force' means the use of force or violence, or the threat of force or violence, including but not limited to the following situations: (1) when the accused threatens to use force or violence on the victim or on any other person, and the victim

under the circumstances reasonably believed that the accused had the ability to execute that threat; or (2) when the accused has overcome the victim by use of superior strength or size, physical restraint or physical confinement." 720 ILCS 5/12-12(d) (West 2010). " 'Bodily harm' means physical harm, and includes, but is not limited to, sexually transmitted disease, pregnancy and impotence." 720 ILCS 5/12-12(b) (West 2010).

¶ 43 Defendant's unlawful-restraint conviction required proof that he knowingly, and without legal authority, detained P.P. 720 ILCS 5/10-3(a) (West 2010). As courts have recognized, the "gist of unlawful restraint is the detention of a person by some conduct which prevents [her] from moving from one place to another. [Citation.] The detention must be willful, against the victim's consent, and prevent movement from one place to another. [Citation.] Actual or physical force is not a necessary element of unlawful restraint as long as an individual's freedom of locomotion is impaired." *People v. Bowen*, 241 Ill. App. 3d 608, 627-28 (1993).

¶ 44 At trial, P.P. testified that just after she placed the remaining beer in her refrigerator and defendant used her bathroom on the night of the incident, defendant said something approximating, "you're not going to leave me like this." Defendant, immediately thereafter, placed his arm around P.P.'s neck and threw her into a hallway wall. Defendant then began hitting P.P. She attempted to crawl away, but defendant grabbed her again, hit her, and "flung" her onto her bed. Defendant, thereafter, said that P.P. was going to do something for him, before he placed his penis against P.P.'s anus, while holding her down. As defendant did so, P.P. defecated. Defendant called P.P. a "nasty bitch," continued to hit her, and attempted to force P.P. to provide him with oral sex. The physical altercation between the two continued until defendant left after P.P. pushed an air conditioner out of the window of her son's room and called out of that window for help. P.P. testified that she did not consent to defendant's sexual acts, that

defendant's attack caused her physical pain, and that her face and hands had been injured and bloodied.

¶ 45 This testimony alone contained evidence of all of the necessary elements of the offenses of aggravated criminal sexual assault and unlawful restraint for which the jury convicted defendant; *i.e.*: it provided evidence of contact between defendant's penis and P.P.'s anus; that defendant made such contact while overcoming P.P. by use of physical restraint; that defendant caused P.P. physical harm; and that defendant prevented P.P. from moving from one place to another. Moreover, this testimony was obviously deemed to be credible by the jury, and was alone sufficient to support defendant's convictions. *People v. Courtney*, 288 Ill. App. 3d 1025, 1036 (1997) ("In a sexual assault case, the victim's testimony alone, if positive and credible, is sufficient to sustain a conviction."); *Siguenza-Brito*, 235 Ill. 2d at 228 (More generally, "the testimony of a single witness, if positive and credible, is sufficient to convict ***").

¶ 46 Nevertheless, on appeal defendant raises several challenges to the evidence supporting his convictions. We reject defendant's specific arguments, as well as his general assertion that the evidence produced at trial leaves any reasonable doubt regarding his guilt.

¶ 47 First, we reject defendant's contention that his conviction for aggravated criminal sexual assault is called into question by the fact that no semen or male DNA was identified on the rectal swab taken from P.P., and there was no evidence of trauma to P.P.'s anus. The statute itself provides that sexual penetration includes "any contact, however slight, between the *** anus of one person by *** the sex organ *** of another person ***. Evidence of emission of semen is not required to prove sexual penetration." 720 ILCS 5/12-12(f) (West 2010). Thus, the statute reflects that sexual penetration can occur without anything more than slight contact and, therefore, physical evidence of any trauma or semen is unnecessary to support a conviction for

aggravated criminal sexual assault. *People v. Lee*, 346 Ill. App. 3d 41, 50 (2004) (There is no "requirement that a victim's testimony be corroborated by physical or medical evidence in order to sustain a conviction for criminal sexual assault."); *People v. Rivera*, 2011 IL App (2d) 091060, ¶ 35 (noting that no medical evidence is necessary to prove a defendant guilty of aggravated criminal sexual assault); *Bowen*, 241 Ill. App. 3d at 620 ("[T]he lack of medical evidence of physical injury does not establish the victim consented to have sexual intercourse."). The evidence in this case presented just such a situation, where P.P. testified that she defecated just after defendant placed his penis on her anus, and never testified at trial that defendant ejaculated during his attempt to engage in anal sex. The lack of any evidence of semen or trauma is, thus, completely consistent with P.P.'s testimony at trial, and consistent with a proper conviction for aggravated criminal sexual assault.

¶ 48 We also reject defendant's contention that P.P.'s testimony was strongly contradicted by the fact that no fecal matter was found by Officer Jordan, the evidence technician who processed the scene. It is true that Officer Jordan testified he did not specifically observe "a bowel movement o[r] feces" on the floor of P.P.'s bedroom; rather, he only observed a brown stain. Officer Jordan also testified that had he observed feces on the floor, he would have collected a sample.

¶ 49 However, Officer Jordan also specifically testified that he did not, in fact, know exactly what the stain was, and that he did not conduct any tests upon the stain. Moreover, photos taken by Officer Jordan do reveal such a brown stain, and P.P. testified at trial that these photos displayed the area where she defecated. Finally, Detective Besteda testified she understood that "fecal matter" was, in fact, found at the scene. In light of all the evidence and testimony, we do not find P.P.'s assertion, that she defecated after defendant's penis made contact with her anus,

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was seriously contradicted by Officer Jordan's testimony. *Wheeler*, 226 Ill. 2d at 116 ("a reviewing court must give the State the benefit of all reasonable inferences").

¶ 50 Defendant also repeatedly contends that P.P.'s overall testimony regarding the events of the incident, and her testimony that she only had two beers that day, was seriously called into question by the fact that: (1) both the EMT that treated P.P. at the scene and the nurse that treated her at the hospital noted that P.P.'s breath smelled like alcohol and both made a written notation of "alcohol abuse;" (2) a bottle of vodka was located in P.P.'s bedroom, corroborating defendant's testimony about the significant amount of liquor P.P. consumed prior to the incident; and (3) P.P. had initially told the police that she had consumed both beer and wine at the barbeque. See *People v. McGuire*, 18 Ill. 2d 257, 259 (1960) ("The intoxication of a witness at the time of an event about which he testifies may always be proved, because it affects the weight to be given to his testimony.").

¶ 51 However, the smell of alcohol on P.P.'s breath can be explained by her admitted consumption of the two beers. Moreover, both the EMT and the nurse testified at trial that a notation of "alcohol abuse" only indicated the use of some alcohol, not any particular amount. The EMT specifically testified that he did not recall if he thought P.P. had been drinking excessively, and the nurse testified that her notation of alcohol abuse was only intended to indicate that she smelled some alcohol on P.P.'s breath. Detective Downes testified that P.P. was not intoxicated when he interviewed her at the hospital following the incident. Finally, even if we agreed that the evidence presented—including the vodka bottle found at the scene, defendant's own testimony, and P.P.'s prior statement to the police—established that there was a question with respect to the extent of P.P.'s alcohol consumption, we note: " 'Where there is conflicting evidence of intoxication, it is the jury's function to determine the credibility of

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witnesses and the weight accorded their testimony.' " *People v. Hood*, 213 Ill. 2d 244, 264 (2004) (quoting *People v. Smith*, 149 Ill.2d 558, 566 (1992)); see also *People v. Gross*, 52 Ill. App. 3d 765, 771 (1977) ("The weight to be given the testimony relating to intoxication and inferences to be drawn therefrom are particularly within the province of the jury ***.)).

¶ 52 Defendant also contends, in a number of instances, that P.P.'s trial testimony was contradicted by her own prior statements and by the other evidence introduced at trial. For example, defendant notes that P.P.'s trial testimony was inconsistent with her prior statements with respect to whether: (1) defendant was inside her apartment because he brought her beer, to use the telephone or bathroom, or because he broke into her apartment in order to assault her; (2) defendant actually placed his penis inside P.P.'s mouth during the incident; (3) P.P. and defendant talked and consumed their beers on the steps outside her apartment or in P.P.'s kitchen; (4) the attack began as P.P. was walking toward the front door or in the kitchen; (5) defendant first used some type of cutting instrument before or after the vaginal rape; and (6) whether or not P.P. ejaculated during the assault. Defendant also notes that while P.P. initially told the police that she struck defendant with a knife, she did not repeat this contention at trial, and the police did not find any recent wounds on defendant following the incident. Finally, defendant notes that Ms. McPherson testified she did not hear anyone talking on the steps on the night of the incident, and that she would have been able to hear any such conversation.

¶ 53 In raising these various issues, defendant essentially requests that this court substitute its judgment for that of the jury as to the weight of the evidence or the credibility of P.P. as a witness. Yet, this is exactly what we are not permitted to do. *Siguenza-Brito*, 235 Ill. 2d at 224-25. Moreover, to the extent that there are any contradictions or inconsistencies in the evidence produced at trial, it "is not the role of this court to reevaluate the credibility of witnesses in light

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of inconsistent testimony and ostensibly retry the defendant on appeal." *People v. Howard*, 376 Ill. App. 3d 322, 329 (2007). We reiterate that "[t]he weight to be given the witnesses' testimony, the credibility of the witnesses, resolution of inconsistencies and conflicts in the evidence, and reasonable inferences to be drawn from the testimony are the responsibility of the trier of fact." *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). As such, a "reviewing court will not reverse a conviction simply because the evidence is contradictory ***." *Siguenza-Brito*, 235 Ill. 2d at 228. To the extent defendant points to specific discrepancies between P.P.'s trial testimony and her prior statements, we specifically note that "the jury was charged with weighing both of those statements and determining which, if either, was to be believed." *People v. Zizzo*, 301 Ill. App. 3d 481, 489 (1998).

¶ 54 Furthermore, while defendant correctly notes that the jury only found him guilty on two of the six counts, we reject his contention that "no rational jury could have rejected P.P.'s testimony concerning the vaginal assault and that Carter had a cutting instrument, while at the same time find that there was sufficient evidence proving there was contact between Carter's penis and P.P.'s anus." While the jury, obviously, did not find the evidence sufficient to convict defendant on all of the charges—perhaps because it did not find P.P.'s testimony to be completely credible—it is well understood that "[t]he trier of fact is free to accept or reject as much or as little of a witness's testimony as it pleases." *People v. McCarter*, 2011 IL App (1st) 092864, ¶ 22.

¶ 55 Lastly, while P.P. and defendant presented two very distinct versions of the events of June 20, 2010, a fact finder faced with conflicting versions of events is entitled to choose among those versions, and it need not accept the defendant's version from those competing versions. *People v. Villarreal*, 198 Ill. 2d 209, 231 (2001). The jury in this case was, thus, not required to

accept any possible explanation compatible with defendant's innocence and elevate it to the status of reasonable doubt. *Siguenza–Brito*, 235 Ill. 2d at 229.

¶ 56 Indeed, defendant's own version of events presented its own inconsistencies and contradictions. For example, defendant's testimony, that he hit or shoved P.P. only once and was only in P.P.'s kitchen and living room, is inconsistent with P.P.'s extensive injuries, the blood found throughout P.P.'s apartment, the "upheaval" noted in P.P.'s bedroom, and the fact that the air conditioner had been pushed out of window in Julian's room. Defendant's testimony; that he gave P.P.'s son a cigarette and that he walked away from P.P.'s apartment after putting on his clothes, was contradicted by Julian's testimony; that he never returned home on the night of the incident, and Ms. McPherson's testimony; that she saw a naked man run away from the apartment building. And defendant's trial testimony was also inconsistent with his prior statements with respect to whether or not he and P.P. had kissed, hugged, or actually engaged in oral sex.

¶ 57 In the end, we conclude that defendant's arguments on appeal have not demonstrated that the evidence is so improbable or unsatisfactory, that it leaves a reasonable doubt regarding his guilt with respect to his convictions for aggravated criminal sexual assault and unlawful restraint. *Evans*, 209 Ill. 2d at 209.

¶ 58 **B. One Act, One Crime**

¶ 59 We next address defendant's contention that his conviction and sentence for unlawful restraint must be vacated on the grounds that it violates the one-act, one-crime doctrine. We agree.

¶ 60 As an initial matter, we note that defendant never raised this argument in the trial court. However, we will review defendant's contentions on this issue, as "a violation of the one-act,

one-crime doctrine affects the integrity of the judicial process, thus, satisfying the second prong of the plain-error analysis." *People v. Span*, 2011 IL App (1st) 083037, ¶ 81.

¶ 61 In *People v. King*, 66 Ill. 2d 551 (1977), our supreme court set forth what has since come to be known as the one-act, one-crime doctrine. *Id.* at 556. As originally formulated, that doctrine concerned the potential for prejudice in the imposition of multiple convictions, and specifically provided:

"Prejudice results to the defendant only in those instances where more than one offense is carved from the same physical act. Prejudice, with regard to multiple acts, exists only when the defendant is convicted of more than one offense, some of which are, by definition, lesser included offenses. Multiple convictions and concurrent sentences should be permitted in all other cases where a defendant has committed several acts, despite the interrelationship of those acts. 'Act,' when used in this sense, is intended to mean any overt or outward manifestation which will support a different offense. We hold, therefore, that when more than one offense arises from a series of incidental or closely related acts and the offenses are not, by definition, lesser included offenses, convictions with concurrent sentences can be entered." *Id.*¹

¶ 62 As our supreme court has more recently noted:

"Decisions following *King* have explained that the one-act, one-crime doctrine involves a two-step analysis. [Citation.] First, the court must determine whether the defendant's conduct involved multiple acts or a single act. Multiple convictions are improper if they are based on precisely the same physical act. Second, if the conduct

¹ The one-act, one-crime doctrine was subsequently extended to the imposition of sentences, such as the ones imposed here, which are to run consecutively. *People v. Artis*, 232 Ill. 2d 156, 165 (2009) (citing *People v. Rodriguez*, 169 Ill. 2d 183, 187 (1996)).

involved multiple acts, the court must determine whether any of the offenses are lesser-included offenses. If an offense is a lesser-included offense, multiple convictions are improper." *People v. Miller*, 238 Ill. 2d 161, 165 (2010).

Thus, even where "the convictions were based on interrelated acts rather than the same act, we proceed to the second prong [and ask]: are any of the offenses lesser-included offenses?" *People v. Peacock*, 359 Ill. App. 3d 326, 333 (2005).

¶ 63 Turning to that issue, we note that our courts "have identified three possible methods for determining whether a certain offense is a lesser-included offense of another: (1) the 'abstract elements' approach; (2) the 'charging instrument' approach; and (3) the 'factual' or 'evidence' adduced at trial approach." *Miller*, 238 Ill. 2d at 166. Nevertheless, in *Miller* our supreme court has made it clear that in situations—such as the one presented here—where a defendant is charged with multiple offenses and the question is whether one of those charged offenses is a lesser-included offense of another charged offense, courts must apply the "abstract elements" approach. *Id.* at 174-75. As our supreme court has explained, under that approach:

"[A] comparison is made of the statutory elements of the two offenses. If all of the elements of one offense are included within a second offense and the first offense contains no element not included in the second offense, the first offense is deemed a lesser-included offense of the second. [Citations.] Although this approach is the most clearly stated and the easiest to apply [citation], it is the strictest approach in the sense that it is formulaic and rigid, and considers 'solely theoretical or practical impossibility.' In other words, it must be impossible to commit the greater offense without necessarily committing the lesser offense. [Citations.]" *Id.* at 166; see also *People v. Novak*, 163 Ill.

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2d 93, 106 (1994), abrogated on other grounds by *People v. Kolton*, 219 Ill. 2d 353 (2006).

One-act, one-crime challenges are reviewed *de novo*. *People v. Stanford*, 2011 IL App (2d) 090420, ¶ 33.

¶ 64 First, we must address the first step of the one-act, one-crime analysis and determine the number of "acts" at issue. Again, an act for the purposes of this analysis includes "any overt or outward manifestation which will support a different offense." *King*, 66 Ill. 2d at 556. Here, P.P. testified that she attempted to crawl away from defendant at least three separate times during the assault, but defendant grabbed her each time. She also testified that defendant contacted her anus with his penis by the use of force. As each of these acts would support the different offenses of unlawful restraint and sexual assault, more than one physical act is at issue here.

¶ 65 Even though we find defendant's actions to have comprised more than one physical act, we note that the State itself recognizes that they were committed "close in time and proximity." Indeed, the incident in question here involved acts on the part of the defendant which all occurred in one place—P.P.'s apartment—and all occurred within moments of each other. There can be no question that defendant's actions, even viewed as separate acts, comprised "a series of incidental or closely related acts." *Id.* at 566. Thus, we must proceed with the second step of the one-act, one-crime analysis, and determine whether unlawful restraint is, by definition, a lesser-included offense of criminal sexual assault such that multiple convictions are improper. *Miller*, 238 Ill. 2d at 165; *Peacock*, 359 Ill. App. 3d at 333.

¶ 66 It is evident that aggravated criminal sexual assault is a greater offense than unlawful restraint. While aggravated criminal sexual assault is a Class X felony (720 ILCS 5/12-14(d)(1) (West 2010)), punishable by a term of 6 to 30 years' imprisonment (730 ILCS 5/5-4.5-25(a)

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(West 2010)), unlawful restraint is a Class 4 felony (720 ILCS 5/10-3(b) (West 2010)), punishable by a term of only 1 to 3 years' imprisonment (730 ILCS 5/5-4.5-45(a) (West 2010)). Thus, we must determine if unlawful restraint is a lesser-included offense of the greater offense of aggravated criminal sexual assault.

¶ 67 As discussed above, defendant's aggravated criminal sexual assault convictions required proof that he committed an act of sexual penetration upon P.P. by the use of force or threat of force and caused bodily harm to her. 720 ILCS 5/12-13(a)(1), 12-14(a)(2) (West 2010). His unlawful restraint conviction required proof that he knowingly, and without legal authority, detained P.P. 720 ILCS 5/10-3(a) (West 2010). Pursuant to the abstract-elements test, if all of the elements of the offense of unlawful restraint are included within the offense of aggravated criminal sexual assault and unlawful restraint contain no element not included in aggravated criminal sexual assault, then unlawful restraint must be deemed a lesser-included offense of aggravated criminal sexual assault. *Miller*, 238 Ill. 2d at 166. Our analysis should consider only theoretical or practical impossibility (*id.*), such that it must have been impossible to commit an act of sexual penetration upon a victim by the use of force or threat of force, causing bodily harm to that victim, without necessarily also knowingly and without legal authority, detaining that victim. Our analysis proceeds in the abstract, and "does not look to the facts of a crime as either charged in the particular charging instrument or proved at trial." *Novak*, 163 Ill. 2d at 106.

¶ 68 The State contends that the *explicit* elements of the offense of aggravated criminal sexual assault do not require a defendant to "detain" a victim; detention is, therefore, not an essential element of that offense; and unlawful restraint is, thus, not a lesser-included offense of aggravated criminal sexual assault. However, in conducting the abstract-elements analysis, we are specifically directed to consider theoretical *or* practical impossibility. We fail to see how, as

a theoretical or practical matter, a defendant could possibly commit an act of sexual penetration upon a victim by the use of force or threat of force, causing bodily harm to that victim, without also knowingly and without legal authority, detaining that victim. See, *supra.*, ¶¶ 42-43 (outlining the statutory definitions of the word and phrases contained in the elements of the offense of aggravated criminal sexual assault and describing the "gist" of the offense of unlawful restraint). Nor does the State offer any possible theoretical or practical examples.

¶ 69 Indeed, we note that Illinois courts have long, at least *implicitly*, recognized that the offense of unlawful restraint is theoretically or practically inherent in the commission of a forcible criminal sexual assault. *People v. Daniel*, 311 Ill. App. 3d 276, 290 (2000) (conduct charged as unlawful restraint "was the same conduct inherent in every case of criminal sexual assault, that being the use of force to detain the victim in order to effectuate the sexual act."); *Bowen*, 241 Ill. App. 3d at 628 ("The unlawful restraint charged in the indictment was that which the legislature addressed in the criminal sexual assault statute and is conduct inherent in every case of criminal sexual assault by force."); *People v. Wrightner*, 219 Ill. App. 3d 231, 234 (1991) ("Rape cases present a special situation in that the physical restraint of the victim against her will is an essential element of the crime of rape, and a judgment of conviction may not be entered for lesser included offenses."); *People v. McCann*, 76 Ill. App. 3d 184, 187 (1979) ("All the elements of unlawful restraint are necessarily present in rape and, therefore, defendant's conviction of unlawful restraint must be reversed.").

¶ 70 Pursuant to the applicable abstract-elements test, it was, therefore, theoretically and practically impossible for defendant to commit the greater offense of aggravated criminal sexual assault without necessarily committing the lesser offense of unlawful restraint. As such, we are

required to vacate defendant's conviction and sentence for unlawful restraint as a lesser-included offense under the principles of the one-act, one-crime doctrine. *Miller*, 238 Ill. 2d at 166.

¶ 71 In so ruling, we necessarily reject the State's reliance upon prior decisions affirming convictions for both sexual assault and unlawful restraint. For example, the State cites to *People v. Jackson*, 203 Ill. App. 3d 1 (1990), as an example of an instance where both aggravated criminal sexual assault and unlawful restraint convictions were upheld on appeal. However, the court's analysis in that case: (1) was *dicta*, as it had found the one-act, one-crime issue waived, (2) concluded that the two convictions were permissible solely because they involved separate acts, without continuing to the second step of the one-act, one-crime analysis, and (3) did not apply the abstract-elements analysis set out above. *Id.* at 10. The State also cites to *People v. Alvarado*, 235 Ill. App. 3d 116 (1992). However, in addition to not applying the two-step analysis or the abstract-elements test required by *Miller*, the court's analysis in that case included a specific finding that the acts constituting criminal sexual assault and unlawful restraint were "separate, independent acts which were not closely related." *Id.* at 117. In contrast, we have specifically concluded that the convictions here arose out of a series of incidental, or closely related acts.

¶ 72 Finally, we find that we must discuss an issue not raised by either defendant, or the State. In *People v. Bouchee*, 2011 IL App (2d) 090542, and *People v. Fuller*, 2013 IL App (3d) 110391, *pet. for leave to appeal pending*, No. 116992, the Second and Third Districts of the Appellate Court considered whether criminal sexual assault was a lesser-included offense of the offense of home invasion. In each case, the courts concluded that—in applying the abstract-elements test—all of the possible subsections of the two relevant offenses must be compared without regard to the actual subsection under which the defendant was charged. As the court

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concluded in *Bouchee*, "[a]lthough the abstract-elements approach does consider 'the statutory elements of the *charged* offenses' [citation], it considers the charged offenses in the statutory abstract, not in terms of how they are framed in a particular charging instrument." (Emphasis in original.) *Bouchee*, 2011 IL App (2d) 090542, ¶ 11.

¶ 73 In our analysis, we have obviously compared only the specific subsection of the offense of aggravated criminal sexual assault under which defendant was charged and convicted (720 ILCS 5/12-13(a)(1), 12-14(a)(2) (West 2010)), which specifically proscribes an act of sexual penetration by "the use of force or threat of force") to the offense of unlawful restraint (720 ILCS 5/10-3(a) (West 2010)). Our one-act, one-crime analysis, thus, hinges on the fact that defendant was charged and convicted of aggravated criminal sexual assault by force or threat of force, causing bodily harm, and that unlawful detention is inherent in that particular form of the offense.

¶ 74 Were we to follow *Bouchee* and *Fuller*, and broaden our analysis to include a consideration of all the various subsections of aggravated criminal sexual assault, it is arguable that we would be compelled to conclude that the offense of unlawful restraint is not *necessarily inherent* in those instances of aggravated criminal sexual assault that do not include force or the threat of force as a statutory element. See, e.g., 720 ILCS 5/12-13(a)(2), 12-14(a)(2) (West 2010) (accused commits aggravated criminal sexual assault if he or she "commits an act of sexual penetration and the accused knew that the victim was unable to understand the nature of the act or was unable to give knowing consent"); 720 ILCS 5/12-13(a)(3), 12-14(a)(2) (West 2010) (accused commits aggravated criminal sexual assault if he or she "commits an act of sexual penetration with a victim who was under 18 years of age when the act was committed and the accused was a family member"); 720 ILCS 5/12-13(a)(4), 12-14(a)(2) (West 2010) (accused

commits aggravated criminal sexual assault if he or she "commits an act of sexual penetration with a victim who was at least 13 years of age but under 18 years of age when the act was committed and the accused was 17 years of age or over and held a position of trust, authority or supervision in relation to the victim"); 720 ILCS 5/12-14(c) (West 2010) ("The accused commits aggravated criminal sexual assault if he or she commits an act of sexual penetration with a victim who was a severely or profoundly mentally retarded person at the time the act was committed.").

¶ 75 However, we do not agree with the conclusion reached in *Bouchee* and *Fuller* that—in conducting the abstract-elements test as part of a one-act, one-crime analysis—all of the possible subsections of the two relevant offenses must be compared without regard to the specific subsection under which the defendant was charged and convicted. The *Bouchee* and *Fuller* courts were clearly interested in avoiding the "charging instrument" approach rejected by our supreme court in *Miller*. However, the aspect of the charging instrument approach rejected by the court in *Miller* was that it looked to the specific *facts* contained in the charging instruments to determine whether one offense was a lesser included offense of another. *Miller*, 238 Ill. 2d at 166-67; *People v. Kolton*, 219 Ill. 2d 353, 367 (2006) (noting that "under the charging instrument approach, whether a particular offense is 'lesser included' is a decision which must be made on a case-by-case basis using the factual description of the charged offense in the indictment."). Nowhere in *Miller* did the court indicate that it was impermissible to look to the charging instruments to determine the specific statutory subsections to be used for comparison under the abstract-elements test.

¶ 76 Indeed, in *Miller*, our supreme court adopted the abstract-elements test, in situations such as the one presented here, specifically for purposes of applying section 5/2-9 of the Criminal Code of 1961. 720 ILCS 5/2-9 (West 2010)); *Miller*, 238 Ill. 2d at 165-66.

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Section 5/2-9 defines a lesser-included offense as an offense established by proof of "the same or less than all of the facts or a less culpable mental state (or both), than that which is required to establish the commission of the *offense charged*." (Emphasis added.) 720 ILCS 5/2-9 (West 2010). Moreover, in its actual application of the abstract elements test in *Miller*, our supreme court cited only to the specific subsections of the relevant offenses for which the defendant in that case had been charged and convicted. *Miller*, 238 Ill. 2d at 175-76. This court has previously done the same in conducting the abstract elements test adopted by *Miller*. *Span*, 2011 IL App (1st) 083037, ¶ 90.

¶ 77 Moreover, in adopting the abstract elements test in *Miller*, our supreme court specifically stated that "[t]o determine whether an offense is a lesser-included offense and, thus, the same as the greater offense for double jeopardy purposes, the United States Supreme Court employs the same elements test *** [which is] the equivalent of the abstract elements approach which we have adopted in the case at bar." *Miller*, 238 Ill. 2d 174-75. In applying the "same elements" test for double jeopardy purposes, our supreme court has consistently compared only the specific subsections of the offenses for which a particular defendant was charged and convicted. See *People v. Gray*, 214 Ill. 2d 1, 7-8 (2005); *People v. Sienkiewicz*, 208 Ill. 2d 1, 10-11 (2003); *People v. Totten*, 118 Ill. 2d 124, 138 (1987) (applying same elements test by comparing offenses "as charged in the information"). We see no reason to believe that our supreme court intended that a different procedure should apply in the context of a one-act, one-crime analysis, considering that it specifically noted that the same elements test and the abstract elements test are "equivalent."

¶ 78 In sum, we agree that defendant's conviction for unlawful restraint does violate the one-act, one-crime doctrine. Pursuant to the principles of that doctrine, we, therefore, vacate defendant's conviction and sentence for the less serious offense of unlawful restraint.

¶ 79 C. Coerced Verdict

¶ 80 Defendant next asserts that he is entitled to a new trial because the trial court improperly coerced a verdict by providing an improper instruction to the jury after receiving a note indicating that the jury was deadlocked on two of the six counts. We disagree.

¶ 81 After retiring to deliberate, the jury sent out a note stating: "We've decided four out of the six charges. We are deadlocked on two. What next?" With both the State and defendant indicating no objection thereto, the trial court responded to the jury's note with the following additional instruction: "You have all the instructions that you received in this case. And the evidence. Please continue to deliberate in reaching a verdict on all the counts." Defendant never offered an alternative instruction, and did not include this issue in his posttrial motion.

¶ 82 Our supreme court has consistently recognized that "a defendant will be deemed to have procedurally defaulted his right to obtain review of any supposed jury instruction error if he failed to object to the instruction or offer an alternative at trial and did not raise the issue in a posttrial motion." *People v. Sargent*, 239 Ill. 2d 166, 188-89 (2010) (citing *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007)). Indeed, under the doctrine of invited error, a defendant may not request or agree to a trial court's response to a jury's question, and then later contend on appeal that the instruction was given in error. *People v. Halerewicz*, 2013 IL App (4th) 120388, ¶ 23; *People v. Curry*, 2013 IL App (4th) 120724, ¶ 88; *People v. Pryor*, 372 Ill. App. 3d 422, 432 (2007); *People v. Smith*, 71 Ill. 2d 95, 104-05 (1978).

¶ 83 Such invitation or agreement to a procedure later challenged on appeal goes beyond simple procedural default; it becomes a matter of estoppel. *People v. Harvey*, 211 Ill. 2d 368, 385 (2004) (citing *Villarreal*, 198 Ill. 2d at 227); see also *Pryor*, 372 Ill. App. 3d 422, 432 ("To allow a defendant to object, on appeal, to the trial court's response to the jury's question that he agreed to at trial would offend all notions of fair play."). Therefore, such issues may not be reviewed for plain error on appeal. *People v. Bowens*, 407 Ill. App. 3d 1094, 1101 (2011) (noting that plain-error analysis applies to cases involving procedural default, not affirmative acquiescence, and that in a situation where "defense counsel affirmatively acquiesces to actions taken by the trial court, a defendant's only challenge may be presented as a claim for ineffective assistance of counsel ***."); *People v. Patrick*, 233 Ill. 2d 62, 77 (2009) (refusing to address assertion of plain error with respect to jury instruction where defendant invited any possible error).

¶ 84 Here, it is evident that defendant not only failed to object to the trial court's response to the jury's question, or include the issue in his posttrial motion, his defense counsel affirmatively indicated that there was no objection to that instruction. "Thus, defense counsel affirmatively acquiesced to the court's instruction, and under the invited error doctrine, defendant cannot object to the instruction on appeal." *Curry*, 2013 IL App (4th) 120724, ¶ 88. We, therefore, refuse defendant's request that the trial court's response to the jury's question in this case be reviewed for plain error.

¶ 85 *D. Krankel* Hearing

¶ 86 Defendant's final contention is that this case should be remanded because the trial court failed to make a proper inquiry into the claim of ineffective assistance of counsel included in defendant's posttrial motion, pursuant to *Krankel* and its progeny. We, again, disagree.

¶ 87 A trial court typically cannot consider *pro se* motions filed by a criminal defendant while he is represented by counsel. *People v. Rucker*, 346 Ill. App. 3d 873, 882 (2004). However, represented defendants are allowed to raise *pro se* claims of ineffective assistance of counsel. *Krankel*, 102 Ill. 2d at 189; *People v. Milton*, 354 Ill. App. 3d 283, 292 (2004). While new counsel may be appointed to represent a defendant raising such claims, new counsel "is not automatically required in every case in which a defendant presents a *pro se* posttrial motion alleging ineffective assistance of counsel." *People v. Moore*, 207 Ill. 2d 68, 77 (2003). As our supreme court has explained:

"Rather, when a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the trial court should first examine the factual basis of the defendant's claim. If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. However, if the allegations show possible neglect of the case, new counsel should be appointed. [Citations.] The new counsel would then represent the defendant at the hearing on the defendant's *pro se* claim of ineffective assistance. [Citations.] The appointed counsel can independently evaluate the defendant's claim and would avoid the conflict of interest that trial counsel would experience if trial counsel had to justify his or her actions contrary to defendant's position. [Citations.]

The operative concern for the reviewing court is whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel. [Citation.] During this evaluation, some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary in assessing what further action, if

any, is warranted on a defendant's claim. Trial counsel may simply answer questions and explain the facts and circumstances surrounding the defendant's allegations. [Citations.] A brief discussion between the trial court and the defendant may be sufficient. [Citations.] Also, the trial court can base its evaluation of the defendant's *pro se* allegations of ineffective assistance on its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face. [Citations.]" *Id.* at 77-79.

¶ 88 As an initial matter, we reject the State's contention that no *Krankel* inquiry was even required in this case because defendant himself did not file a written *pro se* motion alleging ineffective assistance of counsel and, therefore, "did not allege his counsel's ineffectiveness or otherwise inform the court that he had any complaints about his attorney's performance." It is well recognized that "a *pro se* defendant is not required to file a written motion, but must only bring the claim to the trial court's attention." *People v. Patrick*, 2011 IL 111666, ¶ 29. Furthermore, this court has specifically recognized that a *Krankel* inquiry may be required where the possibility of ineffectiveness was raised by *defense counsel* in the context of a posttrial motion. *People v. Williams*, 224 Ill. App. 3d 517, 523-24 (1992) ("Where there is a clear basis for an allegation of ineffectiveness of counsel, a defendant's failure in explicitly making such an allegation does not result in a waiver of a *Krankel* problem.").

¶ 89 Here, defendant's written posttrial motion—prepared by defense counsel—explicitly contained an assertion that defendant felt he was "ill advised" by counsel with respect to the decision not to ask the trial court to instruct the jury on the lesser-included offenses of aggravated battery and battery. At the hearing on the posttrial motion, defense counsel explicitly noted that defendant "wished" that his counsel had asked for lesser-included offense instructions

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in light of the jury's verdicts. In both the written posttrial motion, and at the hearing on that motion, defense counsel indicated that it was bringing this matter to the trial court's attention in order to "preserve" it on behalf of defendant. Upon this record, we conclude that the claim, defendant's counsel was ineffective in advising defendant not to ask the trial court to instruct the jury on the lesser-included offenses, was sufficiently brought to the trial court's attention to merit at least a preliminary *Krankel* inquiry.

¶ 90 Nevertheless, we reject defendant's contention that the trial court improperly denied defense counsel's posttrial motion without appointing new counsel to represent defendant with respect to the specific assertion of ineffective assistance. Again, the claim presented to the trial court, and reasserted on appeal, is that defendant's trial counsel was ineffective in advising defendant not to ask the trial court to instruct the jury on the lesser-included offenses of aggravated battery and battery. As noted above, "[i]f the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion." *Moore*, 207 Ill. 2d at 77. "Illinois courts have generally recognized that '[t]he decision to offer an instruction on a lesser-included offense is one of trial strategy, which has no bearing on the competency of counsel.'" *People v. Phillips*, 383 Ill. App. 3d 521, 540 (2008) (quoting *People v. Evans*, 369 Ill. App. 3d 366, 383 (2006)). "Thus, that decision cannot form the basis of an ineffective assistance of counsel claim." *People v. Moore*, 358 Ill. App. 3d 683, 689 (2005) (citing *People v. Dominguez*, 331 Ill. App. 3d 1006, 1015 (2002)).

¶ 91 We also reject defendant's contention that the trial court's inquiry into this assertion of ineffectiveness was in any way inadequate. Defendant specifically contends that the trial court: (1) failed to make any inquiry into the factual basis for the assertion of ineffectiveness; and (2)

failed to direct that factual inquiry toward defendant himself. However, we reiterate that our supreme court has identified three ways a trial court may conduct its evaluation: (1) the court may ask trial counsel about the facts and circumstances related to the defendant's allegations; (2) the court may ask the defendant for more specific information; or (3) the court may rely on its knowledge of counsel's performance at trial and the insufficiency of the defendant's allegations on their face. *Milton*, 354 Ill. App. 3d at 292 (citing *Moore*, 207 Ill. 2d at 78-79).

¶ 92 Here, the posttrial motion prepared by defendant's trial counsel itself specifically provided the factual background for defendant's claim; *i.e.*, that defendant and his trial counsel had agreed not to ask the trial court to instruct the jury on the lesser-included offenses of aggravated battery and battery as a matter of trial strategy. At the hearing on the motion, and in response to the trial court's request for argument, defense counsel reiterated that this was a mutual decision made only after he and defendant had "numerous discussions with regards to lesser included offenses." In both the written posttrial motion and at the hearing on that motion, defense counsel indicated to the trial court that it was only following the jury's verdicts that defendant expressed regret with respect to that decision.

¶ 93 Thus, we conclude that the trial court properly rejected defendant's assertions of ineffectiveness only after having been provided with the relevant facts and circumstances related to those assertions by defense counsel. While precedent would have also allowed the trial court to ask defendant for more specific information, the trial court was not required to do so. Moreover, while defendant also faults the trial court for denying the assertions of ineffectiveness without further comment, we are aware of no requirement that the trial court engage in such commentary. As noted above, the operative concern for this court is whether the trial court

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conducted an adequate evaluation of defendant's allegations of ineffective assistance of counsel.

On this record, we conclude that the trial court's evaluation was in fact adequate.

¶ 94

III. CONCLUSION

¶ 95 For the foregoing reasons, we affirm defendant's conviction and sentence for aggravated criminal sexual assault. However, pursuant to our authority under Illinois Supreme Court Rule 615(b)(1) (Ill. S. Ct. R. 516(b)(1) (eff. Aug. 27, 1999)), we vacate his conviction and sentence for unlawful restraint and direct the clerk of the circuit court to amend the mittimus to reflect the fact that this conviction and sentence—and only this conviction and sentence—has been vacated.

¶ 96 Affirmed in part; vacated in part; mittimus amended.