SECOND DIVISION
September 10, 2013

No. 1-11-1776

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	10 CR 04692
	)	
DETRICK CULLUM,	)	
	)	Honorable Noreen Valeria-Love,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Justice Harris and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *HELD*: Where the prosecution presented evidence that defendant took his girlfriend's car without permission and refused to return it to her when she asked, and later was agitated and aggressive when driving the victim around town in the early morning hours, refusing to let her out of the car and eventually hitting her, throwing her cell phone out the window of the vehicle and requesting sex and accepting oral sex, and finally caused serious damage to the vehicle when attempting to elude the police, it proved beyond a reasonable doubt that defendant was guilty of aggravated criminal sexual assault, aggravated kidnaping, aggravated possession of a stolen motor vehicle, and aggravated fleeing and eluding.

¶ 2 *HELD*: Where the circuit court failed to merge convictions for crimes based on the same act and for lesser included crimes, the convictions violating the one-act, one-crime rule

must be vacated.

¶ 3 *HELD*: Where circuit court failed to impose mandatory consecutive sentences, the sentences are void and the matter must be remanded to the circuit court for a new sentencing hearing.

¶ 4 *HELD*: Where defendant presented a *pro se* motion for new trial with allegations that he suffered ineffective assistance of counsel, circuit court conducted a sufficient *Krankel* inquiry when it exhaustively heard each of defendant's claims and elicited oral argument from defendant at the hearing and, based on the evidence at trial and the court's observations of counsel during trial, determined that defendant did not present a meritorious claim of ineffective assistance of counsel.

¶ 5 Following a March 10, 2011, bench trial, defendant Detrick Cullum was convicted of all charges against him. Defendant asserted that he suffered ineffective assistance of trial counsel and prepared a written motion. Following an extended hearing on defendant's motion, the circuit court denied his motion and defendant was sentenced to concurrent terms of 10 years for the 3 counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(2), (3), (4) (West 2008); 10 years for the 2 counts of aggravated kidnaping (720 ILCS 5/10-2(a)(3) (West 2008)); 10 years for the 2 counts of kidnaping (720 ILCS 5/10-1(a)(1), (3) (West 2008)); 5 years for aggravated possession of a stolen motor vehicle (625 ILCS 5/4-103.2(a)(7)(A) (West 2008)); 4 years for possession of a stolen motor vehicle (625 ILCS 5/4-103(a)(1) (West 2008)), 3 years for aggravated battery on a public way (720 ILCS 5/12-4(b)(8) (West 2008)), and 2 years for aggravated fleeing or attempting to elude a police officer (625 ILCS 5/11-204.1(a)(3) (West 2008)).

¶ 6 On appeal, defendant argues: that the State failed to prove defendant guilty of aggravated criminal sexual assault, aggravated kidnaping, kidnaping, aggravated possession of a stolen motor vehicle, possession of a stolen motor vehicle, and aggravated fleeing and eluding beyond

a reasonable doubt; the circuit court failed to merge various counts and the mittimus must be corrected to comply with the one act-one crime rule; and the circuit court failed to conduct an adequate inquiry and hearing into his *pro se* posttrial claims and the case should be remanded pursuant to *Krankel*. For the following reasons, we affirm the judgment of the circuit court, vacate the sentences imposed and remand the matter for further proceedings.

¶ 7 I. BACKGROUND

¶ 8 At trial, the State's evidence showed that defendant's girlfriend, Esther Woods, drove defendant to her doctor appointment in River Forest, Illinois, on February 13, 2010. Woods was driving a black 2009 Chevrolet Impala that she rented from Enterprise Care Rental on February 11, 2010, because her own vehicle was being repaired. Woods left defendant in the vehicle with the keys while she went to her appointment. Defendant informed Woods that he needed to go to his grandfather's funeral, but she did not think he was going to leave. When her appointment was finished, she went outside and found her car and defendant gone. She waited for approximately an hour and then took a train home.

¶ 9 Woods had let defendant use her car before but did not give him permission to use the rental car. Woods called defendant and she told him to return the car. He refused and she indicated that she would call the police. Sometime after dinnertime, defendant returned to the apartment he shared with Woods, but he left before she could see him or talk to him. Woods attempted to report the car as stolen, but the Chicago police refused to take the report.

¶ 10 At around 10 p.m. on the night of February 13, 2010, Cian Martin drove A.B. (the

victim[1]), Kimberly Jordan, and Bianca Dover to a party hosted by a friend of Dover's on the west side of Chicago. At the party, all the partygoers were drinking alcohol and smoking marijuana. At the time, A.B. was attending Illinois State University in Bloomington, Illinois, and did not know anyone else at the party and was unfamiliar with the area. She danced and talked with defendant at the party.

¶ 11 Approximately 30 - 45 minutes after arriving at the party, defendant asked A.B. to accompany him to a gas station to get more cigars to use to smoke more marijuana. A.B. testified that she wanted something other than alcohol to drink and after asking defendant if they were coming right back to the party, she voluntarily left with defendant. Defendant drove past several gas stations and A.B. asked him whey they did not stop, defendant told her he knew a gas station where the cigars were cheaper. Defendant then stopped to pick up his friend Michael Dorsey. Defendant stopped to purchase the cigars and the three of them went to an abandoned apartment building where defendant stated they could get more marijuana.

¶ 12 Defendant took A.B. to a room on the second floor of the building and closed the door so that just a crack was open and told A.B. that he wanted to spend alone time with her and please her. A.B. told defendant that she was not going to have sex with him and that if he performed oral sex he would want to have intercourse, but defendant insisted on performing oral sex on A.B. Defendant continued to touch A.B.'s body and breasts, removed her pants and performed oral sex on her for a short period before A.B. saw Dorsey come through the door. A.B. got up and told defendant they should go. Defendant did not want to go and he and Dorsey left the

[1]Due to the nature of the offense in this case, we refer to the victim only as A.B.

room.

¶ 13 A.B. put her pants back on and called Jordan to ask if she could pick her up. Jordan asked where she was at and A.B. went into the living room to find out where they were and defendant and Dorsey were fighting about something. Defendant told A.B. he would take her back to the party. However, defendant then left the apartment, leaving A.B. and Dorsey alone. After a few minutes, defendant returned and was agitated and aggressive. Dorsey asked to be taken home and defendant drove him home. Dorsey asked A.B. if she was ok, but when A.B. tried to get out of the car, defendant sped off.

¶ 14 Defendant proceeded to drive on side streets, through red lights and stop signs at "like 50 miles per hour." A.B. asked to be taken to back to the party. At that time, Jordan called A.B. and A.B. asked defendant where they were. Defendant told her they were on Long and Division and A.B. told Jordan she would meet them there and defendant stopped the vehicle.

¶ 15 While Martin was driving, Jordan called A.B. back and asked where she was since they were at Long and Division. A.B. got out of the car to find she was at Long and Crystal. A.B. called Jordan back and told her the location. Defendant rolled the window down and told A.B. to get back in the car. A.B. got back in the car, but when Jordan and her friends pulled up behind them, defendant kept driving and A.B. was unable to get out of the car. A.B. was on the phone with Jordan at this time and Jordan told her to get out of the car and saw A.B. open the door, but defendant leaned over, shut the door and drove off. Jordan heard A.B. yelling at defendant and could hear A.B. tell the other person to stop the car.

¶ 16 Jordan told Martin to follow defendant and A.B. However, defendant sped through stop signs and lights and they were not able to keep up. Eventually A.B. could not see her friends

behind her and A.B. asked defendant repeatedly to stop so she could get out. Defendant told A.B. "no" and kept saying "I will take you home."

¶ 17 A.B. attempted to talk with Jordan on her phone but defendant asked who she was talking to, touched her, punched her in the face and grabbed the phone from her. Jordan heard A.B. yell "Give me my phone back," but then they were disconnected. When defendant grabbed the phone from A.B., he sideswiped a parked vehicle and threw A.B.'s phone out the window. A.B. asked defendant to stop, but he kept driving and told her "You don't try to jump out if I stop. You are going to try to jump out. You are trying to get away."

¶ 18 A.B. tried to calm herself down and think reasonably. She asked defendant to slow down the vehicle, fearing they would get hurt in an accident. In response, defendant asked A.B. "Are you going to have sex tonight?" A.B. responded that she would not, but told defendant she would perform oral sex on him if he slowed down. A.B. explained that because she knew that defendant wanted something sexual that night, she feared for her life and it was her option to try to get him to stop so she could get away.

¶ 19 Defendant accused A.B. of lying, so A.B. slowly went down on defendant and put the tip of her mouth on his penis. However, she got concerned that he might have AIDS or some other sexually transmitted disease and she stopped. A.B. told defendant she could not do it and that he would have to kill her. Defendant said that A.B. was making him mad and angry and he drove even more erratically. Defendant said that "You are going to make me mad. I am going to hurt you. I don't want to hurt you."

¶ 20 On cross-examination, defense counsel questioned A.B. on whether defendant asked for oral sex or A.B. had offered. A.B. testified that defendant asked for sex and she responded that

she would give him oral sex as her way of not having intercourse and she admitted that she told defendant that she would give him oral sex if he drove her home. However, defense counsel questioned A.B. further and she testified that when she refused intercourse, defendant said if she gave him oral sex, he would take her home. A.B. then testified that defendant did not pull over when she started to give him oral sex and that he did not physically force her to do it, but he would not take her home until she pleasured him.

¶ 21 When defendant drove by the River Forest police station, A.B. determined this was the best chance for her to get away. She told defendant "Just slow down. I will do it for real. Just slow down." Defendant pulled up toward a viaduct and A.B. unlocked her door and jumped out, landed on her left shoulder and tried to run toward the police station. A.B. was screaming for help as she ran until defendant caught up to her, grabbed her and dragged her to the sidewalk. Defendant pulled at A.B.'s hair and dragged her back toward the vehicle while A.B. punched, kicked and screamed in an effort to get away.

¶ 22 Defendant got A.B. back to the vehicle, but A.B. kicked and got out again at which time defendant hit her in her shoulder and pushed her back in the car. Defendant began hitting A.B. in the face to keep her in the back seat of the vehicle. A.B. managed to get out again and saw a man standing across the street by an apartment building. She tried to run toward the man but fell in the snow and defendant grabbed her by the collarbone, ripping her jacket off and exposing her breasts. A.B. looked toward the man and said "Please help me."

¶ 23 The man, Adam Silva, testified that he had gone outside his apartment at about 4:45 a.m. because he had been awakened by screaming. When outside, he saw defendant and A.B. fighting. Defendant saw him and told him "it's ok, it's my girlfriend." However, A.B. said

"please help me," and Silva returned to his apartment to call the police. About 30-60 seconds later he returned outside and saw the police arrive. A.B. saw the flashing lights and kicked defendant one last time before he fell back and then returned to the vehicle.

¶ 24 Officer Carroll and Sergeant O'Shea of the River Forest police department testified that they were responding officers to the call of a woman screaming in the area on February 14, 2010 at 4:40 a.m. Carroll was the first to arrive on the scene and saw defendant and A.B. struggling outside the black Chevrolet Impala. Carroll had his emergency lights activated and pulled up nose to nose with the Impala so it could not pull forward. A.B. and defendant broke away as he arrived and A.B. ran away and toward the arriving O'Shea, who pulled up behind the Impala.

¶ 25 One squad car pulled in front of defendant's vehicle and one pull in behind it. Defendant left A.B. lying on the ground and tried to drive away. Defendant placed his vehicle in reverse and accelerated swiftly toward O'Shea's squad car. Defendant hit the curb, a tree, and then O'Shea's vehicle. The tree sheared off a part of defendant's car and, as defendant shifted to drive, other parts of the vehicle were falling off before it went up a snow embankment and crashed into a parked vehicle. Defendant exited the vehicle and fled while O'Shea yelled at defendant to stop and that he was under arrest. Officers from nearby villages of Oak Park and Forest Park arrived on the scene and Carroll went to check on A.B. and called an ambulance.

¶ 26 O'Shea and the other officers soon discovered defendant on the top floor of a nearby condominium building. Defendant was lying down with his hands curled up in his jacket. When O'Shea commanded defendant to show his hands and lay down, defendant lunged at the policeman and pushed and shoved the officers. O'Shea requested the Forest Park police officer deploy his taser and, on the second taser deployment, defendant was subdued, handcuffed and

placed under arrest.

¶ 27 A.B. testified to photographs taken of her injuries suffered in the altercation with defendant including bruising and scratches on her hands, neck, elbow, wrist, leg, and lower back. A.B. testified that the injuries all resulted from when defendant was hitting her, dragging her toward the vehicle and punching and scratching her to get her into the vehicle. A.B. also testified that the scratches on defendant's face and neck in pictures taken by the police on February 14, 2010, resulted from her efforts to fight and get away from defendant. O'Shea testified to pictures of the crashes by defendant's vehicle, noting the "very extensive" damage to the Chevrolet Impala, including a missing rearview mirror, another part of the car that fell off and was lying in the snow, a broken window, and extensive scratching and dents.

¶ 28 Sergeant Grill of the River Forest police department was assigned the investigation of the incident and interviewed defendant at 9 a.m. on February 14, 2010. He advised defendant of his *Miranda* rights and defendant agreed to give a statement to the police. Grill prepared a written summary of the statement, which defendant reviewed, initialed each paragraph and signed. Defendant stated that he admitted very little from the evening, but that he had met A.B. at a party, she gave him oral sex while driving in his car and that she got mad and he threw her out of the car and then argued with her in the street. Defendant admitted to fleeing and fighting the police and stated that he was so drunk he did not realize he was acting so improperly. Defendant apologized for fighting the police. Later that evening, Silva reported to the police station and identified defendant in a lineup as the person he saw fighting A.B.

¶ 29 The State rested. Defendant moved for a directed verdict. That motion was denied and defendant presented his case. Defendant testified on his own behalf that he met A.B. at the party

on February 13-14, 2010, on the west side of Chicago. Defendant testified that he and his friend, Michael Dorsey (Dorsey), left the party with A.B. at about 12:45 a.m. to go to the gas station to get cigars. After they went to the gas station, the three went to a liquor store and bought a pint of vodka and started drinking it. Defendant asked A.B. if "You going to kick it with me?," which meant hang out, and when she responded yes, defendant went to find a place to hang out. He stopped first at the apartment he shared with Woods, but Woods was home so they went to the abandoned apartment building.

¶ 30 Defendant told A.B. that they were at the apartment to find some more marijuana. When they got in the apartment, defendant took A.B. into a back room. Defendant told A.B. he "was feeling her" and knew she was feeling him and that he knew she was not so naive not to know whey they were there. Defendant began kissing A.B. and feeling her breasts and A.B. did not object. When defendant began to pull down A.B.'s pants she asked what he was doing and he said he was going to perform oral sex and defendant agreed to respond in kind. After about a minute of performing oral sex on A.B., defendant got ready for intercourse but realized he had to use the bathroom, so he left the room.

¶ 31 When defendant returned to the bedroom, Dorsey was in the bedroom pulling down A.B.'s pants. Defendant informed Dorsey that he was not done yet and that Dorsey had to wait his turn. Defendant and Dorsey got into an argument and defendant left the apartment. Defendant testified that he was about to drive away and leave Dorsey and A.B., "but then I got -- I was considerate." Defendant returned upstairs and told Dorsey and A.B. that it was time to leave. Defendant drove Dorsey to his house. A.B. told Dorsey that she was going to stay with defendant.

¶ 32 A.B. received a call from her friends and defendant told her they were at Long and Division and A.B.'s friends said they were on their way there. A.B. talked with her friends again but defendant was ignoring her and had the car stereo up so he could not hear her. When A.B. asked him why he was mad at her, he said she knew why. A.B. giggled and told him to go somewhere no one will see her, so he pulled away. Defendant did not know whether A.B.'s friends were nearby. Defendant denied that A.B. was trying to get out of the vehicle when he pulled away. Defendant testified that A.B. changed her mind several times in the next few minutes between staying with defendant and going with her friends.

¶ 33 Defendant denied driving through stop signs or stop lights and testified that he was unaware of any telephone calls because he had the stereo on loud. Defendant also denied striking A.B., refusing to let her out of the car, or requesting oral sex. He testified that when they arrived in Oak Park to where no one could see them, defendant stopped and said "Well, we are here." A.B. told defendant to pull it out, he pulled his penis out of his pants and A.B. engaged in oral sex for about 30 seconds before stopping and telling defendant he smelled like he had been with someone else. Defendant told her he was probably just sweaty and tried to "sweet talk her" and reminded her that he already gave her oral sex and now it was her turn.

¶ 34 A.B. refused and defendant drove for a while, hoping that A.B. would change her mind. He testified that at this time, A.B. called her friends and then asked defendant to talk to Martin who asked defendant to bring A.B. back to them. Defendant testified that this was the time he was going to ask A.B. to get out, so he put the phone out the car window and said he would throw the phone out if A.B. did not get out of the car. At this point, A.B. started to fight defendant for her phone, hitting and scratching him. This caused defendant to sideswipe another

car and drop the phone out the window.

¶ 35 Defendant testified that he asked A.B. to get out of the car five or six times but she refused, saying it was too cold and she asked defendant to take her back to her friends. A.B. again started to hit and scratch defendant. Therefore, defendant got out of the car and went around to the passenger side to get A.B. out. He saw A.B. climbing over to the driver side, so he opened the back passenger door and pulled A.B. out of the vehicle by her hair. Defendant got back into the car, but A.B. got back into the backseat and defendant got her out of the car again.

¶ 36 Defendant testified that he saw Silva during the altercation and told him " 'Don't worry. This is my girlfriend' thinking - - so he can think it's just like another domestic dispute." While defendant did not think he was committing domestic battery, but just having a "tussle," he was afraid he would be arrested when the police arrived. Therefore, he left A.B. and he tried to drive away. Defendant denied telling A.B. she had to give him sex or oral sex.

¶ 37 Defendant explained that Woods knew he wanted to go to his grandfather's funeral and while he wanted to be there for Woods "and her little thing she was going through," thought she would be with the doctor for several hours since she was having a miscarriage. Therefore, he went to the funeral. After the funeral, he returned to the hospital and called Woods. She said she was at home and told defendant to bring the car back. But since she started arguing, defendant hung up and went back to his family to grieve.

¶ 38 On cross examination, defendant claimed that he was not given the opportunity to read his statement to the police but was just told to sign it. Defendant believed he was being given the opportunity to drop the charges against him relating to the officers leaving only a domestic battery charge, so he signed the statement. Defendant also asserted that he was still intoxicated

at the time he gave the statement, so he just cooperated and did what the police told him to do.

¶ 39 Defendant admitted that Woods' vehicle was in the shop because he had gotten into an accident driving it. He also admitted that he went to the party, picked up A.B. and went to the apartment he shared with Woods, and then the abandoned apartment, to have sex with A.B.. Defendant testified that A.B. knew that was what they were there for and that they had agreed to trade sexual favors.

¶ 40 Detective DeYoung testified that he interviewed A.B. on the morning of February 14, 2010. A.B. told DeYoung that she left the party with defendant to purchase cigars for the purpose of smoking more marijuana. DeYoung also recalled A.B. telling him that she had agreed to perform oral sex on defendant and that she did perform oral sex when defendant pulled over.

¶ 41 The parties gave closing statements and the circuit court found defendant guilty on all counts. The court noted there were discrepancies in each of the witnesses' testimony, but opined that defendant was not a credible witness and she believed the State's witnesses. Following the denial of defendant's motion to reconsider and for a new trial and prior to sentencing, defendant indicated he felt the court erred in reviewing the evidence and counsel failed to file essential motions in his case so he sought to proceed *pro se* in order to file a motion for ineffective assistance of counsel. The circuit court admonished defendant on the impact of such a decision and what was necessary for such a motion. The court stated that the motion would have to be in writing and set a date for defendant to file his written motion and return to argue his ineffective assistance claim.

¶ 42 Defendant filed a motion for a new trial alleging that he was denied his right to effective

assistance of counsel. Defendant alleged that counsel inadequately reviewed the indictment and failed to find errors, thus his convictions based on the improper wording violated his due process rights. Defendant also argued that counsel failed to present exculpatory evidence of a medical doctor to show that the bodily harm to A.B. did not occur during the alleged criminal sexual assault, failed to present evidence of A.B.'s rape kit results, failed to secure the testimony of Martin and Dorsey to refute A.B.'s testimony concerning defendant's driving and what occurred at the abandoned apartment building, and failed to assert that defendant's statement to the police was forced and involuntary.

¶ 43 Defendant presented his motion before the court and the court held an extended hearing covering over 100 pages of trial transcript to determine whether defendant had a meritorious claim. The circuit court reviewed each contention asserted in defendant's motion, sought defendant's argument for each allegation, and in denying the motion, determined and explained why each allegation lacked merit. Defendant's attorney and the State presented evidence and argument at a sentencing hearing and the circuit court entered sentences on each count, all to be served concurrently. This appeal followed.

¶ 44 II. ANALYSIS

¶ 45 A. Sufficiency of the Evidence

¶ 46 The State is required to present proof beyond a reasonable doubt of every necessary fact to find a defendant guilty of a crime. *In re Winship*, 397 U.S. 358, 364 (1970). In assessing the sufficiency of the evidence to sustain a verdict on appeal we must view the evidence in the light most favorable to the prosecution to determine if *"any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v. Bush*, 214 Ill. 2d 318, 326

(2005), citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *People v. Collins*, 106 Ill. 2d 237, 261 (1985). This means that we must allow all reasonable inferences from the record in the favor of the prosecution. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). Furthermore, this court does not retry the defendant, as resolution of the credibility of witnesses and conflicts in evidence are matters within the province of the trier of fact and we grant deference to those findings. *People v. Rendak*, 2011 IL App (1st) 082093 ¶ 28.

¶ 47 Defendant argues on appeal that the State failed to prove his guilt beyond a reasonable doubt of aggravated criminal sexual assault, aggravated kidnaping and kidnaping, and aggravated possession of a stolen motor vehicle and possession of a stolen motor vehicle. He also argues that the State failed to prove the aggravating factor for aggravated fleeing and eluding and, therefore, that charge must be reduced to the lesser-included offense of fleeing or attempting to elude. We consider each argument as to the sufficiency of the evidence in turn.

¶ 48 1. Aggravated Criminal Sexual Assault

¶ 49 Defendant claims that the State failed to prove him guilty beyond a reasonable doubt of aggravated criminal sexual assault. Defendant was charged under subsection (a) of the aggravated criminal sexual assault statute, which states, in pertinent part:

> "(a) A person commits aggravated criminal sexual assault if that person commits criminal sexual assault and any of the following aggravating circumstances exist during the commission of the offense or, for purposes of paragraph (7), occur as part of the same course of conduct as the commission of the offense:

***

(2) the person causes bodily harm to the victim, except as provided in paragraph (10);

(3) the person acts in a manner that threatens or endangers the life of the victim or any other person;

(4) the person commits the criminal sexual assault during the course of committing or attempting to commit any other felony;" 720 ILCS 5/12-14 (West 2008).

¶ 50 Criminal sexual assault is defined in section 12-13(a)(1) of the Criminal Code of 1961 (Code), which provides in pertinent part:

"(a) The accused commits criminal sexual assault if he or she:

(1) commits an act of sexual penetration by the use of force or threat of force." 720 ILCS 5/12-13(a)(1) (West 2008).

Under the Code, "sexual penetration" means

"any contact, however slight, between the sex organ or anus of one person and an object or 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 2008).

"Force or threat of force" is defined as follows:

> "[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 2008).

¶ 51 Defendant concedes that there was some evidence of several of the alleged aggravated factors. He concedes that he was driving so recklessly that A.B. feared for her safety and could not get out of the car. However, he argues that the evidence at trial showed that A.B. consciously and voluntarily chose to perform fellatio on defendant and there was no evidence that defendant forced her to do so. He points to the fact that he performed consensual oral sex on A.B. earlier in the evening and it made sense that he accepted A.B.'s offer to perform fellatio in the vehicle. Alternatively, he argues that the conviction must be vacated and remanded for new trial because trial counsel was ineffective. Defendant asserts that counsel's cross-examination of A.B. elicited the only testimony from her that defendant was the first one to raise the issue of her giving him fellatio.

¶ 52 As noted above, under a sufficiency of the evidence claim, we consider the facts in a light most favorable to the prosecution and grant great deference to the trier of fact's credibility determinations. The trial court explicitly found the State's witnesses credible and defendant to be "absolutely totally, incredible." Accepting much of defendant's arguments on this issue would require a rejection of this finding.

¶ 53 A.B. and Jordan testified consistently concerning their telephone conversations and the defendant's erratic and dangerous driving. The evidence showed that defendant kept A.B. from exiting the car when he sped away when Martin pulled up behind him. Jordan and A.B. testified to conversations with A.B. clearly indicating that she wanted to return to her friends. Defendant testified that he had an agreement with A.B. to trade sexual favors and A.B. testified that he repeatedly mentioned this and expressed anger and frustration that she had not had intercourse or performed oral sex.

¶ 54 Defendant took A.B.'s phone, hit A.B. and continued to drive in a dangerous manner in the early hours of the morning, in the cold, and in neighborhoods that A.B. did not know. Defendant testified that they drove around to try and get A.B. to change her mind and also "sweet talked" her. Eventually, A.B., albeit briefly, performed oral sex. A.B. testified that she did so to try to avoid having intercourse and to pacify defendant. When defendant stopped for what he thought was more oral sex, A.B. attempted to flee to the police station or anyone that might help her. At this point, defendant attempted to drag A.B. back into the vehicle by her hair, hit A.B. and fought with her before the police arrived. Accordingly, an act of sexual penetration was performed after defendant used actual force, the threat of force, and confinement against

A.B., defendant caused bodily harm, and A.B. feared further violence and defendant was properly convicted of aggravated criminal sexual assault.

¶ 55 With respect to defendant's ineffective assistance argument on this issue, a claim of ineffective assistance of counsel is reviewed under the standard announced by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 698, 104 S. Ct. 2052, 2068 (1984). Under *Strickland*, to determine whether there has been a violation of the defendant's sixth amendment right to effective assistance of counsel, the defendant must show: (1) that his counsel's "representation fell below an objective standard of reasonableness;" and (2) that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 80 L. Ed .2d at 698, 104 S. Ct. at 2068; *People v. Shatner*, 174 Ill. 2d 133, 144 (1996). A strong presumption exists that counsel's conduct fell within the range of reasonable professional conduct. *Strickland*, 466 U.S. at 689, 80 L. Ed .2d at 694, 104 S. Ct. at 2065. If the second prong cannot be satisfied, a reviewing court need not consider the first prong. *Strickland*, 466 U.S. at 697, 80 L. Ed .2d at 699, 104 S. Ct. at 2069.

¶ 56 We agree with the State that defendant cannot satisfy the second prong of the test and this argument fails. Even without A.B.'s testimony that it was defendant's idea for her to give him oral sex, the evidence at trial was sufficient to prove his guilt. Defendant drove around erratically and dangerously and away from A.B.'s friends and then kept her confined in the vehicle. Defendant took A.B.'s phone from her, threw it out the window, and physically hit her both before and after she performed fellatio. A.B. suffered bodily harm with numerous areas of

bruising and scratches. A.B. felt scared and helpless in the face of defendant's use of force and confinement and responded to defendants' repeated complaints and references to how she had not given him any sexual favors in return for his performing oral sex earlier in the evening. Based on the totality of this evidence, it cannot be said that, but for counsel's eliciting A.B.'s testimony in cross-examination that defendant suggested oral sex, the result at trial would be different and defendant's ineffective assistance claim fails.

¶ 57 2. Kidnaping and Aggravated Kidnaping

¶ 58 Under the Code, a person commits the offense of kidnaping when he or she knowingly:

> "(1) and secretly confines another against his or her will;
>
> (2) by force or threat of imminent force carries another from one place to another with intent secretly to confine that other person against his or her will; or
>
> (3) by deceit or enticement induces another to go from one place to another with intent secretly to confine that other person against his or her will." 720 ILCS 5/10-1(a) (West 2008).

¶ 59 Aggravated kidnaping is committed when a person commits kidnaping and:

> "(3) inflicts great bodily harm, other than by the discharge of a firearm, or commits another felony upon his or her victim;" 720 ILCS 5/10-2(a)(3) (West 2008).

¶ 60 Defendant asserts that the evidence did not show that he knowingly secretly confined A.B. or by deceit or enticement induced her to go from one place to another and his convictions

for aggravated kidnaping and kidnaping must be vacated. Defendant somewhat concedes that A.B. "may have been 'confined' or 'restrained' to an extent, during the time period that Detrick was driving recklessly and she believed she could not get out," but argues that "the element of 'secrecy' was certainly not proved." He argues that A.B.'s friends knew that she was in the car and he was not trying to keep that a secret especially if he was driving as erratically as the testimony at trial claimed.

¶ 61 Defendant points to several cases where the element of secret confinement was not proven and aggravated kidnaping convictions were reversed in support of his argument that his convictions must be reversed. See *People v. Pasch*, 152, Ill. 2d 133 (1992) (hostage victim not secretly confined); *People v. Trotter*, 371 Ill. App. 3d 869 (2007) (infant not secretly confined because the defendant openly talked with people while holding infant); *People v. Sykes*, 161 Ill. App. 3d 623 (1987) (no attempt to hide or conceal). Defendant also tries to distinguish cases where secret confinement was found. See *People v. Goodwin*, 381 Ill. App. 3d 927 (2008) (infant victim driven in van with tinted windows at a high rate of speed to elude law enforcement); *People v. Gonzalez*, 239 Ill. 2d 471 (2011) (infant in public view, but unable to escape or call attention to her plight); *People v. Bishop*, 1 Ill. 2d 60 (1953) (victim forced at gunpoint to various locations with defendant attempting to keep victim's confinement secret.) Defendant argues that there was no deception or enticement to get A.B. to go with him or for him to secretly confine her. In fact, defendant argues, A.B. testified that he said he would take her home and assured her that she would be okay. He argues that there is no evidence he was not sincere and intended to deceive A.B.

¶ 62 As the State argues, defendant's cited case law and attempt to distinguish the relevant cases do not support reversal of his aggravated kidnaping and kidnaping convictions. It is well established that an intent to secretly confine may be established when the victim is in a moving vehicle, even if in plain view of the public and whether moving or parked. *People v. Calderon*, 393 Ill. App. 3d 1, 8-9 (2009), citing *Bishop*, 1 Ill. 2d at 64; *People v. Kittle*, 140 Ill. App. 3d 951, 955 (1986). There is no minimum time of confinement and keeping a victim against her will in a vehicle for even a short time is sufficient to support a conviction for kidnaping. *Goodwin*, 381 Ill. App. 3d at 935.

¶ 63 Defendant's argument that the evidence merely showed that he was guilty of reckless behavior and that he sincerely intended to take A.B. home falls flat. The evidence must be viewed in a light favorable to the prosecution and with deference to the circuit court's credibility determinations. Even if we were not operating under this lens, the evidence clearly established defendant's guilt. Defendant stopped A.B. from getting out of the car, drove off quickly after closing the door, drove erratically and eluded A.B.'s friends who were trying to follow him, ignored A.B. and listened to loud music while she tried to talk with her friends, took A.B.'s phone and hit her and, when she tried to exit the car, grabbed her by the hair to pull her back in. This evidence established A.B. was secretly confined by force or threat of force, driven around against her will, hidden from her friends, and defendant inflicted great bodily harm and committed a felony upon A.B.. Accordingly, the circuit court did not err in finding defendant guilty of kidnaping and aggravated kidnaping.

¶ 64 3. Possession and Aggravated Possession of a Stolen Motor Vehicle

¶ 65 Defendant next argues that his convictions for possession of a stolen motor vehicle (625 ILCS 5/4-103(a)(1) (West 2008)) and aggravated possession of a stolen motor vehicle (625 ILCS 5/4-103.2(a)(7) (West 2008)) must be reversed because the evidence did not show that he intended to permanently deprive Woods of the possession of the Chevrolet Impala. Defendant contends that the State failed to prove that he possessed the vehicle knowing it to be stolen *and* converted as alleged in the indictment. Defendant asserts that it was counsel's focus on the State's failure to prove that he intended to steal or permanently deprive Woods of the vehicle and therefore the State was bound to prove that element.

¶ 66 The State responds that the inclusion of "stolen" in the indictment was mere surplusage resulting from a scrivener's error. The indictment charged defendant of possession of a stolen motor vehicle under section(a)(1) of that statute, which states, in full:

> "(1) A person not entitled to the possession of a vehicle or essential part of a vehicle to receive, possess, conceal, sell, dispose, or transfer it, knowing it to have been stolen or converted; additionally the General Assembly finds that the acquisition and disposition of vehicles and their essential parts are strictly controlled by law and that such acquisitions and dispositions are reflected by documents of title, uniform invoices, rental contracts, leasing agreements and bills of sale. It may be inferred, therefore that a person exercising exclusive unexplained possession over a stolen or converted vehicle or an essential part of a stolen or converted vehicle has knowledge that such vehicle or essential part is stolen or converted, regardless of whether the date on which such vehicle or

essential part was stolen is recent or remote." 625 ILCS 5/4-103(a)(1) (West 2008).

Defendant is correct that the indictment utilizes the phrase "knowing it to have been stolen and converted; however, this variance with the proof at trial was not so material to vitiate the trial. Such an error or variance must be material and mislead the defendant in undertaking his defense to constitute reversible error. *People v. Collins*, 214 Ill. 2d 206, 219 (2005). Where, as here, the indictment contains all the essential elements of the offense, "other matters unnecessarily added may be regarded as surplusage." *Id.*

¶ 67 The statute requires knowledge that the vehicle was stolen or converted, one element is essential, not both. The proof at trial showed that defendant took Woods' rental car without her permission and left her at the hospital. Later, defendant talked with Woods over the telephone and she told him to return the vehicle or she would contact the police, which she did but was not able to file a stolen vehicle report. In the criminal context, conversion does not require an intent to permanently deprive possession, but "property has been 'converted' if a person lawfully entitled to possession of that property has been wrongfully deprived of it." *People v. Gengler*, 251 Ill. App. 3d 213, 222 (1993). Woods' rented the vehicle in question, was the only named and authorized driver of the vehicle and defendant admittedly took the vehicle, refused to return it to Woods when requested and then proceeded to cause extensive damage to it. The circuit court correctly concluded that the State alleged the essential elements of the crimes of possession of a stolen motor vehicle, and aggravated possession of a stolen motor vehicle, and provided proof of them at trial.

¶ 68 4. Aggravated Fleeing and Eluding

¶ 69 Defendant next argues that his conviction for aggravated fleeing and eluding must be reduced to the lesser-included offense of fleeing or attempting to elude because the State failed to prove the aggravating factor that defendant's actions caused over $300 in property damage. See 625 ILCS 5/11-204.1(A)(3) (West 2008). Defendant admits that the State presented evidence of damage to the Chevrolet Impala at trial, namely pictures of the vehicle, trees, and parts of the vehicle that were on the ground. He also notes that Sergeant O'Shea testified that the damage to the vehicle was "extensive." However, he points out that there was no proof of the value of the damage by an expert or anyone. He contends that without establishing that over $300 of damage occurred by testimony or repair receipt, his conviction must be reversed.

¶ 70 We agree with the State that defendant's argument fails. There is no dispute as to the other elements of aggravated fleeing and eluding being proved at trial. We disagree that the evidence failed to establish that the value of the damage to the vehicle exceeded $300. Our supreme court has pointed out that even without direct proof of value, "courts do not operate in a vacuum; they are presumed to be no more ignorant than the public generally *** to say that it is not common knowledge that a large tractor and trailer are worth more than $150 is to close our eyes to reality." *People v. Tassone*, 41 Ill. 2d 7, 12 (1968).

¶ 71 If we reversed defendant's conviction based on ignoring the common knowledge that the extensive damage caused to the vehicle in this case exceeded $300, we would be closing our eyes to reality. Considering the evidence presented in this case, it is clear that the damage caused exceeded $300. Defendant was driving a 2009 Chevrolet Impala and the damage caused

included a detached rearview mirror, broken window, dislodged portion of bumper and severely scratched and dented body panels. As in *Tassone*, we need not affix a specific value for the damage, but simply find it exceeded the $300 floor and defendant's conviction is affirmed.

¶ 72 B. Sentencing and Mittimus

¶ 73 Defendant argues, and the State concedes, that the circuit court erred in entering his sentence. Under the one-act, one-crime rule, a defendant may be convicted for only one crime resulting from a single act. *People v. Dresher*, 364 Ill. App. 3d 847, 863 (2006). When multiple convictions for the same crime are entered based on a single act, those convictions must be vacated. *People v. Crespo*, 203 Ill. 2d 335 (2001). In this case, the three counts of aggravated criminal sexual assault were all based on the single act of sexual penetration. Therefore, two of the criminal sexual assault convictions must be vacated.

¶ 74 Additionally, where there are multiple offenses, with one of the offenses a lesser-included offense, the lesser-included conviction should be merged into the greater conviction. *People v. Garcia*, 179 Ill. 2d 55, 71 (1997). Accordingly, defendant's two convictions for aggravated kidnaping and two convictions for kidnaping should be merged because kidnaping is a lesser-included offense of the former. Under *Crespo*, of the two surviving convictions for aggravated kidnaping, one must be vacated as they are based on the same act. Finally, the lesser-included offense of possession of a stolen motor vehicle should be merged with defendant's conviction for aggravated possession of a stolen motor vehicle.

¶ 75 The State also correctly notes, and defendant agrees, that the circuit court failed to impose consecutive sentences as required by section 5-8-4(d)(2) of the Unified Code of

Corrections. (730 ILCS 5/5-8-4(d)(2) (West 2008)); *People ex rel. Senko v. Meersman*, 2012 IL 114163, ¶ 18. Because the concurrent sentences were imposed in violation of the Unified Code of Corrections, defendant's sentences are void. *Garcia*, 179 Ill. 2d at 73. As argued by defendant, the proper remedy in this situation is to remand the matter to the trial court for a new sentencing hearing. *People v. Hauschild*, 226 Ill. 2d 63, 81 (2007).

¶ 76 C. Adequate *Krankel* Inquiry

¶ 77 Finally, defendant argues the trial court erred in failing to conduct an adequate *Krankel* hearing. Defendant asserts that the circuit court's inquiry into whether new counsel was warranted was insufficient and incomplete and claims that, when a trial court is presented with allegations of ineffective assistance of counsel during posttrial proceedings, it is required to make a preliminary inquiry to determine if appointment of new posttrial counsel is necessary. *People v. Krankel*, 102 Ill. 2d 181, 189 (1984); *People v. Moore*, 207 Ill. 2d 68, 78-79 (2003). Whether the trial court was required to conduct a *Krankel* inquiry or no determination was made on the merits, are questions of law to be reviewed *de novo*. *Moore*, 207 Ill. 2d at 75. If the court made a determination on the merits of the claim, we may reverse only if that decision was manifestly erroneous. *Id.* If we do find error and there is a sufficient record concerning defendant's claims, we will not reverse if we find the error was harmless. *Id.* at 80. In the instant case, the circuit court conducted an inquiry and made a determination on the merits of defendant's claims.

¶ 78 Our concern is the adequacy of the trial court's inquiry. If the court determines that the defendant's claims are conclusory, misleading or immaterial such that the motion is not

meritorious or simply that it revolves around trial strategy, it may deny the motion. *Id.* at 78. However, if the claims indicate that counsel neglected the defendant's case, the court must appoint new counsel. *Id.* at 78-79. The court may base its decision on "(1) the trial counsel's answers and explanations; (2) a 'brief discussion between the trial court and the defendant"; or (3) 'its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face.' " 2012 IL App (1st) 102943, ¶ 40, quoting *Moore*, 207 Ill. 2d at 78-79. Defendant highlights that the *Moore* court also stated that "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." *Moore*, 207 Ill. 2d at 78.

¶ 79 Defendant asserted in his motion for new trial that counsel inadequately reviewed the indictment and failed to find errors, thus his convictions were improper and violated his due process rights. Defendant also argued that counsel failed to present exculpatory evidence of a medical doctor to show that the bodily harm to A.B. did not occur during the alleged criminal sexual assault, failed to present evidence of A.B.'s rape kit results, failed to secure the testimony of Martin and Dorsey to refute A.B.'s testimony concerning defendant's driving and what occurred at the abandoned apartment building, and failed to assert that defendant's statement to the police was forced and involuntary.

¶ 80 The circuit court did not question trial counsel, but conducted the *Krankel* inquiry with defendant and based its decisions on its discussion with defendant and its knowledge of counsel's performance at trial and the facts and testimony of record. The circuit court opined that counsel

presented vigorous and good arguments and Defendant does not challenge the denial of his claims concerning the indictments, but asserts that the circuit court's review and rejection of his other claims was cursory and deficient. We disagree.

¶ 81 With respect to the failure to introduce A.B.'s rape kit or the testimony of Dorsey, the circuit court correctly found this issue was not meritorious because defendant's convictions were based on conduct that was not disputed or not relevant to his convictions. Defendant was convicted based on mouth to penis sexual penetration and the evidence from A.B.'s rape kit was irrelevant to this fact. It also was not relevant to the issue of bodily harm as the State presented ample evidence of bodily harm to A.B. without requiring the introduction of the rape kit. Furthermore, there could have been various reasons to support a trial strategy to avoid introduction of this evidence. As for Dorsey, there was no dispute concerning the sexual activity that occurred at the abandoned apartment and defendant's convictions related to defendant's actions after Dorsey had been dropped off.

¶ 82 Defendant's allegations that Martin would have testified that defendant did not close the door or speed away were based on pure speculation. Not only is the presentation of a witness generally a matter of trial strategy, even if Martin presented testimony as defendant speculates, it would not have overcome the evidence at trial. *People v. Chapman*, 194 Ill. 2d 186, 231 (2000). Not only did the State present consistent testimony of two witnesses that defendant closed the door and sped off, but also presented testimony concerning telephone conversations between A.B. and Jordan around that time. In addition, and more importantly, defendant's actions after Martin was no longer in sight of defendant were the basis for his convictions.

¶ 83 Finally, defendant's claims that counsel was ineffective for failing to move to bar the introduction of his statement to the police and evidence of his prior convictions also must be rejected. Defendant was tried in a bench trial and the court considered defendant's claims, specifically rejecting the claim that this evidence had any effect on its credibility determination. Furthermore, defendant testified consistently with the statement he gave to the police and argued at trial, and maintains on appeal, that A.B. acted voluntarily and he did not confine A.B. or force her to perform fellatio. The circuit court stated that it found the State's witnesses credible and defendant incredible. Even if introduction of his statement to the police or his prior crimes was in error, it would not have changed the outcome of the trial.

¶ 84 Accordingly, the circuit court explored and considered defendant's written claims. The court also actively attempted to elicit any additional claims or support from defendant at the hearing. Based on its discussion with defendant and recollection of counsel's performance at trial and the evidence at trial, the circuit court concluded that defendant's claims lacked merit. Based on the record, this conclusion was not manifestly erroneous and the circuit court conducted a sufficient *Krankel* inquiry.

¶ 85 III. CONCLUSION

¶ 86 For the foregoing reasons, the judgment of the trial court is affirmed in part and vacated in part, defendant's convictions are to be merged and vacated in part as described herein to comply with the one-act, one-crime rule. Defendant's sentence is void and this matter is remanded for a sentencing hearing consistent with this order.

¶ 87 Affirmed in part, vacated in part and remanded for further proceedings.