THIRD DIVISION
JUNE 11, 2014

No. 1-12-1750

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07CR18165
	)	
	)	
STEVEN BROWN,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Hyman and Justice Mason concurred in the judgment.

O R D E R

¶ 1 *HELD*: Circuit court's judgment convicting defendant of, and sentencing him for, one count of predatory criminal sexual assault and one count of aggravated criminal sexual abuse affirmed where the State alleged, and the circuit court found, that defendant committed two separate sex acts during his assault on the victim and where the circuit court did not err or abuse its discretion in imposing sentences on those offenses during defendant's sentencing hearing. Defendant's remaining convictions and sentences, however, are vacated in accordance with the one-act, one-crime rule.

¶ 2 Following a bench trial, defendant Steven Brown was convicted of, and sentenced for, multiple counts of predatory criminal sexual assault, criminal sexual assault, aggravated criminal sexual abuse, and criminal sexual abuse. On appeal, defendant argues that his multiple convictions violate the one-act, one-crime doctrine. Defendant also argues that he is entitled to a new sentencing hearing because the circuit court considered, and relied upon, improper aggravating factors when imposing his sentences. For the reasons explained herein, the judgment of the circuit court is affirmed in part, vacated in part, and remanded with instructions.

¶ 3 I. BACKGROUND

¶ 4 In 2007, defendant was charged with two counts of predatory criminal sexual assault (720 5/12-14.1(a)(1) (West 2006)), four counts of criminal sexual assault (720 ILCS 5/12-13(a)(1), (2) (West 2006)), four counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(b), (c)(1)(i) (West 2006)), and six counts of criminal sexual abuse (720 ILCS 5/12-15(a)(1), (2) (West 2006)). The victim identified in the indictments was defendant's granddaughter, L.W., who was nine years old at the time of the offense. Defendant elected to proceed by way of a bench trial. The State, in turn, elected to *nolle pros* some of the charges and proceeded to trial on two counts of predatory criminal sexual assault, four counts of criminal sexual assault, two counts of aggravated criminal sexual abuse and three counts of criminal sexual abuse.

¶ 5 At trial, L.W. testified that on February 9, 2007, she spent the afternoon with her older sister, D.W., their younger brother, and defendant. She explained that her grandfather was an electrician and that she and her siblings accompanied him to several work sites on that date. L.W. confirmed that it was not unusual for defendant to take her and her siblings with him while

he was working. That afternoon, defendant first took them to a church to do some repairs, and then to a White Castle Restaurant for a meal. L.W. recalled that after they finished eating, they walked toward defendant's car and she and her sister argued about who would get to sit in the front seat. The argument was resolved when L.W. entered the front seat of defendant's car.

¶ 6 Defendant then drove them all to a second work site. When he parked the vehicle, L.W. testified that he ordered L.W.'s siblings to remain in the vehicle and invited her to accompany him into the building. Once they walked inside the building, L.W. followed her grandfather to the second floor. At that point, defendant put his coat on the floor and ordered L.W. to lay down on his coat. He then took off his pants and instructed L.W. to remove her pants. Once her pants were off, defendant got on top of her and put "his long thing" on her "private part." He was breathing heavily and touched his private part to her private part for a few minutes. Although it was dark and she never actually saw her grandfather's penis, L.W. confirmed that she felt it when he was on top of her. Defendant stopped rubbing against her when he got up to answer his cell phone. The call was from D.W. who still waiting in defendant's car with L.W.'s brother. After receiving the call, defendant and L.W. got dressed and began walking to the car. As they were doing so, defendant looked at her, put a finger over his mouth and instructed: "don't tell nobody."

¶ 7 After defendant drove L.W. and her siblings home, L.W. told her mother what defendant had done. She was then taken to a local hospital and underwent an examination. L.W. spoke to medical personnel, police officers and employees of the Children's Advocacy Center about what had occurred. She confirmed that she did not speak to her siblings about the assault during the car ride home.

¶ 8 D.W. testified that she was 10 years old at the time of her sister's sexual assault. She confirmed that on February 9, 2007, she and her siblings accompanied defendant to several job sites. Defendant first took them to a church where they helped him fix some of the lights. Defendant then drove them to a second job site. D.W. recalled that she and her brother were sitting in the rear passenger seats of defendant's car and that her sister was sitting in the front passenger seat. When they arrived at the second job site, defendant told them that only one of them could go with him into the building. Because L.W. was the sitting in the front seat, she was the one permitted to accompany him, and D.W. and her brother remained in defendant's car. As she was waiting in the car, she received a call from her mother on her cell phone. Her mother asked where they were, and D.W. told her mother that L.W. was with defendant in a building somewhere and that they had been in there together for a long time. D.W.'s mother then instructed her to get out of the car and look for street signs so she could find their location. After D.W. provided the details to her mother, defendant and L.W. exited the building and returned to the car. Defendant then drove them home. D.W. confirmed that her sister was acting nervous in the car, but she did not say anything. When they got home, L.W. talked to their mother. When D.W. asked her sister what happened, L.W. pointed to her "private part" and responded that when she was alone with defendant, he was "feeling on her" and "made her lay on him."

¶ 9 Geneva O., the victim's mother and defendant's daughter, confirmed that defendant picked up her children on February 9, 2007, and took them with him to do some repairs at her uncle's church. When defendant did not arrive with the children at the time she expected him to return, Geneva began calling defendant and her oldest daughter, D.W., on their cell phones.

After speaking with her daughter, Geneva placed additional calls to defendant. When he finally answered, defendant told her he had taken the children to another job site. When defendant returned her children home, she asked him why he had not answered his phone, why he had been gone so long and why he had been alone with L.W. in a building. Defendant did not give any direct responses to her questions. After defendant left, Geneva spoke to L.W. Following their conversation, Geneva called her mother and then took her daughter to Rush Medical Center (Rush). Geneva confirmed that prior to that date she had gotten along "fair enough" with her father and that she had felt comfortable leaving her children in his care.

¶ 10 Barbara Doherty, a registered trauma nurse with sexual assault training, testified that she examined L.W. when she arrived at Rush on February 9, 2007. L.W. informed her that defendant removed his pants as well as her pants, instructed her to lie on top of him, and then kissed her on her lips. Defendant then kept "pushing" his private parts against hers, "touch[ing] the outside of her private parts" with his "private parts." L.W. stated that "her legs [were] sticking together at the time of the touch." Nurse Doherty further testified she collected the clothing that L.W. had been wearing at the time of the assault. At the time that L.W. arrived at the hospital, she was not wearing underwear, which was something that Nurse Doherty thought was unusual. Vaginal and anal swabs were then taken from L.W. Additional swabs were taken from each of L.W.'s inner thighs. Nurse Doherty noticed that there appeared to be dried secretions on L.W.'s inner thighs, near her genitals. A blood sample was also taken and the swabs and blood sample were then sealed in a criminal sexual assault kit, which was later picked up by a Chicago Police Officer.

¶ 11 Doctor Nadhi Kukreja testified that he was pediatric resident employed at Rush on

February 10, 2007, when he performed a sexual assault examination on L.W. L.W. reported that she had been with her siblings and defendant earlier that day and that she accompanied her grandfather into a building. When she and defendant were alone in the building, they went upstairs. Defendant removed his pants and instructed L.W. to remove her pants. After L.W. lay down, she reported that defendant "placed his penis next to * * * her private parts." During his physical examination of L.W., Doctor Kukreja noticed that appeared to be a moist smear on her inner thigh, but did not notice any obvious signs of injury or trauma to L.W. He confirmed that swabs were taken from L.W.'s vagina, rectum and inner thighs because L.W. had informed him that defendant's genitalia contacted her in that vicinity. Doctor Kukreja confirmed that L.W.'s hymen was intact, but confirmed that the presence of a hymen did "not rule out contact" between defendant's penis and her vagina.

¶ 12 Detective Greg Grandon, a member of the Chicago Police Department's Special Investigations Unit, testified that he met with defendant on August 10, 2007. After providing defendant with his *Miranda* rights, defendant agreed to speak with him. Defendant denied engaging in any type of sexual conduct with L.W. and told Detective Grandon that the allegations were made up by his wife and his daughter. Defendant explained that he believed that his wife removed one of his condoms after they engaged in sexual intercourse and that she must have saved the contents in a refrigerator or freezer. Defendant further explained that he believed that his wife must have found out that he had had affairs with other women and speculated that she wanted to punish him. Detective Grandon reported that defendant appeared to be cooperative during their conversation and had agreed to provide a buccal sample.

¶ 13 The parties stipulated that Angel Mosqueda, an evidence technician with the Chicago Police Department received a sealed sexual assault evidence kit from Rush Medical Center as well as a sealed bag containing L.W.'s clothing and other inventoried items. The parties further testified that William Jackson, another evidence technician with the Chicago Police Department collected and inventoried a buccal swab from defendant.

¶ 14 Greg Didomenic, a forensic scientist and DNA coordinator for the Illinois State Police testified that he received the sexual assault kit containing swabs taken from L.W. He examined and tested the swabs and concluded that swabs each tested positive for the presence of semen.

¶ 15 Janet Youngsteadt, a forensic scientist with the Illinois State Police, was assigned to conduct DNA analysis and generate a DNA profile from samples taken from L.W. and the buccal swab taken from defendant. Youngsteadt testified that defendant could not be excluded as the male donor of the DNA found on the vaginal swab taken from L.W. Defendant's DNA profile was conclusively determined to be present on the rectal swab taken from the victim as well as on the swabs taken from L.W.'s inner thighs.

¶ 16 After presenting the aforementioned evidence, the State rested. Defendant elected not to testify. The only witness called by the defense was Michelle Brown, defendant's ex-wife and L.W.'s grandmother. Brown testified that she received a phone call from her daughter Geneva on February 9, 2007, and drove to the hospital. When Brown returned home, she immediately had the locks changed. She also sought, and subsequently obtained, an order of protection against defendant, which effectively prohibited him from returning to their home. Brown also initiated divorce proceedings. Brown denied that she ever threatened to send defendant to jail and did not

recall overhearing her daughter threaten her father. She also denied ever collecting or saving defendant's semen in order to plant evidence and get him in trouble and out of her house.

¶ 17 The parties then delivered closing arguments. After considering the evidence, the trial court acquitted defendant of counts 3 and 11, criminal sexual abuse and criminal sexual assault predicated on use of force, because there was no evidence that defendant used force or threatened the use of force during the assault. It found defendant guilty of the remaining counts. The court explained its ruling as follows:

> "This is a multi-count indictment here. As to counts 3 and 11, allegations of criminal sexual abuse by force, and criminal sexual assault by force, whatever happened here, I don't find that force was used in the method that we are advised of, is required, and there are laws in the state of Illinois, and everything else notwithstanding, the facts of the case, and as troubling as the facts are, the defendant is given the benefit of the doubt and discharged not guilty as to counts 3 and 11, because I don't believe the government has met their burden of proof as to the element about force.
>
> As to the remaining charges, there is no question in the court's mind but that [L.W.] was giving accurate, compelling testimony about how the semen of her grandfather got on her body. I found her credible and compelling and credible beyond a reasonable doubt.
>
> I am also mindful of the fact that the physical examination showed some things and did not show other things; in particular, her hymen was still intact. She was obviously not a promiscuous child and had not had her hymen altered by any kind of

penetration or something that may have happened to the hymen.

And I've looked carefully at the statute and Illinois law about what is required. I'm mindful of the definition of penetration and contact. And to prove sexual penetration, the government must prove contact, however slight, between the sex organ of one person and sex organ of another.

The testimony about this evidence comes from the mouth of [L.W.] when she talks about her grandfather laying her down, undressing her, mounting her, pumping her. And she talked about more than contact, she talked about more than contact, she talked about penetration, that he is penetrating her vagina, albeit not to the extent that her hymen was changed or altered physically, but that she was indeed penetrated.

I find that the government has indeed, in light of all the evidence in this case, met their burden of proof, and I find [defendant] guilty of [the remaining charges]."

¶ 18 Thereafter, the cause proceeded to a sentencing hearing where the parties advanced arguments in aggravation and mitigation. Defendant was provided with the opportunity to address the court in allocution and proclaimed his innocence of the charged offenses. After hearing and considering the evidence, the court addressed the parties as follows:

"I've heard the evidence in this case, and I've considered everything present at trial and at the sentencing hearing and the matters in the pre-sentence investigation, and I will not hold it against someone that they want to assert their innocence after a conviction and at a sentencing. You have a right to do that.

I will note that a nine-year-old child testified in court. It was very, very difficult, sad

testimony for anybody that happened to have been in the court to hear her talk about a betrayal by her grandfather in the matter in which this happened, and it wasn't just what she said but the manner in which she did it and how she talked to her mom on the phone, and stressed that her s[iblings] in the car, they were waiting for her to come out of the abandoned building with their grandfather. All of that led up to the police getting involved very early on, taking her to the hospital, finding [defendant's] DNA all over her vaginal area, exactly in the manner that she described it might have been.

The evidence in this case is extremely compelling and extremely clear and extremely troubling, and I have a person here, although– and I'll acknowledge so far as these types of cases go[] there could have been– and unfortunately we have to listen to matters where there is more violence that is imposed and penetrations may be much more severe than happened here, and there may be other injuries that people suffer when they are being taken sexually against their will, other injuries and threats and none of that happened here.

She was told, as a nine-year-old child, to lay down, take off your clothes, and the grandfather mounted her and ejaculate[d] all over her and penetrated her while doing so, albeit without any other injuries.

[Defendant] does have prior criminal history. He served serious time for a serious felony offense in the past. The family described how they stood with him through thick and thin, and they feel a horrible sense of betrayal, which is clear.

I have to be concerned about the fact that in sentencing I have to consider

everything, including the offense, and the penetration here was a slighter one than some sexual offenses, but it was horrific insofar as the [victim was defendant's] nine-year-old grand[daughter] of all things. And he does have a criminal record.

And I see now some degrees of– even though I don't hold it against him that he wants to assert his innocence, but some manipulations in trying to blame other people for framing him and how somebody would come up with some idea of framing him by putting their granddaughter– his granddaughter through the trauma of having to pretend to be a rape victim, ejaculate all over her, and go through everything she did. I haven't heard many things like that.

I note that this is an 85 percent case on counts one and two, and I know [defendant] is already in his 50s. [The State] is asking for an extended term, and I'm being asked for a minimum sentence on the other end. I do find this case to be very serious, and the amount of betrayal is just appalling.

As to counts one and two [predatory criminal sexual assault], the sentence will be 28 years in the penitentiary. As to counts four, five, and six, criminal sexual assault, fifteen years in the penitentiary on each. As to count seven, the aggravated criminal sexual abuse, it will be seven years in the penitentiary. All of it runs concurrent."

Defendant's post-trial and post-sentencing motions were denied and this appeal followed.

¶ 19 II. ANALYSIS

¶ 20 A. One-Act, One-Crime

¶ 21 On appeal, defendant first argues that six of his convictions must be vacated because they

were entered in violation of the one-act, one-crime doctrine. In support of his argument, defendant observes that he was charged with, and convicted of, multiple sex crimes against a single victim. Although he acknowledges that "the charges for these offenses allege both penis-to-vagina contact ('sexual penetration') and the resulting semen transmission ('sexual conduct'), this conduct comprise[d] a single continuous act." Accordingly, because "there was a single victim in a single location, and the successive parts of th[e] act were interrelated, not interrupted by any intervening events, and occurred nearly simultaneously," defendant argues that "six of [his] seven convictions should be vacated, leaving only the most serious offense: predatory criminal sexual assault."

¶ 22 The State concedes that the one-act, one-crime rule was violated in the instant case, but disputes the appropriate remedy. Specifically, the State argues that "where defendant committed two separate acts, where he was charged with committing separate acts, and where the court in th[e] bench trial found him guilty of committing the separate offenses, the court properly convicted defendant of a single count of predatory criminal sexual assault (count 2) and a single count of aggravated criminal sexual abuse (count 7)." The State agrees, however, that the remaining convictions should be vacated on one-act, one-crime rule grounds.

¶ 23 As a threshold matter, we note that defendant acknowledges that he failed to properly preserve this issue for review; however, "the plain error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either: (1) the evidence is so close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness or the evidence." *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005).

It is well-established that "[f]orfeited one-act, one-crime arguments are properly reviewed under the second prong of the plain-error rule because they implicate the integrity of the judicial process." *People v. Nunez*, 236 Ill. 2d 488 (2010); see also *People v. Span*, 2011 IL App (1st) 083037, ¶ 81. Under the second prong of plain error analysis, "a court may disregard forfeiture where a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *People v. Artis*, 232 Ill. 2d 156, 165 (2009). The first step in plain error review is to first determine whether any error occurred. *People v. Rinehart*, 2012 IL 111719, ¶ 15. Keeping these principles in mind, we turn to the merit of the instant appeal.

¶ 24 Pursuant to the one-act, one-crime doctrine, a criminal defendant may not be convicted of more than one offense "carved from the same physical act." *People v. King*, 66 Ill. 2d 551, 566 (1977); see also *People v. Hampton*, 406 Ill. App. 3d 925, 943 (2010). For purposes of one-act, one-crime analysis, an "act" has been defined as "any overt or outward manifestation which will support a direct offense." *King*, 66 Ill. 2d at 566; *People v. Rodriguez*, 169 Ill. 2d 183, 188 (1996); *People v. Rivera*, 2014 IL App (1st) 121793-U, ¶ 6. If the defendant committed multiple acts, then multiple convictions are permitted even though there is a relationship between the acts. *People v. Campbell*, 2014 IL App (1st) 112926, ¶ 83. However, although a criminal defendant may be convicted of multiple offenses where a common act is part of both offenses, to sustain multiple convictions the charging instrument must indicate the State's intent to treat the defendant's conduct as separate multiple acts. *People v. Crespo*, 203 Ill. 2d 335, 345 (2001); *Rodriguez*, 169 Ill. 2d at 188. In the event that a defendant is convicted of more than one offense

based upon the same single physical act, the remedy is to vacate the convictions for the less serious offense. *People v. Johnson*, 237 Ill. 2d 81, 97 (2010); *Artis*, 232 Ill. 2d at 170 ("This court has 'always held' that under the one-act, one-crime doctrine, sentence should be imposed on the more serious offense and the less serious offense should be vacated"). Whether multiple convictions violate the one-act, one-crime doctrine is a question of law and is thus subject to *de novo* review. *Johnson*, 237 Ill. 2d at 97.

¶ 25 To determine whether a one-act, one-crime violation has occurred, a court must engage in a two-step inquiry. *People v. Miller*, 238 Ill. 2d 161, 165 (2010); *People v. Span*, 2011 IL App (1st) ¶ 81. First, the court must determine whether the defendant's conduct involved a single act or multiple acts. *Miller*, 238 Ill. 2d at 165; *Artis*, 232 Ill. 2d at 165. If the conduct involved multiple acts, the second step is to determine if any of the offenses are lesser-included offenses. *Miller*, 238 Ill. 2d at 165. "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." *King*, 66 Ill. 2d at 566; *Artis*, 232 Ill. 2d at 161.

¶ 26 Here, it is evident from the record that the State charged defendant with multiple sex crimes, including predatory criminal sexual assault, criminal sexual assault, criminal sexual abuse, and aggravated criminal sexual abuse. The basis for the charges were two separate acts: (1) an act of sexual penetration, i.e., penis to vagina contact; and (2) the transmission of semen on the victim. It is also evident from the record that the circuit court found that defendant had committed those two separate acts. Where, as here, a defendant commits more than one sex act against a victim during the course of a sexual assault, multiple convictions do not violate the one-

act, one-crime doctrine. *See, e.g., People v. Segara*, 126 Ill. 2d 70, 77 (1988) (finding that two acts of sexual contact committed against one victim during a single transaction, including vaginal and oral penetration, could support two convictions for aggravated criminal sexual assault); *People v. Hestand*, 362 Ill. App. 3d 272, 278 (2005) (finding that the defendant's convictions for one count of criminal sexual assault and one count of aggravated criminal sexual abuse did not violate the one-act, one-crime doctrine where the indictment alleged one act of "sexual penetration" and one act of "sexual conduct" against the single victim).

¶ 27 Having found that defendant's conduct involved two separate acts, we reiterate that the one-act, one-crime doctrine does not preclude two convictions of two different offenses as long as one offense is not a lesser included offense of the other. See *Campbell*, 2014 Il App (1st) 112926, ¶ 83 (recognizing that if a defendant commits multiple acts, then multiple convictions are permitted under the one-act, one-crime doctrine). Here, the most serious offense predicated on an act of sexual penetration was predatory criminal sexual assault while the most serious offense predicated on an act of transmission of semen was aggravated criminal sexual abuse. Pursuant to the one-act, one-crime doctrine, defendant could be properly convicted of one count of predatory criminal sexual assault and one count of aggravated criminal sexual abuse as long as aggravated criminal sexual abuse is not a lesser included offense of predatory criminal sexual assault.

¶ 28 The abstract elements approach is the proper approach to determine whether one charged offense is a lesser-included offense from another charged offense for purposes of one-act, one-crime doctrine analysis. *Miller*, 238 Ill. 2d at 173-74; *Span*, 2011 IL App (1st) 083037, ¶ 89. To

do so, a court must compare the statutory elements of one offense to the other offense to determine whether "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. " *Miller*, 238 Ill. 2d at 166.

¶ 29 Pursuant to the Criminal Code of 1961 (Criminal Code), "(a) The accused commits predatory sexual assault of a child if: (1) The accused was 17 years of age or over and commits an act of sexual penetration with a victim who was under 13 years of age when the act was committed." 720 ILCS 5/12-14.1(a)(1) (West 2006). The term "sexual penetration," is defined as "any contact, however slight, between the sex organs or anus of one person and an object or 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 ILCS5/12-12(f) (West 2006).

¶ 30 The elements of the offense of aggravated criminal sexual abuse, in turn, are set forth in the Criminal Code as follows: "The accused commits aggravated criminal sexual abuse if he or she commits an act of sexual conduct with a victim who was under 18 years of age when the act was committed and the accused was a family member." 720 ILCS 5/12-16(b) (West 2006). The term "sexual conduct" is defined by the Criminal Code to mean "any intentional or knowing touching or fondling by the victim or the accused, either directly or through clothing, or the sex organs, anus or breast of the victim or the accused, or any part of the body of a child under 13 years of age, or any transfer or transmission of semen by the accused upon any part of the clothed

or unclothed body of the victim, for the purpose of sexual gratification." 720 ILCS 5/12-12(e) (West 2006).

¶ 31 In *People v. Stull*, 2014 IL App (4th) 12074, the Fourth District recently used the abstract elements approach and concluded:

> "[I]t is obvious that the offense of aggravated criminal sexual abuse is not a lesser-included offense of predatory criminal sexual assault of a child. Predatory criminal sexual assault of a child requires the element of sexual penetration as that term is defined, whereas aggravated criminal sexual abuse does not. In addition, the accused need not be a family member to commit the offense of predatory criminal sexual assault of a child, which is an element of the offense of aggravated criminal sexual abuse. In other words, it is possible to commit the offense of predatory criminal sexual assault of a child without necessarily committing the offense of aggravated criminal sexual abuse." *Stull*, 2014 IL App (4th) 12074, ¶ 64.

We agree with the Fourth District's analysis, and accordingly, we find that defendant was properly convicted of one count or predatory criminal sexual assault predicated on sexual penetration and one count of aggravated criminal sexual abuse predicated on the transmission of semen as those convictions are not precluded by the one-act, one-crime rule. The remaining counts, however, must be vacated as they were all predicated on acts of penetration and were imposed in violation of the one-act, one-crime doctrine. See *Johnson*, 237 Ill. 2d at 97 (In the event that a defendant is convicted of more than one offense based upon the same single physical act, the remedy is to vacate the convictions imposed on the less serious offenses).

¶ 32 B. Sentencing

¶ 33 Defendant next argues that he is entitled to a new sentencing hearing because the court considered improper factors including the victim's age and his familial relationship with the victim in imposing his sentence. Because those factors were elements of the charged offenses, defendant asserts that the court's consideration of those factors during his sentencing hearing amounted to an improper double enhancement. Defendant also suggests that remand for a new sentencing hearing is also warranted because the court misconstrued the victim's testimony and relied upon facts not in evidence in imposing his sentence.

¶ 34 The State, in turn, responds that the court did not consider any improper factors when it imposed defendant's sentence and argues that the court's consideration of relevant factors pertaining to the crime did not amount to an improper double enhancement and that the sentences imposed by the circuit court did not constitute an abuse of discretion.

¶ 35 The Illinois Constitution requires a trial court to impose a sentence that achieves a balance between the seriousness of the offense and the defendant's rehabilitative potential. Ill. Const. 1970, art. I, §11; *People v. Lee*, 379 Ill. App. 3d 533, 539 (2008). To find the proper balance, the trial court must consider appropriate aggravating and mitigating factors, which include: "the nature and circumstances of the crime, the defendant's conduct in the commission of the crime, and the defendant's personal history, including his age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment and education." *People v. Maldonado*, 240 Ill. App. 3d 470, 485-86 (1992). Because the trial court is in the best position to weigh these factors, the sentence that the trial court imposes is entitled to great deference and

will not be reversed absent an abuse of discretion. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000); *Lee*, 379 Ill. App. 3d at 539. Ultimately, a reviewing court may not re-weigh aggravating and mitigating factors in reviewing a defendant's challenge to her sentence, and it may not substitute its judgment for the trial court merely because it could or would have weighed the factors differently. *People v. Jones*, 376 Ill. App. 3d 372, 394 (2007).

¶ 36 Although a circuit court is afforded broad discretion at sentencing, however, it may not consider a factor that is implicit in the offense as an aggravating factor in determining the appropriate sentence. *People v. Phelps*, 211 Ill. 2d 1 (2004); *People v. Ellis*, 401 Ill. App. 3d 727, 730 (2010). "A double enhancement occurs when either (1) a single factor is used both as an element of an offense and as a basis for imposing a harsher sentence than might otherwise have been imposed, or (2) the same factor is used twice to elevate the severity of the offense itself." *People v. Guevara*, 216 Ill. 2d 533, 545 (2005). The double enhancement rule precludes such dual use of a single factor. *People v. Phelps*, 211 Ill. 2d 1, 11-12 (2004). The double enhancement rule is one of statutory construction and "the prohibition against double enhancements is based on the assumption that, in designating the appropriate range of punishment for a criminal offense, the legislature necessarily considered the factors inherent in the offense." *Phelps*, 211 Ill. 2d at 12. Although a court has discretion in imposing a sentence, the question of whether the court improperly imposed a sentence in violation of the prohibition against double enhancement is a question of law, which is subject to *de novo* review. *Phelps,* 211 Ill. 2d at 12; *People v. Shanklin*, 2014 Il App (1st) 120084, ¶ 91. Ultimately, a double enhancement error does not automatically require remand for a new sentencing hearing; rather, if

the record indicates that the circuit court's reference to an improperly considered aggravating factor was not significant and did not lead to a greater sentence, then remand for re-sentencing is not required. *People v. Shanklin*, 2014 Il App (1st) 120084, ¶ 91.

¶ 37 Here, we do not find that the court's reference to L.W.'s age amounted to an impermissible double enhancement. Although the victim's age is an element of the offense of predatory criminal sexual assault (720 ILCS 5/12-14.1(a)(1) (West 2006)) and aggravated criminal sexual abuse (720 ILCS 5/12-12 (West 2006)), based on our examination of the record, we do not find that the court's reference to L.W.'s age during the sentencing hearing demonstrates that defendant was subject to a double enhancement. The record demonstrates that prior to delivering defendant's sentence, the court detailed the circumstances of defendant's crime, referencing L.W.'s age, defendant's status as her grandfather, as well as the nature of the assault. Where, as here, the victim's age is an element of a charged offense, the court does not err in merely mentioning the victim's age at sentencing, as it is relevant to the nature of the case. See, *e.g.*, *Raney*, 2014 IL App (4th) 130551, ¶ 36 (finding no improper double enhancement where the court referenced the victim's age during the sentencing hearing even though the age of the victim was an element of the charged offense because it was evident from the record that the courts comments pertaining to the victim's age "related to the nature and circumstances of the offense and do not imply the court used these factors to enhance [the] defendant's sentence"); *People v. Thurmond*, 317 Ill. App. 3d 1133, 1144-45 (2000) (circuit court did not err in considering the age of the victim during the defendant's sentencing hearing because it pertained to the nature and circumstances of the offense, which is a relevant consideration). Similarly, the

court's reference to defendant's status as L.W.'s grandfather was also made during its discussion of the relevant nature and circumstances of the charged offenses and was not indicative of an improper reliance on an aggravating factor. Accordingly, we reject defendant's argument that he was subjected to an improper double enhancement.

¶ 38 We similarly reject defendant's contention that the court relied on facts not in evidence– namely, that L.W. was penetrated– in imposing his sentence. The court recounted L.W.'s testimony about the details of defendant's assault, including the fact that defendant had put "his long thing" on her "private part." Ultimately, we find that the court's statement that L.W. was penetrated constituted appropriate commentary on the evidence, and does not provide this court with a basis to remand for a new sentencing hearing.

¶ 39 III. CONCLUSION

¶ 40 For the reasons explained above, we affirm defendant's conviction on count 2, predatory criminal sexual assault, and on count 7, aggravated criminal sexual abuse. We do, however, note that in sentencing defendant to 28 years' and 7 years' imprisonment, respectively, the court mistakenly ordered that the sentences be served concurrently rather than consecutively as required by statute. See 730 ILCS 5/5-8-4(d)(2) (West 2006) (sentences for predatory criminal sexual assault and aggravated criminal sexual abuse must be served consecutively). We thus remand the cause to the circuit court for a new sentencing hearing on those two counts with instructions to consider the statutory requirement that the sentences must be served consecutively. As to the remaining counts, we note that the State *nolle prosed* counts 9 and 10 and defendant was acquitted of counts 3 and 11. Counts 8, 12, and 13 were merged, and

accordingly, we need not address these counts. Defendant's convictions on counts 1, 4, 5, 6, however, are vacated as they were imposed in violation of the one-act, one-crime rule. Accordingly, the judgment of the circuit court is affirmed in part, vacated in part, and remanded with instructions.

¶ 41 Affirmed in part; vacated in part; remanded with instructions.