2015 IL App (1st) 123367-U

FIRST DIVISION
JUNE 29, 2015

No. 1-12-3367

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. 08 CR 6006
	)	
ANJENAI BOLDEN,	)	Honorable
	)	Steven J. Goebel,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Delort and Justice Connors concurred in the judgment.

ORDER

¶ 1 *Held*: Evidence was sufficient to establish that defendant displayed a knife during the commission of the offense of aggravated criminal sexual assault; defense counsel provided effective assistance of counsel at trial; the one-act, one-crime rule requires that one of the two convictions for aggravated criminal sexual assault be vacated.

¶ 2 Following a bench trial, the circuit court of Cook County found defendant Anjenai Bolden guilty of two counts of aggravated criminal sexual assault (720 ILCS 5/12-14 (West

2008)).[1] Subsequently, the defendant was sentenced to concurrent prison terms of 16 years and 8 years for his convictions. On direct appeal, the defendant argues that: (1) the evidence was insufficient to prove beyond a reasonable doubt that he displayed a knife during the commission of the offense; (2) defense counsel was ineffective for failing to impeach the victim at trial with his prior inconsistent statements; and (3) one of his two convictions for aggravated criminal sexual assault should be vacated where only a single act of sexual penetration was alleged or proven at trial. For the following reasons, we affirm in part and vacate in part the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 On March 27, 2008, the defendant was charged with multiple counts of aggravated criminal sexual assault; aggravated kidnapping; kidnapping; criminal sexual assault; aggravated criminal sexual abuse; criminal sexual abuse; aggravated unlawful restraint; and unlawful restraint.[2]

¶ 5 On January 12, 2012, a bench trial commenced which lasted for several non-continuous days over the course of several months. The victim, S.O., testified at trial that he was 15 years old and a student in the eighth grade on February 27, 2008. At about 3:30 p.m. on February 27, 2008, he called the "Gay Blade" party line and had a private one-on-one conversation with a man. S.O. and the man exchanged telephone numbers and agreed to meet in person at a Jewel-Osco grocery store near 87th Street and Lafayette Avenue in Chicago. The man had promised to

[1] The aggravated criminal sexual assault statute was renumbered as 720 ILCS 5/11-1.30 in July 2011.

[2] The State elected to only proceed against the defendant at trial on charges of aggravated criminal sexual assault (counts 1 and 2); criminal sexual assault (count 20); aggravated criminal sexual abuse (counts 21, 22 and 25); aggravated unlawful restraint (count 29) and unlawful restraint (count 30).

help S.O. buy some shoes, but did not indicate what S.O. had to do in exchange for the money. At 6 p.m., S.O. went to the designated meeting place and met with the man, who had previously given S.O. a description of his vehicle. At trial, S.O. identified the defendant as the man sitting in the parked vehicle. S.O. testified that he entered the defendant's vehicle and they drove to the defendant's home at 87th Street and Cottage Grove Avenue because the defendant had left his wallet at home. The weather was cold and snowy, and S.O. was wearing jeans, a shirt, boxers, gym shoes, and a coat. The defendant and S.O. then entered the basement of an apartment building, went into a small storage closet in the basement, and S.O. sat on a bucket in the closet while the defendant went upstairs for about 10 minutes. After the defendant returned with some vodka, the two talked to "[get] to know each other." The defendant then asked S.O. several times to undress, and S.O. responded by removing only his shoes and coat. The defendant then became aggressive, demanded that S.O. take off the rest of his clothes or else be killed. Defendant then picked up a knife from a shoebox, and held the knife "as if he was going to use it." Once the defendant grabbed the knife, S.O. began screaming and tried to leave. The defendant stifled S.O.'s screams by placing a hand over S.O.'s mouth while wielding the knife in his other hand. The two began to struggle as S.O. tried to take the knife away from the defendant, and the knife fell to the floor. The defendant then became more aggressive and held S.O. tighter by wrapping his arms around S.O.'s neck from behind and placing his hand over S.O.'s mouth while S.O. continued to scream. During this struggle, the defendant removed S.O.'s jeans, boxers and shirt, as well as his own clothing. The defendant then attempted to insert his penis into S.O.'s anus. S.O. testified that the defendant's penis touched S.O.'s anus, but the defendant was unable to insert it all the way because S.O. turned around to face him and sat down on the bucket. When S.O. sat down on the bucket, the defendant "[h]eld [S.O.'s] neck and

then put [S.O.'s] mouth toward [the defendant's] penis." The defendant's penis made contact with his mouth, and S.O. again tried to leave. At that point, someone came out of a basement apartment unit and S.O. heard a female voice but did not see the person. When S.O. heard the female voice, he screamed and again tried to exit the storage closet. However, the defendant covered S.O.'s mouth with his hand, prevented S.O. from leaving, and "told the woman that everything was okay." S.O. then threw a "temper tantrum" by screaming and kicking things in the closet, and the defendant "had no choice but to let [S.O.] go." S.O. then ran out of the closet screaming, saw the woman reemerge from her apartment unit, and tried to enter the woman's apartment unit. However, the woman refused to allow S.O. to enter her apartment and S.O. instead ran outside to a nearby gas station, where he alerted a female bystander to call the police. S.O. was completely nude as he escaped the apartment building and the female bystander gave S.O. a scarf to cover himself. S.O. testified that the door to the storage closet was closed during the attack, that he never consented to any sexual acts with the defendant, and that he never consented to perform any sexual acts in exchange for money.

¶ 6 After the police arrived, S.O. told them what had happened and they took him back to the apartment building, where they observed S.O.'s clothes laying in the street directly in front of the defendant's house. S.O. provided the police with a description of the offender, after which the police brought the defendant out of the apartment building and S.O. identified him as his attacker. S.O. then accompanied the police to the police station and later went home. The next day, S.O. went back to the police station, met with detectives assigned to the case, and recounted the events of the previous night. S.O. then identified the defendant in a police lineup as the person who had sexually assaulted him. The police also took photographs of the scratches on S.O.'s face, which S.O. described were caused by the defendant's "holding [S.O.'s] mouth."

¶ 7 On cross-examination, S.O. testified that that he did not initially tell the police at the gas station that he met the defendant on the party chat line, and that the police found out about the party chat line when they "pulled up phone records" on his mother's cellular telephone which S.O. had used to make the calls. On redirect, S.O. clarified that while he did not initially tell the police officers at the gas station about the party line calls, he did tell the detectives about the party chat line at the police station. On recross, S.O. denied that he only informed the detectives about the party chat line at the police station after they had discovered it in the telephone records.

¶ 8 G.R. testified on behalf of the State that the defendant was his stepfather's brother and they had known each other for G.R.'s entire life. On February 16, 2008, between 9 p.m. and 11 p.m., the defendant picked G.R. up and the pair went to a liquor store. G.R. was 16 years old at that time. After purchasing liquor, they went to the home of G.R.'s friend for 10 to 15 minutes, after which G.R. and the defendant went to the defendant's house at 87th Street and Cottage Grove Avenue. They went downstairs to the defendant's basement two-bedroom apartment where they smoked marijuana and drank liquor in one of the two bedrooms. At trial, G.R. testified that there was a utility closet in the basement across from the defendant's apartment unit. After drinking alcohol and smoking marijuana, G.R. fell asleep on his stomach on the bed in the bedroom. When G.R. awoke, G.R.'s clothes had been pulled down and the defendant was on top of him. G.R. told the defendant to get off him. The defendant then restrained G.R.'s forearms with his hands and told G.R. to "stop playing before I hit you." G.R. unsuccessfully struggled to get the defendant off his body because the defendant was too strong. Without G.R.'s consent, the defendant inserted lotion and his penis into G.R.'s anus for about 15 to 25 minutes. During the attack, G.R. continued to resist and yell, while the defendant "grabb[ed]" G.R.'s mouth to prevent him from screaming. Following the sexual assault, G.R. went into the bathroom and later lay on

the floor of the second bedroom. G.R. testified that he was in shock and his forearms hurt. The defendant then came into the second bedroom and lay next to G.R. The next morning, the defendant drove G.R. home and told G.R. not to tell anyone about what had happened. However, G.R. told his mother about the attack and she took him to the hospital for treatment.

¶ 9 Sharee Johnson (Sharee) testified that on February 27, 2008, she was visiting her daughter's basement apartment unit at 8745 South Cottage Grove Avenue in Chicago. In the late evening, Sharee heard a lot of noise and "a boy hollering for help" in the hallway. Sharee opened the door but kept the door chain on, and saw a completely naked teenage boy. The teenage boy, who appeared to be 14 years old, tried to push her door open but Sharee did not allow him inside her daughter's apartment. Sharee also observed the defendant holding the boy "like he was trying to choke him." The teenage boy then ran outside of the building, after which Sharee fully opened her door and saw the janitor who worked in the building. At trial, Sharee made an in-court identification of the defendant as the janitor who worked inside the apartment building. Sharee testified that after the teenage boy escaped, she observed the defendant wearing a shirt and a pair of pants. On cross-examination, Sharee testified that she called the police as soon as she heard someone hollering and before she opened the door. She stated that another female neighbor also came out into the hallway and the two of them spoke with each other. When the police arrived, the defendant was standing upstairs against the wall near her door.

¶ 10 Tracey Jackson (Tracey) testified that on February 27, 2008, she lived in the basement level of an apartment building at 8745 South Cottage Grove Avenue. The building consisted of three floors. At about 9:50 p.m., Tracey heard scuffling noises, heard a scream and a knock at the door, and looked out the peephole of her apartment door. Tracey saw the defendant, whom she recognized as a worker in the building. Tracey testified that she then heard a "higher-pitched

voice" yell for "help," which she thought was a female's voice, and heard the defendant say, "[d]on't worry about it, he got it under control." Tracey and her boyfriend then called the police, who arrived shortly thereafter.

¶ 11 Detective Clifford Martin (Detective Martin) testified that at 11:45 p.m. on February 27, 2008, he and Detective Shirley Colvin (Detective Colvin) responded to a call about an offender in custody. At trial, Detective Martin identified the defendant as the person who was in police custody. Detective Martin spoke with the victim, S.O., before going to the crime scene at 8745 South Cottage Grove Avenue. At the crime scene, Detective Martin observed two basement apartment units in the building, as well as a utility closet. He then searched the utility closet but did not recover a knife. On February 28, 2008, the defendant was placed in a lineup at the police station and Detective Martin also interviewed the defendant after he waived his *Miranda* rights. During the interview, the defendant told Detective Martin that he had met S.O. on a party chat line, that they had exchanged telephone numbers, that they had agreed to meet in person, and that the defendant had picked S.O. up and had gone to the defendant's residence at 8745 South Cottage Grove Avenue. The defendant informed Detective Martin that he and S.O. went to the hallway on a lower level of the apartment building, that they sat and talked, and that the defendant asked S.O. to undress and to give the defendant oral sex. According to the defendant, S.O. agreed but, during oral sex, S.O. wanted to stop and the defendant "pushed his head back down to get him to continue" when S.O. tried to stop. The defendant told the detective that after pushing S.O.'s head down, S.O. became hysterical by screaming and struggling. The defendant then covered S.O.'s mouth with his hand so as to not "get him caught." The defendant stated that at that point, neighbor Tracey came to her door and asked if everything was okay, to which the defendant responded that everything was okay. The defendant told Detective Martin that S.O.

then calmed down for a moment before getting hysterical again, after which the defendant told S.O. to leave and S.O. ran out of the building naked. Detective Martin testified that the defendant provided him with a handwritten statement of the incident. At 12:30 a.m. on February 29, 2008, Detective Martin was present when the defendant provided another incriminating statement to Assistant State's Attorney Kelly Navarro (ASA Navarro), who prepared it in writing and the defendant signed it. At trial, the defendant's two incriminating handwritten statements were published to the court and admitted as evidence.

¶ 12 Bonnie Rogers-Carey (Bonnie) testified that at about 10 p.m. on February 27, 2008, she was walking to a gas station with her granddaughter at 87th Street and Cottage Grove Avenue when a teenage boy ran up to them. The teenage boy was completely nude and the temperature outside was freezing. The teenager was agitated and frightened, and Bonnie gave him a scarf to cover himself. The teenager told Bonnie that he had been accosted and taken to a basement. The trio then ran to the nearby gas station, where Bonnie asked the attendant to call the police. Before they arrived at the gas station, Bonnie saw a man standing in the back of a gangway. Once the police arrived, Bonnie had a short conversation with them and then went home with her granddaughter. During her trial testimony, the prosecutor asked Bonnie to explain what the teenager had specifically told her, to which defense counsel objected. The trial court overruled the objection, and Bonnie testified that the teenager had told her that he had taken a shortcut when a man ran up to him and forced him at knifepoint into a basement where he was forced to remove all of his clothing. At that point, the trial court sustained defense counsel's objection and said it would not consider the victim's statement. On cross-examination, defense counsel questioned Bonnie regarding her testimony that the victim had told her that he had been abducted while taking a shortcut through a gangway. The prosecutor objected and reminded the court that

it had previously "struck the whole line of questioning." The trial court then sustained the prosecutor's objection and noted that it had previously "struck that."

¶ 13 The State then rested its case-in-chief. Defense counsel made a motion for a directed finding, which the trial court denied.

¶ 14 The defendant testified on his own behalf that at about 3:30 p.m. on February 27, 2008, he and S.O. had a telephone conversation on an underground homosexual chat line. They chatted about money, exchanged telephone numbers, and made arrangements to meet in person. He testified that S.O. never discussed wanting money for shoes, that the defendant advertised on the chat line as someone "looking to pay to play" which meant "pay for sex," and that S.O. advertised himself as someone who preferred to be a "bottom" which meant he wanted to receive penetration. According to the defendant, he picked S.O. up on the block where S.O. lived and drove to the defendant's apartment building. They went to the storage room area in the basement of the building, and the defendant went inside the closet while S.O. sat on a bucket outside of the closet. The pair drank alcohol, smoked marijuana, and talked for four hours. During the conversation, S.O. asked to see the defendant's penis and voluntarily removed his own clothing. The defendant also undressed. S.O. then performed oral sex on the defendant, but stopped during the act and told the defendant that he wanted his money. The defendant responded that he would not pay S.O. unless he finished the sexual act, and pushed S.O.'s head back down as part of the sexual act. S.O. then became angry and hysterical by yelling and arguing about the money, at which time the defendant put his hand over S.O.'s mouth and asked S.O. to be quiet because they were both naked in an open area. A neighbor opened her door and asked if everything was okay, to which the defendant responded that it was. As S.O. became angrier and more hysterical by banging on the door to cause a scene, the defendant asked him to leave. The

defendant denied grabbing S.O.'s neck, denied ever threatening S.O. with a knife, and denied touching S.O.'s anus. The defendant testified that after S.O. ran out of the building, the defendant got dressed and tried to hand S.O. his clothes outside of the building. However, Bonnie told S.O. not to retrieve his clothes from the defendant and, as a result, the defendant threw S.O.'s clothes over the gate and went back inside the building to smoke a cigarette. The defendant then called the police to tell them that "this boy was acting hysterical, and that he was trying to cause a scene." After the police arrived, the defendant was arrested and placed into a police vehicle. The defendant testified that he told the police that he intended to pay S.O. for sex. He further testified that the handwritten statements provided to the police were given involuntarily and under coercion, that the police had refused his request for an attorney, and that the police had threatened to "put more cases on [him]" if he did not cooperate.

¶ 15 In rebuttal, the State presented the testimony of ASA Navarro and Detectives Martin and Colvin. They testified that the defendant's incriminating handwritten statements were given voluntarily, that they did not coerce him into signing the statements, that they did not threaten him with more charges, and that the defendant never asked for an attorney.

¶ 16 On July 10, 2012, the trial court found the defendant guilty of aggravated criminal sexual assault (counts 1 and 2); criminal sexual assault (count 20); aggravated criminal sexual abuse (counts 21, 22 and 25); aggravated unlawful restraint (count 29) and unlawful restraint (count 30). In making its ruling, the trial court found S.O. and the State's witnesses to be credible, found that the defendant used a knife to threaten and intimidate S.O. into complying with his sexual acts, and did not believe that the encounter was a "money for sex situation" as the defendant claimed.

¶ 17 On August 8, 2012, the defendant filed a motion for a new trial, arguing that the State failed to prove his guilt beyond a reasonable doubt. On September 27, 2012, the trial court granted the defendant's motion in part as to his convictions for aggravated unlawful restraint and unlawful restraint (counts 29 and 30), and entered a not guilty finding on those counts. However, the trial court denied the defendant's motion as to all remaining counts. The trial court then sentenced the defendant to a 16-year prison term for his conviction for aggravated criminal sexual assault (count 1), which included a 10-year enhancement for the use of a dangerous weapon other than a firearm, as well as a concurrent sentence of 8 years in prison for aggravated criminal sexual assault (count 2) based on the "same act." The trial court noted that his convictions for counts 20, 21, 22 and 25 all merged into counts 1 and 2.

¶ 18 On October 26, 2012, the trial court denied the defendant's motion to reconsider the sentence. On that same day, the defendant filed a notice of appeal. On February 21, 2014, this court allowed the defendant leave to file an amended notice of appeal to reflect the correct name in the body of the notice of appeal; the correct sentence of 16 years and 8 years; and the correct offense of two counts of aggravated criminal sexual assault.

¶ 19 ANALYSIS

¶ 20 We determine the following issues on appeal: (1) whether the evidence was sufficient to prove beyond a reasonable doubt that the defendant displayed a knife during the commission of the offense; (2) whether defense counsel provided ineffective assistance of counsel for not impeaching S.O. at trial with his prior inconsistent statements; and (3) whether one of his two convictions for aggravated criminal sexual assault should be vacated under the one-act, one-crime rule.

¶ 21 We first determine whether the evidence was sufficient to prove beyond a reasonable doubt that the defendant displayed a knife during the commission of the offense.

¶ 22 The defendant argues that the State failed to prove beyond a reasonable doubt that he displayed a knife during the commission of the offense, where no knife was ever recovered by the police and S.O.'s trial testimony that he wielded a knife was incredible because S.O. had initially exaggerated the violent nature of the incident when he first reported the crime to Bonnie and the police. Specifically, the defendant argues that the only evidence regarding the presence of a knife came from S.O.'s trial testimony, which was not corroborated by any other evidence, and that S.O.'s testimony was unbelievable because he had initially lied to Bonnie that he was accosted and taken to the basement against his will and had initially failed to tell the police that he had met the defendant on a party chat line. The defendant suggests that because S.O. initially embellished and misrepresented these parts of the encounter, S.O.'s claim that the defendant threatened him with a knife is called into question. The defendant suggests that it is "far more likely that S.O. invented a story in which he was victimized by a stranger at knifepoint in order to explain his presence in the basement and how he ended up outside without any clothes."

¶ 23 The State counters that the evidence, when viewed in a light most favorable to the State, established that the defendant used a knife during the commission of the offense of aggravated criminal sexual assault of S.O. The State argues that S.O. testified credibly about the incident, where three separate witnesses—Sharee, Tracey, and Bonnie—corroborated different portions of his account of the events. Evidence such as photographs of the scratch marks on S.O.'s face also corroborated S.O.'s testimony. The State contends that the fact that no knife was recovered did not negate S.O.'s testimony. Because it was within the province of the trial court, as the fact finder, to assess the credibility of witnesses and to weigh their testimony, the State argues that

the trial court's finding that S.O. testified credibly was not unsatisfactory, improbable, or implausible in light of the substantial corroborating evidence. The State further argues that although other witnesses did not provide any testimony about the use of a knife and that no knife was recovered, there was ample time after the attack and before the police arrived for the defendant to remove or destroy the knife. The State also argues that S.O. could not be considered incredible simply because he failed to mention that he met the defendant on a party chat line during the police officers' initial investigation, where in viewing the circumstances surrounding the incident, it was "reasonable that S.O. may have omitted some facts in the very beginning stages of the police investigation due to his youthful age, embarrassment, or desire to focus on more pressing issues, such as where defendant could be found." Likewise, the State contends that even if S.O. may have initially told Bonnie that he was accosted and forced into the basement by the defendant, rather than having voluntarily accompanied the defendant to the basement, this did not render all parts of S.O.'s testimony incredible.

¶ 24 When the sufficiency of the evidence is challenged on appeal, we must determine " 'whether, after viewing the evidence in the light most favorable to the [State], *any* rational trier of fact could have found the essential elements of the crime beyond the reasonable doubt.' " (Emphasis in original.) *People v. Graham*, 392 Ill. App. 3d 1001, 1008-09 (2009), quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). A reviewing court affords great deference to the trier of fact and does not retry the defendant on appeal. *People v. Smith*, 318 Ill. App. 3d 64, 73 (2000). It is within the province of the trier of fact "to assess the credibility of the witnesses, determine the appropriate weight of the testimony, and resolve conflicts or inconsistencies in the evidence." *Graham*, 392 Ill. App. 3d at 1009. The trier of fact is not required to accept any possible explanation compatible with the defendant's innocence and elevate it to the status of

reasonable doubt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 229 (2009). A reviewing court will not substitute its judgment for that of the trier of fact. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). A reviewing court must allow all reasonable inferences from the record in favor of the State. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). A criminal conviction will not be reversed "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to the defendant's guilt." *Graham*, 392 Ill. App. 3d at 1009.

¶ 25 In the case at bar, the defendant was convicted of and sentenced on two counts of aggravated criminal sexual assault of S.O. (counts 1 and 2). Count 1 alleged sexual penetration between the defendant's penis and S.O.'s mouth, with the aggravating factor being that the defendant displayed a knife during the commission of the offense. Count 2 alleged sexual penetration between the defendant's penis and S.O.'s mouth, with the aggravating factor being that the defendant caused bodily injury to S.O. The defendant's arguments on this issue pertain only to count 1.

¶ 26 A person commits the offense of criminal sexual assault when he commits an act of sexual penetration by the use of force or threat of force. 720 ILCS 5/12-13(a)(1) (West 2008).[3] A person commits the offense of *aggravated* criminal sexual assault when he commits criminal sexual assault and during the assault, an aggravating factor is present. 720 ILCS 5/12-14(a) (West 2008). An accused who is convicted of aggravated criminal sexual assault is subject to a Class X felony sentence. 720 ILCS 5/12-14(d)(1) (West 2008). Where the defendant has "displayed, threatened to use, or used a dangerous weapon, other than a firearm, or any object fashioned or utilized in such a manner as to lead the victim under the circumstances reasonably to believe it to be a dangerous weapon," which is an aggravating factor, the statute requires that a

[3] The criminal sexual assault statute was renumbered as 720 ILCS 5/11-1.20 in July 2011.

10-year term be added to the sentence imposed by the court. *Id.* Here, the defendant does not contest that his actions constituted criminal sexual assault, but argues that the State failed to prove beyond a reasonable doubt the aggravating factor in count 1—that is, the display of a knife during the attack—for which a 10-year mandatory sentence enhancement was added to the 6-year prison term, for a total of 16 years of imprisonment on count 1. The defendant requests that this court vacate the 10-year sentence enhancement and reduce his sentence on count 1 to six years of prison, or remand this case for resentencing.

¶ 27 Viewing the evidence in the light most favorable to the State, we find that the evidence was sufficient to prove beyond a reasonable doubt that the defendant committed aggravated criminal sexual assault against S.O. while displaying a knife during the commission of the offense. The State presented S.O.'s detailed testimony regarding the events prior to, during, and after the sexual assault by the defendant. S.O.'s testimony included details of how the defendant had picked up a knife held it "as if he was going to use it," how the defendant wielded the knife and used his free hand to cover S.O.'s mouth, and how the knife fell to the floor during the struggle. The State also presented evidence that S.O. subsequently identified the defendant as the perpetrator when the police brought the defendant out of the building, and again identified him as the offender in a police lineup at the police station. The State also presented as evidence photographs depicting scratches on S.O.'s face which he suffered as a result of the attack. The State also presented the testimony of G.R., who testified that the defendant had similarly attacked him 11 days prior to the incident involving S.O. Trial testimony by Sharee, Tracey, and Bonnie, also corroborated different portions of S.O.'s testimony. Sharee testified that she heard noises and a "boy hollering for help" in the hallway, opened the apartment door, and saw a completely naked teenage boy. Sharee observed the defendant holding the teenage boy "like he

was trying to choke him," and described how the teenage boy tried to push her door open. Sharee then observed the teenage boy flee from the building. Tracey, another neighbor, testified that on February 27, 2008, she heard scuffling noises, a scream, and a knock at the door. She heard someone yell for help, saw the defendant through a peephole on her door, and heard the defendant say "[d]on't worry about it, [I] got it under control." Bonnie testified at trial that on the evening of February 27, 2008, a completely nude teenage boy ran up to her and her granddaughter at 87th Street and Cottage Grove Avenue. She testified that the teenage boy was agitated and frightened, and that she assisted him by giving him a scarf to cover up and by asking a gas station attendant to call the police. Detective Martin also testified at trial regarding his interview with the defendant, in which the defendant detailed his sexual encounter with S.O. The State also presented the defendant's two incriminating handwritten statements at trial, which the trial court admitted into evidence. Given this evidence, we find that the trier of fact could reasonably have concluded that the defendant committed aggravated criminal sexual assault against S.O. while displaying a knife during the commission of the offense.

¶ 28 Notwithstanding the evidence, the defendant argues that the State failed to prove beyond a reasonable doubt that he displayed a knife during the commission of the offense, where no knife was ever recovered by the police, there was no corroborating evidence regarding the knife, and S.O.'s testimony about the presence of a knife was incredible because he had initially embellished and exaggerated the violent nature of the incident when he first reported the crime to the police and Bonnie. The defendant contends that because S.O. initially misrepresented these parts of the encounter, S.O.'s claim that the defendant threatened him with a knife is called into question. We reject the defendant's arguments. First, we find that the fact that the police never recovered a knife during their investigation of the crime, or that no witness testimony

corroborated S.O.'s testimony as to the existence of the knife, did not automatically negate S.O.'s testimony that the defendant displayed a knife during the sexual assault. See *People v. Daniels*, 311 Ill. App. 3d 276, 285 (2000) (rejecting defendant's argument that evidence was insufficient to convict him where no other witnesses actually saw him with a weapon; defendant's threat to use a pistol, even in the absence of the pistol being observed, displayed, produced, or later recovered, is sufficient to sustain his conviction for aggravated criminal sexual assault). Second, much of what the defendant argues on appeal pertains to the credibility of S.O., which we decline to reassess. It is strictly within the province of the trier of fact to assess the credibility of witnesses, determine the appropriate weight of the testimony, and resolve any conflicts and inconsistencies in the evidence. *Graham*, 392 Ill. App. 3d at 1009. We will not usurp the function of the trier of fact by substituting our judgment for that of the trial court in this case. *Sutherland*, 223 Ill. 2d at 242. Nor will we retry the defendant on appeal. See *Smith*, 318 Ill. App. 3d at 73; see generally *People v. Walton*, 221 Ill. App. 3d 782, 785 (1991) (a reviewing court should not gainsay the decision of the trial court simply because the judges of the reviewing court might have come to a different conclusion). Moreover, we note that although S.O., contrary to his trial testimony, had initially told Bonnie that he was accosted and taken to the basement against his will, and had initially failed to tell the police that he had met the defendant on a party chat line, we find that how the defendant met S.O., or how he ended up in the basement, bears little relevance to whether the defendant used a knife during the sexual assault in the storage closet. Further, the fact that S.O. did not initially mention certain facts to the police did not necessarily mean that S.O. was incredible as to the defendant's display of a knife during the attack. See *People v. Hardeman*, 203 Ill. App. 3d 482 (1990) (evidence was sufficient to sustain conviction of aggravated sexual assault where victim's trial testimony that

intercourse occurred was clear and convincing, even though she had not stated that fact to the police officer during investigation immediately following the crime and even though there was no physical evidence such as the presence of semen or physical injury to the vaginal area, to support a finding of sexual intercourse); see also *Siguenza-Brito*, 235 Ill. 2d at 229 (trier of fact is not required to accept any possible explanation compatible with defendant's innocence and elevate it to the status of reasonable doubt). Thus, based on our review of the record, we cannot say that the evidence was so improbable or unsatisfactory as to create a reasonable doubt that the defendant possessed a knife at the time of the offense. Therefore, we hold that the State proved beyond a reasonable doubt, the presence of the requisite aggravating factor to sustain the defendant's conviction and sentence under count 1. Accordingly, we reject the defendant's request that this court vacate the 10-year sentence enhancement on count 1, or remand this case for resentencing.

¶ 29 We next determine whether defense counsel was ineffective for not impeaching S.O. with his prior inconsistent statements at trial.

¶ 30 The defendant argues that a new trial is warranted because defense counsel was ineffective at trial for failing to impeach S.O. with his prior inconsistent statements to Bonnie and the police immediately after the incident. He argues that defense counsel failed to support the defense theory that S.O. was incredible, by not impeaching S.O. with his prior inconsistent statements and by successfully raising an objection to the State's attempt to admit one of the two statements. He contends that defense counsel's conduct was not sound trial strategy, where the prior inconsistent statements would have severely weakened S.O.'s credibility, and that he was prejudiced by defense counsel's performance because the outcome of the trial boiled down to a credibility contest between S.O. and the defendant as to what happened in the storage closet.

¶ 31 The State argues that defense counsel provided effective assistance at trial where counsel's decision not to present S.O.'s prior inconsistent statements was strategic and competent. Specifically, the State maintains that S.O.'s prior inconsistent statements would not have exonerated the defendant, and that questioning S.O. on why he initially provided a different account of the events would have merely highlighted damning testimony and would have been damaging for defense counsel to argue a theory that implicitly blamed the then 15-year-old S.O. for the sexual assault by the then 29-year-old defendant. The State further argues that the defendant was not prejudiced by defense counsel's decision not to impeach S.O. regarding the prior inconsistent statements, where the evidence of the defendant's guilt was overwhelming.

¶ 32 To prevail on a claim of ineffective assistance of counsel, the defendant: (1) must prove that counsel's performance fell below an objective standard of reasonableness so as to deprive him of the right to counsel under the sixth amendment (performance prong); and (2) that this substandard performance resulted in prejudice (prejudice prong). *Strickland v. Washington*, 466 U.S. 668, 687-94 (1984). To establish the performance prong, the defendant must overcome a strong presumption that, under the circumstances, the challenged action or inaction was sound trial strategy. *People v. Lopez*, 371 Ill. App. 3d 920, 929 (2007). Because effective assistance of counsel refers to competent, not perfect, representation, "matters relating to trial strategy are generally immune from claims of ineffective assistance of counsel." *Id.* at 929. Further, in determining the adequacy of counsel's representation, "a reviewing court will not consider isolated instances of misconduct, but rather the totality of the circumstances." *Id.* To establish prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *People v. King*, 316 Ill. App. 3d 901, 913 (2000). A reasonable probability is one that sufficiently undermines

confidence in the outcome. *Id.* The defendant must satisfy both prongs to prevail on his claim of ineffective assistance of counsel. However, a reviewing court may analyze the facts of the case under either prong first, and if it deems that the standard for that prong is not satisfied, it need not consider the other prong. *People v. Irvine*, 379 Ill. App. 3d 116, 129-30 (2008).

¶ 33 Where an accused claims ineffective assistance of counsel based on counsel's failure to impeach a witness with a prior inconsistent statement, the value of the potentially impeaching material must be put into perspective. *People v. Jimerson*, 127 Ill. 2d 12, 33 (1989). Counsel is not ineffective for failing to impeach a witness based on prior statements with minor variances and inconsistencies with regard to collateral matters. See *Id.* at 35-37 (finding counsel effective after failing to impeach the State's witnesses with inconsistent statements where the value of their inconsistent testimony was not great); *People v. Steidl*, 142 Ill. 2d 204, 242 (1991) (finding counsel effective after failing to impeach witness who originally did not name defendant as the killer, but did place defendant in the company of other offenders on the night in question).

¶ 34 At bar, defense counsel did not impeach S.O. at trial with his prior inconsistent statement to the police immediately after the incident. The record contains an arrest report prepared by Officer Crisler which stated that S.O. had informed the police that he had agreed to meet the defendant at 8700 South Cottage Grove Avenue. According to the report, S.O. and the defendant walked to 8745 South Cottage Grove Avenue together, where the defendant then "grabbed [S.O.] and dragged [him] to [the] basement," pulled S.O. into a "storage bin," threatened to kill S.O., produced a knife, and began removing S.O.'s clothing. During Bonnie's direct examination, the prosecutor asked her to explain what S.O. had specifically told her, to which defense counsel objected. The trial court initially overruled the objection, and Bonnie explained that S.O. had told her that he had taken a shortcut when a man ran up to him and forced him at knifepoint into

a basement where he was forced to undress. At that point, the trial court sustained defense counsel's objection and said it would not consider the victim's statement. On cross-examination, defense counsel tried to question Bonnie regarding her testimony that S.O. had told her how he had been abducted while taking a shortcut through a gangway. The prosecutor then raised an objection and reminded the court that it had previously "struck the whole line of questioning." The trial court then sustained the prosecutor's objection and noted that it had previously "struck that." Contrary to S.O.'s trial testimony, neither of S.O.'s two prior inconsistent statements mentioned that he had met the defendant on a party chat line or that he had voluntarily accompanied the defendant to the basement. The defendant now challenges defense counsel's failure to impeach S.O. on these points in order to undermine his credibility, noting that defense counsel had even successfully raised an objection to the State's attempt to admit S.O.'s prior inconsistent statement to Bonnie at trial.

¶ 35 We find that the defendant failed to establish his claim of ineffective assistance of counsel. First, based on our examination of the record, we cannot conclude that defense counsel was deficient for failing to impeach S.O. with his prior statements, where the value of the potentially impeaching material was not great, and the inconsistencies complained-of in the prior statements pertained to collateral matters such as how S.O. met the defendant and how they ended up in the basement of the building, rather than S.O.'s testimony about the sexual assault itself. See *Jimerson*, 127 Ill. 2d at 35-37. Second, even assuming, *arguendo*, that defense counsel's performance was deficient for failing to impeach S.O. with his prior inconsistent statements, the defendant's ineffective assistance of counsel claim must still fail where he cannot establish the prejudice prong under *Strickland*. Even if S.O.'s prior inconsistent statements had been presented, there was no reasonable probability that, but for counsel's errors, the result of the

trial would have been different. Therefore, we hold that the defendant's ineffective assistance of counsel claim must fail.

¶ 36 We next determine whether one of the defendant's two convictions for aggravated criminal sexual assault should be vacated under the one-act, one-crime rule, which we review *de novo*. See *People v. Nunez*, 236 Ill. 2d 488, 493 (2010).

¶ 37 The defendant argues that this court should vacate one of his two convictions for aggravated criminal sexual assault because the trial evidence revealed only one instance of penis-to-mouth contact. He contends that because the one-act, one-crime rule precludes a defendant from receiving multiple convictions and sentences for the same act, this court should vacate the less serious of the two convictions—count 2.

¶ 38 The State counters that the defendant was properly convicted of two counts of aggravated criminal sexual assault and that he should have received consecutive sentences for both counts. The State argues that there were two distinct contacts between the defendant's penis and S.O.'s mouth, that both convictions should stand, and that his sentences for both convictions should run consecutively. The State further argues that it is reasonable to infer from the defendant's incriminating statements, as well as the defendant's trial testimony and other corroborating evidence, that there were two separate and distinct acts of oral penetration. Thus, the State argues, the trial court should have imposed consecutive, rather than concurrent, sentences on counts 1 and 2. The State asserts that the trial court's conviction of the defendant on both counts 1 and 2 revealed that the court had actually concluded that he committed two separate acts.

¶ 39 In reply, the defendant argues that the State neither charged the defendant with separate acts of penetration, nor did it argue such theory at trial, and that the State argues for the first time on appeal, in violation of *People v. Crespo* (203 Ill. 2d 335 (2001)), that the defendant

committed two separate acts of penis-to-mouth penetration. As a result, the defendant maintains, the one-act, one-crime rule mandates that conviction for only one count of aggravated criminal sexual assault can remain. The defendant further argues that the State's references to the *corpus delicti* doctrine in its response brief, was wholly irrelevant to the instant issue. The defendant also counters that the trial court had expressly found that he committed a single act of penetration, contrary to the State's claims on appeal that it had found that he committed two separate acts. Further, he contends that the State's claim of two separate acts of penetration is not supported by the evidence or case law.

¶ 40 Initially, we note, and the defendant acknowledges, that this issue has been forfeited for review on appeal because he failed to raise it before the trial court. However, an alleged one-act, one-crime violation and the potential for a surplus conviction and sentence affects the integrity of the judicial process, thus satisfying the second prong of the plain error rule which allows plain errors affecting substantial rights to be reviewed on appeal. *People v. Harvey*, 211 Ill. 2d 368, 388-89 (2004). Therefore, we turn to the merits of the parties' arguments.

¶ 41 The one-act, one-crime rule prohibits multiple convictions where more than one offense is based on the same physical act. *Crespo*, 203 Ill. 2d 335; *People v. King*, 66 Ill. 2d 556 (1977). When multiple convictions of greater and lesser offenses are obtained for offenses arising from a single act, a sentence should be imposed on the most serious offense and the convictions on the less serious offenses should be vacated. *People v. Garcia*, 179 Ill. 2d 55, 71 (2002). In determining which offense is the more serious, a reviewing court compares the relative punishments prescribed by the legislature for each offense. *People v. Artis*, 232 Ill. 2d 156, 170 (2009).

¶ 42 In the present case, on September 27, 2012, the trial court sentenced the defendant to a 16-year prison term for his conviction for aggravated criminal sexual assault (count 1), which included a mandatory 10-year enhancement for the use of a dangerous weapon other than a firearm, and imposed a *concurrent* term of 8 years in prison for aggravated criminal sexual assault (count 2) based on the "same act." At the sentencing hearing, the State raised no objection to the trial court's finding that the convictions on counts 1 and 2 were based on the "same act."

¶ 43 We agree with the defendant's position that, under the one-act, one-crime rule, one of the two convictions for aggravated criminal sexual assault must be vacated. In *Crespo*, the issue was whether the defendant's conviction for aggravated battery must be vacated because it stemmed from the same physical act as his conviction for armed violence. *Crespo*, 203 Ill. 2d at 340. There, the defendant stabbed the victim three separate times. *Id.* at 338. The indictment charged the defendant with armed violence and aggravated battery, but did not differentiate between the separate stab wounds. *Id.* at 339. The defendant was found guilty of both aggravated battery and armed violence, but argued on appeal that the aggravated battery conviction should be vacated because it stemmed from the same physical act of stabbing that supported the armed violence conviction. *Id.* The appellate court rejected the defendant's "same physical act" argument. *Id.* at 340. On appeal, our supreme court rejected the State's argument that each stabbing was a separate and distinct act capable of sustaining multiple convictions. *Id.* at 345. The *Crespo* court held that "each of [the victim's] stab wounds could support a separate offense; however, this is not the theory under which the State charged defendant, nor does it conform to the way the State presented and argued the case to the jury." *Id.* at 342. The *Crespo* court explained that a careful review of the indictment revealed that "the counts charging defendant with armed

violence and aggravated battery do not differentiate between the separate stab wounds. Rather, these counts charge defendant with the same conduct under different theories of criminal culpability." *Id.* at 342. Because the State did not "attempt to apportion these offenses among the various stab wounds," and the State presented its case at trial under a theory that the defendant's conduct constituted a single attack on the victim, the *Crespo* court found that it would be "profoundly unfair" to allow the State to change its theory for the first time on appeal. *Id.* at 343-44.

¶ 44 Applying the principles of *Crespo* to this case, we reject the State's arguments, advanced for the first time on appeal, that its theory of the case was that there were two separate and distinct acts of oral penetration. Like *Crespo*, here, the State did not choose to charge the defendant under the theory of separate acts of penetration, but rather, both counts of aggravated criminal sexual assault (counts 1 and 2) alleged the same criminal act and the indictment did not differentiate between separate acts of penetration. Count 1 in the indictment alleged that the defendant committed aggravated criminal sexual assault by committing "an act of sexual penetration" between his penis and S.O.'s mouth. Count 2 similarly alleged that the defendant committed aggravated criminal sexual assault by committing "an act of sexual penetration" between his penis and S.O.'s mouth. The only difference between the two counts was the aggravating factor: the display of a knife (count 1) and the infliction of bodily harm on S.O. (count 2). Further, like *Crespo*, here, the State did not argue at trial under a theory that the defendant's conduct constituted separate acts. In its closing argument, the State never argued that the defendant's conduct constituted two separate acts of oral penetration, and instead focused its arguments on highlighting evidence showing that the sexual encounter was not consensual. Like *Crespo*, we find that, to allow the State to change its theory of the case by dividing the

sexual penetration into two separate physical acts for the first time on appeal would be "profoundly unfair." See *id.* at 343-44. Thus, we hold that, under the one-act, one-crime rule, only one of the two convictions for aggravated criminal sexual assault may stand.

¶ 45 Because the defendant's conviction for count 1 arose out of section (a)(1) of the aggravated criminal sexual assault statute (720 ILCS 5/12-14(a)(1) (West 2008), which required the imposition of a 10-year enhancement (720 ILCS 5/12-14(d)(1) (West 2008)), but his conviction for count 2 required no such sentence enhancement under the aggravated criminal sexual assault (720 ILCS 5/12-14(a)(2) (West 2008)), we hold that count 1 is the more serious of the two offenses. Therefore, we vacate the defendant's conviction for aggravated criminal sexual assault under count 2, as the less serious offense, and order that the mittimus be corrected to reflect a single conviction and sentence under count 1. See *Garcia*, 179 Ill. 2d at 71. We note that because the defendant was sentenced by the trial court to a 16-year term for aggravated criminal sexual assault under count 1, to be served *concurrently* with his 8-year sentence for aggravated criminal sexual assault under count 2, the vacation of his conviction and sentence under count 2 on appeal has little practical effect on the defendant as he will remain incarcerated on the 16-year sentence. Accordingly, in light of our holding, we necessarily reject the State's arguments that the trial court should have imposed the defendant's sentences to run consecutively.

¶ 46 For the foregoing reasons, we affirm the defendant's conviction and sentence for aggravated criminal sexual assault under count 1, but vacate his conviction and sentence under count 2. The mittimus is corrected to reflect a single conviction and a 16-year sentence for aggravated criminal sexual assault under count 1.

¶ 47 Affirmed in part; vacated in part; mittimus corrected.