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Illinois Official Reports

Appellate Court

People v. Skaggs, 2019 IL App (4th) 160335

Appellate Court Caption	THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JACK SKAGGS, Defendant-Appellant.
District & No.	Fourth District Docket No. 4-16-0335
Filed	May 17, 2019
Decision Under Review	Appeal from the Circuit Court of Sangamon County, No. 12-CF-967; the Hon. John M. Madonia, Judge, presiding.
Judgment	Affirmed in part and vacated in part; cause remanded with directions.
Counsel on Appeal	James E. Chadd, Patricia Mysza, and Maria A. Harrigan, of State Appellate Defender's Office, of Chicago, for appellant. John C. Milhiser, State's Attorney, of Springfield (Patrick Delfino, David J. Robinson, and John M. Zimmerman, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.
Panel	JUSTICE TURNER delivered the judgment of the court, with opinion. Justice Knecht concurred in the judgment and opinion. Justice DeArmond dissented, with opinion.

OPINION

¶ 1 In November 2012, the State charged defendant, Jack Skaggs, with three counts of criminal sexual assault, three counts of aggravated criminal sexual assault, and three counts of home invasion. After a September 2015 trial, a jury found defendant guilty of only two counts of criminal sexual assault and one count of home invasion. In April 2016, the Sangamon County circuit court sentenced defendant to consecutive prison terms of 10 years for home invasion and 40 years on each count of criminal sexual assault.

¶ 2 On appeal, defendant only argues that one of his convictions for criminal sexual assault should be vacated as it is a lesser-included offense of home invasion. We agree and vacate in part, affirm in part, and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 The charges at issue in this case stem from an incident occurring in the early morning hours of November 11, 2012, at the home of defendant's former girlfriend, T.P. The three counts of criminal sexual assault alleged that defendant committed an act of sexual penetration by placing his penis in contact with the sex organ (count I), anus (count II), and mouth (count III) of T.P. 720 ILCS 5/11-1.20(a)(1) (West 2012). The aggravated criminal sexual assault charges asserted defendant committed an act of sexual penetration by placing his penis in contact with the sex organ (count IV), anus (count V), and mouth (count VI) of T.P. while displaying a dangerous weapon, a knife. 720 ILCS 5/11-1.30(a)(1) (West Supp. 2011). In the home invasion counts, the State alleged defendant entered the dwelling of T.P. without authority and committed a criminal sexual assault (count VII), committed an aggravated criminal sexual assault (count VIII), and threatened the imminent use of force while armed with a knife (count IX). 720 ILCS 5/12-11(a)(1), (a)(6) (West 2010) (text of section effective July 1, 2011).

¶ 5 Before trial, defendant complained about his public defender and indicated his desire to represent himself. After admonishing defendant pursuant to Illinois Supreme Court Rule 401 (eff. July 1, 1984), the circuit court granted defendant's request to proceed *pro se* and allowed the public defender to withdraw. At trial, the State presented the testimony evidence of (1) T.P., the victim, (2) Springfield police officer Ronald Roy, (3) Springfield police detective Michael Flynn, (4) Heather Saunders, an emergency room nurse, (5) Springfield police detective Kim Overby, (6) Amanda Humke, a forensic scientist with the Illinois State Police, and (7) Kelly Biggs, a forensic scientist with the Illinois State Police. Defendant recalled Detective Flynn, Officer Roy, and T.P. Defendant also testified on his own behalf and presented the testimony of Russell Blevins, defendant's employee. Both the State and defendant presented numerous exhibits consisting of, *inter alia*, photographs of the crime scene and T.P. The parties also stipulated defendant had been charged with three counts of aggravated criminal sexual assault and two counts of criminal sexual assault in Sangamon County case No. 99-CF-98. Defendant was found guilty of only one count of criminal sexual assault. The evidence relevant to the issue on appeal is set forth below.

¶ 6 T.P. testified she had the job of managing dart tournaments at various establishments. On the night of November 11, 2012, T.P. was running a dart tournament at The Cove, and defendant was playing in the tournament. T.P. had dated defendant for five years, and they broke up a month before that night. T.P. testified defendant appeared to be intoxicated and they

spoke very little to each other during the tournament. T.P. did not make any plans with defendant that night.

¶ 7 After the tournament ended, T.P. gave two people a ride home and purchased some food from McDonald's for herself to eat at home. When T.P. arrived at her home, she noticed the basement light was on and thought her daughter was there. After looking in the bedroom for her daughter, she turned off the basement light and went to the refrigerator to get a drink. While she was at the refrigerator, the basement door swung open, and defendant appeared. Defendant came at T.P., demanding she masturbate him or he would "beat [her] within an inch of [her] life." T.P. asked defendant what he was doing there and told him to get out. Defendant grabbed her by the throat and pushed her, causing T.P. to fall into her open dishwasher. When T.P. stood up, defendant ordered her to remove her clothes. T.P. refused, and defendant hit her in the head. Defendant started taking off T.P.'s clothes, and T.P. tried to stop him. At some point, defendant dragged T.P. by her shirt collar to the bedroom and threw her on the bed. T.P. eventually removed her shirt as ordered but refused to remove her bra. Defendant obtained a steak knife from the kitchen, held it to her throat, and demanded she take off her bra. When defendant pushed the knife harder into her throat, she complied and took off her bra.

¶ 8 Defendant penetrated T.P.'s anus and then attempted to penetrate her vagina. T.P. moved around trying to avoid defendant. In the struggle, defendant's penis made contact with T.P.'s vagina. Defendant then left the room and got extension cords. When he returned, he tied T.P.'s hands above her head. Defendant then put his penis in T.P.'s mouth. The knife was above her head during the encounter. When defendant was finished, he threw T.P.'s clothes at her. They both got dressed and returned to the kitchen.

¶ 9 While in the kitchen, defendant kept "chastising" T.P. because she would not let defendant see her grandson. At some point, defendant approached T.P. and demanded she put her hand on his penis. T.P. protested, and eventually defendant threw her in the bedroom a second time. Defendant attempted to penetrate T.P.'s anus with his penis and eventually penetrated her vagina. After defendant was done, they again dressed and returned to the kitchen. Defendant was still upset with T.P. for not allowing him to see her grandson and threatened to kill her. He also kept asking her to take a shower. T.P. was eventually able to calm defendant down, and defendant called a cab. As he was leaving, defendant asked T.P. if he should stop by the police department on his way home.

¶ 10 When defendant was gone, T.P. contacted the police. A police officer arrived shortly after she called. While T.P. was talking to the police officer, she noticed something was not right with the window above her kitchen sink. When she examined the window, T.P. noticed the corner of the screen was cut and a ladder was standing next to the window. She stored the ladder in a shed in her backyard, and defendant had previously used her ladders while they were dating. After talking with T.P., the police officer sent T.P. to the hospital. At the hospital, someone took pictures of T.P.'s wrists, neck, and face. T.P. also had her daughter take a photograph of bruising beginning to show on her left eye on the evening of November 12, 2012.

¶ 11 Saunders testified she was the emergency room nurse who completed the sexual assault kit on T.P. After completing the 15 steps for collecting evidence, Saunders sealed the box and gave it to a police officer. Saunders also testified it was normal for bruising to form over time, which may take hours or days.

¶ 12 Detective Overby testified she was the one who took pictures at the scene and at the hospital. She also collected the evidence at T.P.'s home. Moreover, Detective Overby testified she was told by either Officer Roy or Detective Flynn that the knife defendant used was put back into the knife block in the kitchen. The person explained it was the knife on the lower left side. Detective Overby collected that knife.

¶ 13 Humke testified she examined the vaginal, oral, and anal swabs from T.P.'s sexual assault kit. Humke identified semen on the vaginal and anal swabs but did not find any on the oral swab. Humke forwarded the vaginal swabs to another forensic scientist for deoxyribonucleic acid (DNA) testing. Biggs testified she was the one who conducted the DNA analysis on the vaginal swabs. Biggs was able to generate DNA profiles from the vaginal swabs. The female DNA profile matched T.P.'s DNA, and the male DNA profile matched defendant's DNA.

¶ 14 Defendant testified he won money at the dart tournament and went up to T.P. to collect it. Defendant told T.P. to keep his winnings and asked if they could get together sometime. T.P. told him he could meet her at the house or stay at the bar until she was done with the tournament. Defendant left the bar and eventually went to T.P.'s house. He sat on T.P.'s front porch until she arrived home. T.P. opened the front door, and he followed her into the home. They started talking and eventually kissed. They then had consensual sex. Afterwards, they talked in the kitchen for about 45 minutes and then he took a cab home. Defendant further testified he cooperated with the police and gave them a buccal swab.

¶ 15 Defendant recalled T.P. to have her acknowledge their prior relationship and the fact she knew he was a registered sex offender. He also had her acknowledge that she made an allegation of sexual assault on the night of October 11, 2012, and did not report it to the police.

¶ 16 At the close of all the evidence, the State dismissed count III of the information, which charged defendant with criminal sexual assault based on oral contact. The jury found defendant guilty of two counts of criminal sexual assault, count I (vaginal) and count II (anal), and one count of home invasion, count VII (criminal sexual assault). The jury found defendant not guilty of the three counts of aggravated criminal sexual assault, counts IV through VI, and two counts of home invasion, count VIII (aggravated criminal sexual assault) and count IX (force while armed with a knife).

¶ 17 After trial, the circuit court appointed defendant counsel at his request. Defense counsel filed a motion for a new trial and several amended motions. After a March 2016 hearing, the court denied defendant's posttrial motions. Before sentencing, defendant's counsel filed a document addressing the sentencing scheme at issue in this case and asserting the court should merge one of the criminal sexual assault convictions with the home invasion conviction. Counsel argued that, based on the charges and the facts of the case, one of the criminal sexual assault counts had to merge with the home invasion count as a lesser-included offense. At the April 15, 2016, sentencing hearing, the court declined to merge one of the counts of criminal sexual assault with the home invasion count and sentenced defendant to consecutive prison terms of 40 years for each count of criminal sexual assault and 10 years for home invasion.

¶ 18 On April 28, 2016, defendant filed a timely notice of appeal in compliance with Illinois Supreme Court Rule 606 (eff. Dec. 11, 2014), listing only one count of criminal sexual assault. On May 24, 2016, defendant filed a timely amended notice of appeal under Illinois Supreme Court Rules 606(d) (eff. Dec. 11, 2014) and 303(b)(5) (eff. Jan. 1, 2015) that appealed all three of defendant's convictions and sentences. Accordingly, this court has jurisdiction of defendant's conviction and sentence under Illinois Supreme Court Rule 603 (eff. Feb. 6, 2013).

¶ 19 II. ANALYSIS

¶ 20 The sole issue in this appeal involves the application of the one-act, one-crime rule established by our supreme court in *People v. King*, 66 Ill. 2d 551, 363 N.E.2d 838 (1977). In *King*, 66 Ill. 2d at 566, the supreme court explained the rule as follows:

> "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."

Applying the aforementioned test to the facts before it, the *King* court observed "the offenses of rape and burglary are based on separate acts, each requiring *proof of a different element*. The convictions of both were, therefore, proper." (Emphasis added.) *King*, 66 Ill. 2d at 566. Since *King*, the supreme court has explained the one-act, one-crime doctrine involves the following two-step analysis:

> "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 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, 938 N.E.2d 498, 501 (2010).

¶ 21 In this case, defendant was found guilty of violating section 12-11(a)(6) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/12-11(a)(6) (West 2010) (text of section effective July 1, 2011)). That section defines home invasion as follows:

> "A person who is not a peace officer acting in the line of duty commits home invasion when without authority he or she knowingly enters the dwelling place of another when he or she knows or has reason to know that one or more persons is present or he or she knowingly enters the dwelling place of another and remains in such dwelling place until he or she knows or has reason to know that one or more persons is present or who falsely represents himself or herself, including but not limited to, falsely representing himself or herself to be a representative of any unit of government or a construction, telecommunications, or utility company, for the purpose of gaining entry to the dwelling place of another when he or she knows or has reason to know that one or more persons are present and
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> (6) Commits, against any person or persons within that dwelling place, a violation of Section 11-1.20, 11-1.30, 11-1.40, 11-1.50, 11-1.60, 12-13, 12-14, 12-14.1, 12-15, or 12-16 of the Criminal Code of 1961." 720 ILCS 5/12-11(a)(6) (West 2010) (text of section effective July 1, 2011).

We note the legislature has since renumbered the aforementioned home-invasion provision as section 19-6(a)(6) of the Criminal Code of 2012. See 720 ILCS 5/19-6(a)(6) (West 2012). The home invasion charge for which defendant was found guilty alleged he violated section 11-1.20(a)(1) of the Criminal Code of 2012 (720 ILCS 5/11-1.20(a)(1) (West 2012)), under which a person commits criminal sexual assault when the person performs an act of sexual penetration and uses force or the threat of force. A violation of section 11-1.20(a)(1) is generally a Class 1 felony (720 ILCS 5/11-1.20(b)(1) (West 2012)) with a prison term of 4 to 15 years (730 ILCS 5/5-4.5-30(a) (West 2012)). However, as in this case, when a defendant has been previously convicted of violating section 11-1.20(a)(1) or (a)(2), the defendant commits a Class X felony and is subject to a prison term of not less than 30 years and not more than 60 years. 720 ILCS 5/11-1.20(b)(1)(A) (West 2012). Home invasion in violation of subsection (a)(6) is a Class X felony (720 ILCS 5/12-11(c) (West 2010) (text of section effective July 1, 2011)), with a sentencing range of 6 to 30 years in prison (730 ILCS 5/5-4.5-25(a) (West 2012)).

¶ 22 Defendant argues that this court should vacate his sentence for one of the counts of criminal sexual assault and remand the cause for resentencing because criminal sexual assault is a lesser-included offense of home invasion. Defendant recognizes the Second and Third Districts have held criminal sexual assault is not a lesser-included offense of home invasion in the cases of *People v. Bouchee*, 2011 IL App (2d) 090542, ¶ 10, 962 N.E.2d 15, and *People v. Fuller*, 2013 IL App (3d) 110391, ¶ 22, 990 N.E.2d 882. However, he asserts those cases are based on unsound reasoning and notes our decision in *People v. Gillespie*, 2014 IL App (4th) 121146, 23 N.E.3d 641, which questioned the analysis in *Bouchee*.

¶ 23 We recognize this case is a little different from the three aforementioned cases because multiple criminal sexual assault and aggravated criminal sexual assault charges relating to two different series of sexual acts were brought against defendant and tried before a jury. However, the jury found defendant guilty of only two counts of criminal sexual assault and one count of home invasion based on criminal sexual assault (720 ILCS 5/12-11(a)(6) (West 2010) (text of section effective July 1, 2011)). The jury found defendant not guilty of all of the aggravated criminal sexual assault and home invasion charges related to the knife, which involved the other series of sexual acts. Hence, one of the criminal sexual assaults upon which defendant was found guilty had to serve as the underlying criminal sexual assault for the home invasion guilty finding. To conclude otherwise would require us to enter the minds of the jurors to determine why they found defendant not guilty of the other charges. That is not the function of this court. See *People v. Griffin*, 375 Ill. App. 3d 564, 572, 874 N.E.2d 221, 228 (2007) (rejecting the "defendant's argument that, because a verdict was returned finding that he did not personally discharge the firearm causing the victim's death, the jury necessarily found him guilty of felony murder and not intentional or knowing murder" because the reviewing court's function was not to enter the minds of the jurors and the jury's verdict was entitled to great deference). Accordingly, we find the facts of this case warrant an examination of whether one of defendant's criminal sexual assault convictions was a lesser-included offense for purposes of the one-act, one-crime rule. The application of the one-act, one-crime rule presents a question of law, which we review *de novo*. *People v. Johnson*, 237 Ill. 2d 81, 97, 927 N.E.2d 1179, 1189 (2010).

¶ 24 In *Miller*, 238 Ill. 2d at 176, the supreme court concluded that the abstract elements approach was the proper approach "to determine whether one charged offense is a lesser-included offense of another under *King*."

> "Under the abstract elements 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." *Miller*, 238 Ill. 2d at 166.

With that approach, "it must be impossible to commit the greater offense without necessarily committing the lesser offense." *Miller*, 238 Ill. 2d at 166. Moreover, "[t]he abstract elements approach does not look to the facts of a crime as either charged in the particular charging instrument or proved at trial." *People v. Novak*, 163 Ill. 2d 93, 106, 643 N.E.2d 762, 769 (1994). The *Miller* court described the abstract elements approach as the most clearly stated and the easiest to apply but noted "it is the strictest approach in the sense that it is formulaic and rigid, and considers 'solely theoretical or practical impossibility.' " *Miller*, 238 Ill. 2d at 166 (quoting *Novak*, 163 Ill. 2d at 106). Since *Miller*, the districts of the appellate court have not agreed on how to apply the abstract elements approach to separate convictions for an offense and its predicate offense.

¶ 25 A. *Bouchee* Line of Cases

¶ 26 In *Bouchee*, 2011 IL App (2d) 090542, ¶ 10, the Second District found criminal sexual assault was not a lesser-included offense because it was possible to commit home invasion without necessarily committing a criminal sexual assault, both by examining the home invasion statute as a whole and at the specific subsection charged. Specifically, the court noted section 12-11(a)(5) of the Criminal Code (720 ILCS 5/12-11(a)(5) (West 2006)) provides "a person can commit home invasion by entering and then '[p]ersonally discharg[ing] a firearm that proximately causes,' *inter alia*, a death" and section 12-11(a)(6) (720 ILCS 5/12-11(a)(6) (West 2006)) provides a person can commit home invasion by committing criminal sexual abuse. *Bouchee*, 2011 IL App (2d) 090542, ¶ 10. Additionally, as to the defendant's assertion that "the indictment 'specifically charge[d]' that he committed home invasion by entering and then committing criminal sexual assault, it was impossible for him to commit home invasion, '[a]s charged,' without committing the criminal sexual assault," the court found the defendant was utilizing the charging-instrument approach. *Bouchee*, 2011 IL App (2d) 090542, ¶ 11.

¶ 27 The Second District also disagreed with the defendant's argument that section 12-11(a)(6) of the Criminal Code (720 ILCS 5/12-11(a)(6) (West 2006)) is "analogous to felony murder, where the predicate felony is deemed to be a lesser-included offense of felony murder." (Internal quotation marks omitted.) *Bouchee*, 2011 IL App (2d) 090542, ¶ 12. It found the predicate felony for felony murder was a lesser-included offense based on legislative intent. *Bouchee*, 2011 IL App (2d) 090542, ¶¶ 13-14. The *Bouchee* court based its aforementioned finding on the fact the felony supplies the mental state for first degree murder. *Bouchee*, 2011 IL App (2d) 090542, ¶ 14. However, according to the *Bouchee* court, the legislature did not intend for criminal sexual assault to be a lesser-included offense of home invasion because the unauthorized entry is the gravamen of home invasion and the predicate is not necessarily a lesser offense. *Bouchee*, 2011 IL App (2d) 090542, ¶¶ 15-17. Last, the Second District found it would be "absurd and unjust" to not impose separate punishment for a more serious sex offense committed after the unauthorized entry where "the legislature has insisted that sex offenses be punished not only separately, but consecutively." *Bouchee*, 2011 IL App (2d) 090542, ¶ 18 (citing 730 ILCS 5/5-8-4(a)(i), (a)(ii) (West 2006)).

¶ 28 In *Fuller*, 2013 IL App (3d) 110391, ¶ 23, the Third District followed *Bouchee* and found that, "under the abstract elements approach, criminal sexual assault is not a lesser included offense of home invasion." The *Fuller* court also found it was possible to commit home invasion without necessarily committing a criminal sexual assault, both by looking at the home invasion statute as a whole and at the specific subsection. *Fuller*, 2013 IL App (3d) 110391, ¶ 23. Recently, the Third District was asked to find its decision in *Fuller* was wrongly decided, and it declined to do so. See *People v. Reveles-Cordova*, 2019 IL App (3d) 160418, ¶ 65.

¶ 29 B. *Gillespie*

¶ 30 In *Gillespie*, 2014 IL App (4th) 121146, ¶ 13, this court addressed whether robbery was a lesser-included offense of aggravated criminal sexual assault under section 12-14(a)(4) of the Criminal Code (720 ILCS 5/12-14(a)(4) (West 2010) (text of section effective until July 1, 2011)), which requires criminal sexual assault be "perpetrated during the course of the commission or attempted commission of any other felony by the accused." (Internal quotation marks omitted.) While we found *Bouchee* and *Fuller* were distinguishable from the case before us, this court did raise several concerns about the analysis in *Bouchee*. *Gillespie*, 2014 IL App (4th) 121146, ¶¶ 21-22. Specifically, we questioned *Bouchee*'s examination of all subsections of a statute in applying the abstract elements approach and its legislative intent analysis. *Gillespie*, 2014 IL App (4th) 121146, ¶¶ 21-22.

¶ 31 While *Gillespie* involved a different statute and its predicate offense, a review of our decision is relevant because it involved the application of the abstract elements test to separate convictions for an offense and its predicate offense. In applying the abstract elements approach to the offenses at issue in *Gillespie*, this court found robbery was a lesser-included offense of aggravated criminal sexual assault. *Gillespie*, 2014 IL App (4th) 121146, ¶ 23. We noted the following:

> "The commission of another felony or attempted commission is an element of aggravated criminal sexual assault under section 12-14(a)(4), and thus one cannot commit aggravated criminal sexual assault under section 12-14(a)(4) without also committing or attempting to commit another felony. Any predicate felony or attempt felony charge does not require proof of an element in addition to those required to prove aggravated criminal sexual assault under section 12-14(a)(4) based on the underlying felony or attempt felony. Therefore, it is impossible to commit aggravated criminal sexual assault without necessarily committing the predicate felony or attempt felony, and thus the abstract elements approach is satisfied." *Gillespie*, 2014 IL App (4th) 121146, ¶ 23.

Moreover, we are unaware of any cases from our district finding a predicate felony was not a lesser-included offense of the main offense for purposes of the one-act, one-crime rule.

¶ 32 C. This Case

¶ 33 In this case, we are confronted with the same statutory provisions in *Bouchee* and *Fuller*. We have reviewed our decision in *Gillespie* and the other relevant case law and decline to follow *Bouchee* and *Fuller*.

¶ 34 First, the *Bouchee* court utilized a superficial approach in applying the abstract elements test to the situation involving an offense and its predicate offense by comparing all of the

possible statutory subsections of the two offenses without regard to the actual subsections under which the defendant was charged. As we noted in *Gillespie*, the supreme court in *Miller* examined the elements of the specific subsection of the statute charged by the State and not the other subsections. *Gillespie*, 2014 IL App (4th) 121146, ¶ 22 (citing *Miller*, 238 Ill. 2d at 176 (analyzing only subsection (a) of the retail-theft statute and not the other subsections)). "The *Miller* court did not suggest it was impermissible to look to the charging instruments to determine the specific statutory subsections to be used for comparison under the abstract elements approach." *Gillespie*, 2014 IL App (4th) 121146, ¶ 22. Our supreme court also did not indicate the elements of the lesser offense must be included in all of the elements of every permutation (whether related to the charge or not) of the statute defining the greater offense. The *Bouchee* court may have been trying to avoid the "charging instrument" approach, but the aspect of the charging instrument approach rejected by the *Miller* court was the examination of 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. We note several other cases in applying the abstract elements approach have also looked to the specific subsections of the crimes charged. See *People v. Brown*, 2018 IL App (3d) 150070-B, ¶ 19, 109 N.E.3d 905; *People v. King*, 2017 IL App (1st) 142297, ¶ 26, 80 N.E.3d 599; *People v. Stull*, 2014 IL App (4th) 120704, ¶¶ 58-59, 64, 5 N.E.3d 328; *People v. Span*, 2011 IL App (1st) 083037, ¶ 90, 955 N.E.2d 100.

¶ 35 Additionally, in adopting the abstract elements approach, the *Miller* 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 [citation], the equivalent of the abstract elements approach which we have adopted in the case at bar." *Miller*, 238 Ill. 2d at 174-75. In applying the same elements test, our supreme court has compared only the specific subsections of the offenses for which the defendant was charged and convicted. See *People v. Gray*, 214 Ill. 2d 1, 7-8, 823 N.E.2d 555, 558-59 (2005); *People v. Sienkiewicz*, 208 Ill. 2d 1, 10-11, 802 N.E.2d 767, 773 (2003); *People v. Totten*, 118 Ill. 2d 124, 138, 514 N.E.2d 959, 965 (1987) (applying the same elements test by comparing offenses "as charged in the information"). Given our supreme court's reference to the two tests as being "equivalent," we see no reason why the supreme court would apply the two tests differently.

¶ 36 Moreover, the United States Supreme Court has not applied the same elements test, which is also referred to as the *Blockburger* rule (*Gillespie*, 2014 IL App (4th) 121146, ¶ 19), to an offense and its predicate offense in the same manner employed by *Bouchee*. As noted in *Gillespie*, the United States Supreme Court has held that "Congress did not authorize consecutive sentences for rape and for a killing committed in the course of the rape" because it is not the case where " 'each provision requires proof of a fact which the other does not.' " *Whalen v. United States*, 445 U.S. 684, 693 (1980) (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). "A conviction for killing in the course of a rape cannot be had without proving all the elements of the offense of rape." *Whalen*, 445 U.S. at 693-94. Additionally, the *Whalen* Court explicitly rejected the government's argument that felony murder and rape were not the same offense under *Blockburger* because felony murder does not in all cases require proof of a rape. *Whalen*, 445 U.S. at 694. The government had pointed out that the statute at issue "proscribes the killing of another person in the course of committing rape *or* robbery *or* kidnaping *or* arson, etc." (Emphases in original.) *Whalen*, 445 U.S. at 694. The *Whalen* Court

noted that, if the offense was the killing during a robbery, then cumulative punishments for felony murder and rape would be permitted under the *Blockburger* rule. However, "[i]n the present case *** proof of rape is a necessary element of proof of the felony murder, and we are unpersuaded that this case should be treated differently from other cases in which one criminal offense requires proof of every element of another offense." *Whalen*, 445 U.S. at 694. The *Whalen* Court explained the aforementioned conclusion would be obvious if Congress had enacted six different species of felony murder under six separate statutory provisions instead of listing the six species as alternatives in one provision. *Whalen*, 445 U.S. at 694. "It is doubtful that Congress could have imagined that so formal a difference in drafting had any practical significance, and we ascribe none to it." *Whalen*, 445 U.S. at 694.

¶ 37 More recently in *United States v. Dixon*, 509 U.S. 688, 698 (1993), the Supreme Court found that, under the *Blockburger* rule, a contempt sanction imposed for violating a court order through the commission of a drug offense barred the later prosecution for the drug offense. The *Dixon* Court found the "underlying substantive criminal offense is 'a species of lesser-included offense.' " *Dixon*, 509 U.S. at 698 (quoting *Illinois v. Vitale*, 447 U.S. 410, 420 (1980)). It also noted that the drug offense did not include any element not contained in the defendant's previous contempt offense. *Dixon*, 509 U.S. at 700. The Supreme Court has taken the same approach in other cases as well. See *Harris v. Oklahoma*, 433 U.S. 682, 682-83 (1977) (*per curiam*) (holding the defendant's conviction for felony murder based on a killing in the course of an armed robbery barred a subsequent prosecution against the same defendant for the armed robbery); *Vitale*, 447 U.S. at 419-20 (holding that, if a careless failure to slow is always a necessary element of manslaughter by automobile as a matter of Illinois law, then the two offenses are the "same" under the *Blockburger* rule and a prosecution of the defendant on the latter charge would constitute double jeopardy).

¶ 38 Second, the *Bouchee* decision is inconsistent with how Illinois courts have handled other statutory provisions and predicate offenses. As we noted in *Gillespie*, 2014 IL App (4th) 121146, ¶ 14, "[o]ur supreme court has long held the predicate offense for another crime is a lesser-included offense of the other crime." It has consistently held the predicate offense underlying felony murder is a lesser-included offense of felony murder and cannot support a separate conviction and sentence. See *People v. Smith*, 233 Ill. 2d 1, 17, 906 N.E.2d 529, 538 (2009); *People v. Smith*, 183 Ill. 2d 425, 432, 701 N.E.2d 1097, 1100 (1998); *People v. Coady*, 156 Ill. 2d 531, 537, 622 N.E.2d 798, 801 (1993). Our supreme court has also held that convictions for both armed violence and the underlying felony could not stand. *People v. Donaldson*, 91 Ill. 2d 164, 170, 435 N.E.2d 477, 479-80 (1982). The *Donaldson* court explained as follows:

> "The underlying felony charge here, aggravated battery causing great bodily harm, does not require proof of a fact in addition to those required to prove the offense of armed violence based on the underlying felony of aggravated battery causing great bodily harm. One cannot violate the armed violence statute without first committing a felony. The alleging of that felony in the armed violence charge has the effect, upon conviction, of making it a necessarily included offense." *Donaldson*, 91 Ill. 2d at 170.

¶ 39 As with felony murder and armed violence, one cannot commit home invasion charged under section 12-11(a)(6) of the Criminal Code (720 ILCS 5/12-11(a)(6) (West 2010) (text of section effective July 1, 2011)) without committing all of the elements of one of the listed sex offenses. In other words, under section 12-11(a)(6), all of the elements of the sex offense are

included within the home invasion offense, and the sex offense contains no element not included in the home invasion offense. Thus, we find it is theoretically and practically impossible to commit home invasion under section 12-11(a)(6) without committing the sex offense listed in the home invasion charge. Accordingly, under the abstract elements approach, the sex offense is deemed a lesser-included offense of home invasion. We agree with the United States Supreme Court's approach to predicate offenses and find the fact that we have to read the charging instrument to determine under what subsection the home invasion was charged and the sex offense that applies does not alter the aforementioned conclusion. In this case, defendant was found guilty of home invasion based on criminal sexual assault. The criminal sexual assault was a lesser-included offense of the home invasion.

¶ 40 However, as noted by the Supreme Court in *Whalen*, the *Blockburger* rule is based on the assumption Congress ordinarily does not intend to punish the same offense under two different statutes, and thus, "where two statutory provisions proscribe the 'same offense,' they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent." *Whalen*, 445 U.S. at 691-92. In distinguishing felony murder, the *Bouchee* court found a clear legislative intent existed for convictions for both home invasion and criminal sexual assault. *Bouchee*, 2011 IL App (2d) 090542, ¶¶ 14-18. It noted the offense and the " 'predicate' " offense had distinct criminal purposes. *Bouchee*, 2011 IL App (2d) 090542, ¶ 15. The *Bouchee* court also pointed out that the predicate was not necessarily " 'lesser' " based on the sentencing ranges and contended the defendant would pay for the home invasion but not pay for the criminal sexual assault. *Bouchee*, 2011 IL App (2d) 090542, ¶¶ 16-17. Moreover, it noted sex offenses are punished separately and consecutively (see 730 ILCS 5/5-8-4(a)(i), (a)(ii) (West 2006)). *Bouchee*, 2011 IL App (2d) 090542, ¶ 18. The *Bouchee* court concluded that it could not imagine the legislature intended criminal sexual assault to be a lesser-included offense of home invasion because "[i]t would be more than merely absurd and unjust; it would shock this court's collective conscience." *Bouchee*, 2011 IL App (2d) 090542, ¶ 18. We also disagree with *Bouchee*'s analysis of legislative intent.

¶ 41 We begin by noting that "home invasion consist[s] of two separate physical acts." *People v. Price*, 2011 IL App (4th) 100311, ¶ 30, 958 N.E.2d 341. While home invasion and criminal sexual assault may have separate criminal purposes, the unauthorized entry alone is not a crime under section 12-11(a)(6) if a sex offense does not occur. Stated differently, the sex offense supplies the second act, completing the offense of home invasion. We see no difference from felony murder where the felony supplies the mental state for first degree murder. See *Bouchee*, 2011 IL App (2d) 090542, ¶ 14. Thus, we do not find a clear legislative intent for separate punishments based on separate criminal purposes.

¶ 42 Additionally, with statutory construction, "[t]he statutory language, given its plain and ordinary meaning, best indicates the legislature's intent." *People v. Burlington*, 2018 IL App (4th) 150642, ¶ 16, 99 N.E.3d 577 (citing *People v. Bradford*, 2016 IL 118674, ¶ 15, 50 N.E.3d 1112). In this case, neither statute specifically allows for cumulative punishment for both home invasion and the underlying sex offense. For example, in *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983), the United States Supreme Court held that, when

> "a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor

may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial."

In that case, one of the criminal statutory provisions at issue stated, " 'The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon.' " *Hunter*, 459 U.S. at 362 (quoting Mo. Stat. App. § 559.225 (Vernon 1979)). The statutes at issue in this case do not contain any similar language.

¶ 43 We also do not find the fact section 5-8-4(d)(2) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-8-4(d)(2) (West Supp. 2011) (formerly 730 ILCS 5/5-8-4(a)(ii) (West 2006)) provides for mandatory consecutive sentences when the defendant is convicted of criminal sexual assault is clear legislative intent for cumulative punishments. As previously stated, our supreme court has determined that convictions for the predicate offenses of felony murder and armed violence cannot stand (*Smith*, 233 Ill. 2d at 17; *Donaldson*, 91 Ill. 2d at 170), and sections 5-8-4(d)(1) and 5-8-4(d)(3) of the Unified Code (730 ILCS 5/5-8-4(d)(1), (d)(3) (West Supp. 2011)) provide for mandatory consecutive sentences when the defendant has committed first degree murder or armed violence predicated on certain felonies.

¶ 44 Moreover, this court does not find the sentencing scheme for criminal sexual assault provides a clear legislative intent of separate punishments. As indicated, criminal sexual assault is generally a Class 1 felony (720 ILCS 5/11-1.20(b)(1) (West 2012)) with a prison term of 4 to 15 years (730 ILCS 5/5-4.5-30(a) (West 2012)) and thus is a lesser offense than home invasion, which is a Class X felony (720 ILCS 5/12-11(c) (West 2010) (text of section effective July 1, 2011)) with a sentencing range of 6 to 30 years in prison (730 ILCS 5/5-4.5-25(a) (West 2012)). We recognize criminal sexual assault may be a Class X felony with a sentencing range of 30 to 60 years based on a prior conviction. 720 ILCS 5/11-1.20(b)(1)(A) (West 2012). In such cases, the criminal sexual assault does carry a longer sentence. However, it is the State's decision to charge a Class X criminal sexual assault as the predicate for home invasion. In this case, the State could have simply charged defendant with only the criminal sexual assaults to avoid the absurdity claimed in *Bouchee*.

¶ 45 Accordingly, we find one of defendant's criminal sexual assault convictions is a lesser-included offense of home invasion and the conviction and sentence must be vacated under the one-act, one-crime rule.

¶ 46 III. CONCLUSION

¶ 47 For the reasons stated, we vacate one of defendant's criminal sexual assault convictions and sentences (count I), affirm the Sangamon County circuit court's judgment in all other respects, and remand the cause for resentencing.

¶ 48 Affirmed in part and vacated in part; cause remanded with directions.

¶ 49 JUSTICE DeARMOND, dissenting:

¶ 50 This case involves only the second of the two-step, one-act, one-crime analysis of *King*. We need determine only whether criminal sexual assault is a lesser-included offense of home invasion. Under the particular facts here, I contend it is not. Although defendant conceded before the trial court that multiple acts were involved, he contended that one of the criminal

sexual assault counts for which he was found guilty must be a lesser-included offense of the home invasion count for which he also was found guilty, and therefore, cannot support a separate conviction. Defendant argues this court should vacate his sentence for one of the counts of criminal sexual assault because criminal sexual assault is a lesser-included offense of home invasion. The majority believes likewise, and for this reason, I must dissent.

¶ 51 First and foremost among the reasons I disagree is that defendant not only committed multiple acts of criminal sexual assault (vaginally, anally, and orally), he also committed two separate incidents of criminal sexual assault as well. The first incident occurred in conjunction with the home invasion, shortly after T.P. came home, when she said defendant orally, vaginally, and anally penetrated her. The second incident occurred later, after the parties dressed, returned to the kitchen, and had an argument. Defendant again vaginally and anally penetrated the victim. These incidents constituted separate, although closely related, crimes.

¶ 52 I. The Charges

¶ 53 The State charged defendant with three counts each of aggravated criminal sexual assault, criminal sexual assault, and home invasion. The criminal sexual assault counts (counts I, II, and III) and aggravated criminal sexual assault counts (counts IV, V, and VI) each alleged a different form of sexual penetration (vaginal, anal, oral) with the additional element of "displaying a dangerous weapon, a knife" to create the aggravated criminal sexual assault counts. The three home invasion counts (counts VII, VIII, and IX) alleged defendant's entry into T.P.'s residence along with the commission of one of the following: criminal sexual assault (count VII), aggravated criminal sexual assault (count VIII), and threatening the use force while armed with a knife (count IX).

¶ 54 At the close of the evidence, the State dismissed count III, charging criminal sexual assault orally. The jury convicted defendant of two counts of criminal sexual assault—count I (vaginal penetration) and count II (anal penetration)—and one count of home invasion—count VII (criminal sexual assault).

¶ 55 II. The Verdict

¶ 56 I agree with the majority we are not to invade the province of the jury absent extraordinary circumstances. *People v. Peoples*, 2015 IL App (1st) 121717, ¶ 106, 35 N.E.3d 1156 (" 'Simply put, courts are not in the business of second-guessing a jury's "clear intent." ' " (quoting *People v. Spears*, 112 Ill. 2d 396, 409, 493 N.E.2d 1030, 1035 (1986))). Instead, we are supposed to give the jury's verdict "great deference." Although the majority tells us we are not to speculate about the jury's verdict, it does just that when it says "[t]he jury found defendant not guilty of all of the aggravated criminal sexual assault and home invasion charges related to the knife, which involved the other series of sexual acts." *Supra* ¶ 23. In fact, in my opinion, all the jury did was conclude there was insufficient evidence of the use of a knife.

¶ 57 Once the State dismissed count III, either of the two remaining acts of sexual penetration committed shortly after the unauthorized and unlawful entry into the dwelling place of T.P. could have formed the basis for the criminal sexual assault as part of the home invasion or could have been the basis of the separate criminal sexual assault convictions.

¶ 58 With all due respect to the majority, its contention that the jury found defendant not guilty of the other series of sexual acts makes no sense. The jury obviously found T.P. credible with

regard to defendant's unwanted and uninvited entry into her residence and the commission of criminal sexual assaults on her person, discounting defendant's claim it was invited and consensual sex. Having found her credible regarding the sexual assaults and the home invasion, what was there about either her testimony or defendant's that would cause them to conclude she was surprised by defendant as an intruder and viciously sexually assaulted but then decided later to have consensual sex? Or that although surprised by defendant's unwanted intrusion, she had consensual sex with him first but then did not consent the second time? Of the counts for which no guilty verdict was entered, the one element each of the aggravated criminal sexual assault counts had in common was "displaying a dangerous weapon, a knife." In addition, the other two home invasion counts were related either to displaying a knife as part of an aggravated criminal sexual assault or threatening with a knife.

¶ 59 For all we know from this record, the jury could have concluded there was insufficient evidence of the additional element "while displaying a dangerous weapon." It is just as reasonable to conclude the jury found defendant guilty of criminal sexual assault, since it could see by the definitions and issues instructions that aggravated criminal sexual assault (anal, vaginal, or oral) without the element of "while displaying a dangerous weapon" became criminal sexual assault. This is not to imply it understood or even considered the legal concept of a lesser-included offense. Instead, I suggest the jury concluded there was insufficient evidence of threats with a knife, were capable of reading the definitions and issues instructions, and saw that, without the knife, the second set of sexual assaults were simple criminal sexual assaults. My analysis of the verdicts differs from the majority's in that I see the home invasion count as reflective of the first attack and the two criminal sexual assault convictions as reflective of the second.

¶ 60 The majority notes how we are not to "enter the minds of the jurors to determine why they found defendant not guilty of the other charges" (*supra* ¶ 23) and may be quick to criticize this analysis. I would simply note the majority has done the same thing by concluding the jury must have relied upon the same criminal sexual assault for both a guilty verdict on that count, as well as the home invasion count, and found defendant not guilty of the other series of sexual assaults. Either way, the fact there were two separate incidents of criminal sexual assaults distinguishes this case from *Gillespie*, a case with which the majority, understandably, wishes to remain consistent.

¶ 61 III. *Gillespie*

¶ 62 This court, in fact the majority in this case, found in *Gillespie*—a criminal sexual assault committed during a robbery—that the robbery constituted a lesser-included offense where it was used as the predicate offense to enhance the assault to aggravated criminal sexual assault. I have no quarrel with that part of the opinion in *Gillespie*, even though a distinction with a clear difference is the fact our case does not involve a predicate offense serving as an enhancement of one offense to another. Instead, it involves the commission of one offense while committing an entirely separate and distinct offense. Where we part company is the portion of the analysis in *Gillespie* upon which the majority relies to find criminal sexual assault to be a lesser-included offense of home invasion in this case.

¶ 63 The majority, both here and in *Gillespie*, took exception with *Bouchee*, 2011 IL App (2d) 090542, and *Fuller*, 2013 IL App (3d) 110391, for what it considers to be a misguided (my word, not the majority's) understanding of the abstract elements test as it applies to a lesser-

included-offense analysis. In both *Bouchee* and *Fuller*, the courts interpreted the abstract elements test to mean what the supreme court said in *Miller*, 238 Ill. 2d at 166—that "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." The majority here, however, interprets *Miller* to require an analysis of the actual offenses charged as part of the abstract elements approach, not because such is the pronouncement of the court in *Miller* but because that appears to be what the court did under the facts of that case. This can actually be explained rather simply.

¶ 64 In *Miller*, the more serious offense, burglary, can only be committed one way. There are no multiple subsections from which to choose in section 19-1(a), unlike home invasion in the case before us. A person commits burglary by either entering or remaining within a structure without authority, with intent to commit a felony or theft. In *Miller*, the lesser offense was retail theft. Although retail theft may be committed in a variety of ways, they are all theft, so it did not matter whether the court considered the specific offense charged. In each instance, the retail theft offense was going to include an element missing from burglary. Each version of theft involved, in some form or another, a "taking" and a failure to pay full retail value. The court concluded, therefore, it was possible to commit burglary without committing a retail theft. Since the court concluded retail theft was not a lesser-included offense of burglary, it did not matter which version of retail theft was charged.

¶ 65 Here, the difference is rather clear. Home invasion is a unique offense that is premised primarily upon the unauthorized entry into a residence knowing people are present. Once inside, there are a variety of offenses that may cause the unauthorized entry to become home invasion, including a list of sex offenses. It is therefore theoretically and practically possible to commit home invasion without committing a criminal sexual assault as occurred in this case. And it is that "theoretical or practical" possibility that places this case squarely within the abstract elements analysis for lesser-included offenses.

¶ 66 The majority explains its rationale in *Gillespie* by noting how, under those factual circumstances, a conviction for both robbery and aggravated criminal sexual assault would result in "the defendant [being] punished twice for the underlying offense, once for the offense and once for aggravating the criminal sexual assault." *Gillespie*, 2014 IL App (4th) 121146, ¶ 24. Therein lies the difference and the distinction I noted above. In *Gillespie*, the underlying offense of robbery was used to enhance a criminal sexual assault to an aggravated criminal sexual assault. The concern for double punishment is based entirely on the fact that the aggravated criminal sexual assault became aggravated only as a result of the robbery. Here, there are two separate and distinct offenses and one does not enhance or change the punishment for the other. One is committed while committing the other, but each is a distinct offense. The penalty for home invasion remains the same, as does the penalty for criminal sexual assault. Defendant could have been charged and convicted of home invasion under several other provisions of the statute, as well as the criminal sexual assault, while nothing about the home invasion changed the penalty for criminal sexual assault. The only thing that enhanced the penalty in this case was the external factor of defendant's prior conviction, which is in no way related to the analysis here.

¶ 67 IV. Prior Rulings of This Court

¶ 68 At one time, this court relied on the charging instruments approach to find home invasion to be a separate and distinct offense from the underlying offense committed during the home invasion—a position which, I would suggest, is diametrically opposed to the majority here. In *People v. Tate*, 106 Ill. App. 3d 774, 436 N.E.2d 272 (1982), and *People v. Peacock*, 359 Ill. App. 3d 326, 833 N.E.2d 396 (2005), this court found even though the home invasion was predicated on the commission of an aggravated battery after the defendant gained entry, neither was a lesser included of the other.

¶ 69 In *Tate*, 106 Ill. App. 3d at 778, this court concluded that aggravated battery included an element of " 'great bodily harm' [citation] while the home invasion required only the infliction of 'injury' [citation]." Entry of the home was found to be an element of home invasion which was not a required element of the aggravated battery and therefore "[c]learly, neither offense was an included offense of the other." *Tate*, 106 Ill. App. 3d at 778.

¶ 70 In *Peacock*, this court described the supreme court's decision in *People v. McLaurin*, 184 Ill. 2d 58, 703 N.E.2d 11 (1998), and its own case of *People v. Priest*, 297 Ill. App. 3d 797, 698 N.E.2d 223 (1998), as "decisions allowing a conviction for home invasion to coexist with a conviction for another offense even though the injury supporting the home invasion *was the entire basis of the other conviction*." (Emphasis added.) *Peacock*, 359 Ill. App. 3d at 332. As a result, this court in *Peacock* found home invasion, as charged, had two elements—the unauthorized entry of a dwelling and the intentional injury of a person therein. Although both the aggravated battery and domestic battery charges included in *Peacock* formed the underlying bases for the home invasion, the fact they contained elements that home invasion did not precluded a finding of either as a lesser-included offense of home invasion under the "charging instruments" approach.

¶ 71 In *Priest*, 297 Ill. App. 3d at 804, this court held a defendant charged with domestic battery and home invasion predicated on the domestic battery could properly be found guilty of both, concluding that the fact the defendant entered the victim's home was an overt act supporting the home invasion count and separate from causing the victim bodily harm, which supported the domestic battery count. Using language similar to that found in *Bouchee*, this court reasoned "[o]ne element of the offense of home invasion requires that the defendant entered the dwelling place of another 'without authority.' [Citation.] *The gravamen of the offense of home invasion is unauthorized entry*." (Emphasis added.) *Priest*, 297 Ill. App. 3d at 805. The court in *Bouchee* said the same thing, noting how the "gravamen is complete when a person 'without authority *** knowingly enters the dwelling place of another when he or she knows *** that one or more persons is present." *Bouchee*, 2011 IL App (2d) 090542, ¶ 15. The *Bouchee* court found that although subsection (a)(6) of the home invasion statute required the subsequent commission of a sex offense, such as criminal sexual assault, that assault was a discrete offense with its own elements and mental state. *Bouchee*, 2011 IL App (2d) 090542, ¶ 15.

¶ 72 I find no distinction between this court's holdings, as mentioned above, with the position I maintain here. Home invasion has elements that, even as charged, are distinct from criminal sexual assault, and criminal sexual assault includes elements that are not required for a conviction of home invasion. When we consider the charges within the context of the abstract elements test, which allows us to consider not only the offenses as charged but all theoretical

possibilities, the result is the same.

¶ 73 V. *Miller*

¶ 74 The road to *Miller*'s ultimate pronouncement of the abstract elements test as the proper method for analyzing whether one of two charged offenses may be a lesser included of the other bears further examination in order to see why it does not require analysis of the exact offenses charged, as proposed by the majority.

¶ 75 In *Miller*, our supreme court cleared up the previously existing confusion surrounding which test to apply during a lesser-included analysis. After a lengthy discussion of the three approaches, the court held: "We conclude that the abstract elements approach applies to determine whether one charged offense is a lesser-included offense of another under *King*." *Miller*, 238 Ill. 2d at 176. The confusion had been caused, in no small part, by the fact the same court said previously in *Novak*, 163 Ill. 2d at 112-13, that the "charging instrument approach best serves the purposes of the lesser included offense doctrine." Finding the abstract elements approach to be "inherently inflexible," the court expressly disapproved of it where a defendant contended the trial court erred by refusing his tendered instruction for an uncharged lesser-included offense of aggravated criminal sexual abuse when he was charged with aggravated criminal sexual assault. *Novak*, 163 Ill. 2d at 111-12.

¶ 76 The supreme court's disapproval continued in *People v. Kolton*, 219 Ill. 2d 353, 848 N.E.2d 950 (2006), 12 years later. There, while considering an uncharged conviction for aggravated criminal sexual assault based on a charge of predatory criminal sexual assault, the court again found the charging instrument approach appropriate when resolving the question of whether an uncharged offense was a lesser included of the offense charged. The court found the charging instrument approach to be fact-specific and dependent upon the factual description of the offense charged in the indictment for obvious reasons. *Kolton*, 219 Ill. 2d at 361. A criminal defendant has a fundamental due-process right to notice of the charges against him and normally cannot be convicted of an offense he has not been charged with committing except where the offense for which he is convicted is a lesser included of the charged offense. See *Kolton*, 219 Ill. 2d at 359-60. In both *Novak* and *Kolton*, the defendants were convicted of offenses for which they were never charged. This is a significantly different situation than the one before us and in *Miller*.

¶ 77 Here, defendant has always known he was charged with both home invasion and criminal sexual assault. In fact, each count of criminal sexual assault and aggravated criminal sexual assault identified the specific sexual act involved, while the home invasion counts alleged criminal sexual assault, aggravated criminal sexual assault, or threatening force while armed with a knife. More importantly, it was for this kind of case that *Miller* said the abstract elements test was intended, *i.e.*, where both offenses are charged and known to the defendant.

¶ 78 As the majority has noted, the abstract elements approach is considered the most clearly stated and easiest to apply but is also the strictest since it is "formulaic and rigid" in that it considers "solely theoretical or practical impossibility." (Internal quotation marks omitted.) *Miller*, 238 Ill. 2d at 166. As the *Miller* court said, "it must be impossible to commit the greater offense without necessarily committing the lesser offense." *Miller*, 238 Ill. 2d at 166. The court in *Miller* concluded that there was "no reason to apply the charging instrument approach when a defendant is charged with multiple offenses and the issue is whether, under *King*, one offense is a lesser-included offense of the other." *Miller*, 238 Ill. 2d at 173. So where, as here, a

defendant is charged with multiple offenses, as opposed to an uncharged lesser included, the abstract elements test would not require a limitation to only those offenses actually charged because the defendant has notice of both offenses from the outset.

¶ 79 In *King*, 66 Ill. 2d at 566, where the whole one-act, one-crime analysis originated, the supreme court upheld separate convictions for burglary with intent to commit rape and rape, since each offense required proof of a different element. The majority, by interpreting the abstract elements test to require an analysis of the specific offense charged, as opposed to theoretical or practical possibilities, not only reverts to the charging instruments test but would have found the burglary with intent to commit rape in *King* to be a lesser-included offense, since the only basis for the burglary, as charged, was to commit the offense of rape. As indicated above, this rationale is also inconsistent with previous findings by this court in *Peacock*, *Tate*, and *Priest*. The fact these cases were decided under the charging instrument approach is irrelevant to our analysis, since here they are, in effect, doing the same thing when they limit their abstract elements test to only the offenses as charged.

¶ 80 VI. *Bouchee*, *Fuller*, and Legislative Intent

¶ 81 Contrary to the expressed language in *Miller*, the majority has ignored the intent of applying the abstract elements test as set forth in that case, *i.e.*, that "allowing convictions on both charged offenses, under the abstract elements test, will ensure that defendants are held accountable for the full measure of their conduct and harm caused." *Miller*, 238 Ill. 2d at 173. The interpretation given the abstract elements test by the majority, in my opinion, serves to defeat the legislative intent of the statutes.

¶ 82 In *Bouchee*, like here, the defendant was charged with home invasion and criminal sexual assault. He argued that criminal sexual assault was a lesser-included offense of home invasion. The Second District found home invasion was based not just on the criminal sexual assault but on the defendant's act of entering the home. "The entry was a distinct act that supported a different offense." *Bouchee*, 2011 IL App (2d) 090542, ¶ 7. (Note this language is substantially similar to that used by this court in *Tate*, *Peacock*, and *Priest*.) The court concluded, under the abstract elements approach, that criminal sexual assault was not a lesser-included offense of home invasion because, in the "statutory abstract," it is possible to commit home invasion without necessarily committing criminal sexual assault. *Bouchee*, 2011 IL App (2d) 090542, ¶¶ 10-11. The court explained: "Although the abstract-elements approach does consider 'the statutory elements of the *charged* offenses' (emphasis added) [citation], it considers the charged offenses in the statutory abstract, not in terms of how they are framed in a particular charging instrument." *Bouchee*, 2011 IL App (2d) 090542, ¶ 11. The court noted how even if it limited its analysis to the statutory subsection (a)(6), one could still commit home invasion without committing aggravated criminal sexual assault by committing aggravated criminal sexual abuse. *Bouchee*, 2011 IL App (2d) 090542, ¶ 10. The same is true here.

¶ 83 More importantly, the court in *Bouchee* said the "defendant would have us presume that the legislature intended that a person could commit the gravamen of a home invasion, and receive punishment for same, but receive no separate punishment for even a more serious sex offense that he commits inside." *Bouchee*, 2011 IL App (2d) 090542, ¶ 18. Considering that the legislature specifically mandated consecutive sentencing for criminal sexual assault under section 5-8-4(a)(i) and (a)(ii), the court found such a conclusion to be "more than merely absurd

and unjust; it would shock this court's collective conscience." *Bouchee*, 2011 IL App (2d) 090542, ¶ 18.

¶ 84 In *Fuller*, 2013 IL App (3d) 110391, ¶¶ 21-22, the Third District also considered the "statutory abstract" of the offenses charged and noted the various other ways in which a person could commit home invasion without committing the offense of criminal sexual assault, in order to conclude criminal sexual assault was not a lesser-included offense of home invasion. Citing *Bouchee*, the court in *Fuller* noted how the charged offenses are considered "in the statutory abstract, not in terms of how the offenses were framed in the charging indictment." *Fuller*, 2013 IL App (3d) 110391, ¶ 20. In both *Fuller* and *Bouchee*, the offenses were charged and known to the defendants. The majority notes how the Third District has reaffirmed its position recently in *Reveles-Cordova*, 2019 IL App (3d) 160418, another case of home invasion with criminal sexual assault as the predicate offense where both offenses were charged.

¶ 85 The majority notes how the court in *Miller* referred to the same elements test applied in double jeopardy analyses as being the " 'equivalent' " of the abstract elements test. *Supra* ¶ 35. I do not see *equivalent* to mean *identical*. I agree they serve essentially the same purpose. However, for purposes of double jeopardy, it would be absolutely critical that the charged crimes be the same in all their elements, since the issue is whether the crime, as charged, is now barred from being charged again. All that is required under our circumstances is whether it is theoretically impossible to commit one crime without the commission of the other. In addition, as noted above, *Gillespie* involved one offense enhancing another to the extent that, without the existence of the lesser offense (robbery), there would be no aggravated criminal sexual assault. Here, defendant could have been charged with home invasion under three of the other provisions in the statute separate from the criminal sexual assaults committed once inside, *i.e.*, (1) uses force while armed with a dangerous weapon, (2) intentionally causes any injury, or (3) commits criminal sexual abuse.

¶ 86 The majority complains that the approach in *Bouchee* is too rigid (*supra* ¶ 34), yet that is exactly what *Miller* and similar cases have said it is to be. The majority references its own language in *Gillespie* that " '[t]he *Miller* court did not suggest it was impermissible to look to the charging instruments to determine the specific statutory subsections to be used for comparison under the abstract elements approach.' " *Supra* ¶ 34 (quoting *Gillespie*, 2014 IL App (4th) 121146, ¶ 22). However, in context, *Miller* was citing its earlier decision in *Novak* when the court discussed how it is to consider " 'solely theoretical or practical impossibility.' " *Miller*, 238 Ill. 2d at 166; see also *Novak*, 163 Ill. 2d at 106. That reference from *Novak* was immediately preceded by: "[t]he abstract elements approach *does not* look to the facts of a crime as either charged in the particular charging instrument or proved at trial." (Emphasis added.) *Novak*, 163 Ill. 2d at 106. Further, the *Miller* court went on to discuss *People v. Reed*, 137 P.3d 184 (Cal. 2006), to explain why it was unnecessary to consider the charging instrument when both offenses are charged. It must have considered the California Supreme Court's rationale to be persuasive authority because it discussed *Reed* at length, ultimately stating it agreed with *Reed*'s analysis. *Miller*, 238 Ill. 2d at 173. And what analysis was that?

> "The justifications for using the charging instrument approach with respect to uncharged offenses—the importance of providing notice to the parties of what offenses a defendant may be convicted of based on the particular facts of the crime and what

instructions may be sought—have no applicability when dealing with charged offenses." *Miller*, 238 Ill. 2d at 173.

¶ 87 I would posit therefore that the court in *Miller* did, in fact, tell us we do not look to the charging instrument when both offenses have been charged and are known to the defendant. Based on the facts of this case and the case law, I would find criminal sexual assault is not a lesser-included offense of home invasion and would thus leave defendant's convictions and sentences intact.

¶ 88 For all these reasons, I respectfully dissent.