2014 IL App (2d) 130498-U
No. 2-13-0498
Order filed December 31, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOHNNY HASKINS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 10-CF-1210 Honorable T. Clint Hull, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Schostok and Justice Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant forfeited his contention by failing to preserve it below, and the plain-error rule did not apply, as any error was not clear or obvious and the evidence was not closely balanced; (2) defendant's two convictions of aggravated criminal sexual abuse violated the one-act, one-crime rule: although the evidence supported two acts, the charges and the instructions were such that the jury could have found two bases of liability for one act.

¶ 2 Defendant, Johnny Haskins, appeals from a judgment of the circuit court of Kane County finding him guilty of two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2008)) and sentencing him to concurrent terms of three years' imprisonment. Because defendant forfeited the issue of whether the trial court erred in admitting other-crime evidence,

and because the plain-error rule does not apply, we do not reach that issue. However, because defendant's convictions violated the one-act, one-crime rule, but were of the same offense and resulted in the same sentence, we remand for a determination of which conviction should be vacated as being the less serious.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted on one count of aggravated criminal sexual abuse based on his having touched the breast of the victim, who was at least 13 years old but under 17 years old, for the purpose of sexual gratification or arousal and his being at least five years older than the victim (720 ILCS 5/12-16(d) (West 2008)) (count I), one count of aggravated criminal sexual abuse based on his having touched the buttocks of the same victim, who was the same age, for the purpose of sexual gratification or arousal (720 ILCS 5/12-16(d) (West 2008)) (count II), one count of aggravated criminal sexual abuse based on his having touched the breast of the same victim, who was a family member, for the purpose of sexual gratification or arousal (720 ILCS 5/12-16(b) (West 2008)) (count III), and one count of aggravated criminal sexual abuse based on his having touched the buttocks of the same victim, who was a family member, for the purpose of sexual gratification or arousal (720 ILCS 5/12-16(b) (West 2008)) (count IV). All offenses were alleged to have occurred between January 1, 2009, and November 13, 2009. The State nol-prossed counts II and IV, and defendant was tried by a jury on counts I and III.

¶ 5 Before trial, the State filed a motion *in limine*, seeking to have admitted, pursuant to section 115-7.3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7.3 (West 2008)), uncharged sexual conduct of defendant. The specific conduct was an incident in which defendant, while lying next to the victim on the floor of her bedroom, put his hand inside of her underwear and moved it toward her "private." The State argued, alternatively, that the incident

showed an absence of accident or mistake and corroborated that the charged acts were done for the purpose of sexual gratification or arousal and were part of a course of sexual conduct between the victim and defendant.

¶ 6 Defendant objected orally to the State's motion *in limine*. In doing so, he specifically argued that, because the incident involved an attempt to commit a sex offense, it was not admissible under section 115-7.3.

¶ 7 The trial court granted the motion *in limine* based, in part, on section 115-7.3. In that regard, the court ruled that an attempted sex offense qualified for admission under section 115-7.3.

¶ 8 The following evidence was developed at the trial. In 2009, the victim, C.T., lived with her mother, her sister and two brothers, and defendant in a three-bedroom apartment in Carpentersville. Ordinarily, C.T.'s mother and defendant slept in the master bedroom. C.T. and her sister slept in the bedroom next to the master bedroom, and C.T.'s two brothers slept in an adjacent bedroom.

¶ 9 In 2009, the apartment became infested with bedbugs. The family was forced to discard most of the furniture, including all of the beds. As a result, for most of 2009 they slept on the bedroom floors.

¶ 10 According to C.T., sometime in 2009 defendant came into her bedroom at night, lay down beside her on the floor, and touched her breast with his hand. She moved his hand away and tried to go back to sleep. C.T. told her mother that defendant had been in the room, but she did not mention that he had touched her breast. Her mother told defendant not to go into the bedroom again.

¶ 11 Again in 2009, defendant entered C.T.'s bedroom during the night. He lay next to her on the floor and squeezed her breast with his hand. C.T. moved his hand away and went to sleep. C.T. told her mother that defendant had again come into her room. Her mother said that she could not prevent defendant from doing so, because he helped pay the bills.

¶ 12 The morning after the first incident, defendant asked C.T. if he had touched her. When she said yes, he asked her to forgive him and to pray for him. After the second incident, defendant again asked her to pray for him.

¶ 13 Later in 2009, defendant came into C.T.'s bedroom at night and lay down next to her. He put his hand inside of her underwear, touched her hip, and moved his hand toward her "private part." C.T. moved his hand away and went to sleep.

¶ 14 The next morning, C.T. talked about the incident with her friends. She did not tell her mother, however, because she thought that her mother would not do anything.

¶ 15 Once again in 2009, defendant entered C.T.'s bedroom around 4 or 5 a.m. Defendant awoke C.T. and asked her to put lotion on his back, chest, and stomach. C.T. sat on the floor with defendant sitting facing away from her. As she put lotion on defendant's back, he began leaning back against her. As he did so, he told her that he knew that she was "hot and ready" and wanted him. He sat up, turned around, hugged C.T., and asked her what she wanted to do. C.T. answered "nothing." Defendant then said that he could have had sex with her because everybody else was asleep. Following that incident, C.T. feared that he was going to rape her.

¶ 16 A day or two after the lotion incident, C.T. wrote a note about defendant's conduct and gave it to her school counselor. She wrote the note because she was uncomfortable speaking to her counselor about defendant's actions.

¶ 17 When asked why she did not leave the bedroom during the lotion incident, C.T. stated that she was afraid that she would get in trouble. According to her, defendant would not let her or the other children sleep in other bedrooms or use the bathroom at night.

¶ 18 During cross-examination, C.T. described defendant as a "military man" and a strict disciplinarian. He imposed a strict set of rules that required C.T. to come home right after school, prohibited her from dating boys, and limited her from going to the mall with her friends. She admitted that it was not easy being a teenager in the house and that she occasionally argued with defendant.

¶ 19 C.T. admitted that she did not tell David Berg, an investigator with the Kane County children's advocacy center, that she had reported the first two incidents to her mother. She could not remember, when asked by Berg if defendant had tried to touch her "privates," denying that he had.

¶ 20 She also admitted that, although she talked to a friend about defendant's conduct, she never told her about defendant putting his hand inside of her underwear. Although she never told her favorite teacher or the school police officer about any of the incidents, she explained that she felt that if her mother did not do anything about it then no one else would either. Nor did she refer to the first two incidents in the letter to her counselor or state that defendant had put his hand in her underwear.

¶ 21 C.T. had talked to defendant about sex when her mother was present. Defendant did not ask her for sex. Rather, he was talking about boys and told her to talk with him first if she wanted to have sex.

¶ 22 According to C.T.'s mother, she lived with defendant in the apartment for about eight years. During the bedbug infestation, defendant would occasionally sleep in the girls' bedroom.

Sometimes C.T.'s sister would sleep with C.T.'s mother. Defendant told C.T.'s mother that he was sleeping in the girls' room because there were fewer bedbugs there.

¶ 23 At some point, C.T. told her mother that she did not want defendant coming into her bedroom. When her mother told defendant, he responded that he felt uncomfortable going into C.T.'s bedroom and would not go back in. Defendant also told C.T.'s mother that when he asked C.T. to rub lotion on his back she moved her hands "further down" than he had told her to and he pushed her hands back up.

¶ 24 C.T.'s mother first became aware that C.T. had reported defendant's conduct when someone from the Department of Children and Family Services (DCFS) came to the house. DCFS required defendant to leave the house.

¶ 25 C.T.'s mother described defendant as the disciplinarian who set the rules in the house, including that the children could use the bathroom only one at a time at night. C.T. did not have much freedom under defendant's rules. Defendant did not approve of C.T.'s friends. However, C.T. did not have any "heated arguments" with defendant about her friends or not being able to hang out after school.

¶ 26 Defendant insisted on family game days, but they were not fun, because he forced the children to participate. Defendant also conducted family meetings where the family would air grievances. At one of those meetings in 2009, C.T. stated that her fear of defendant raping her was based on her misunderstanding. C.T.'s mother explained that previously she had told defendant that C.T. feared that he would rape her. Defendant had responded that C.T. must have misunderstood him.

¶ 27 Investigator Harry Reed of the Illinois State Police interviewed defendant. Defendant acknowledged that he had slept in C.T.'s bedroom because that room had fewer bedbugs. When

Reed asked about the lotion incident, defendant initially stated that C.T. had leaned against him and that that had made him uncomfortable. When Reed told him that the reports indicated that he had leaned into C.T., defendant stated that he had leaned back because he was falling asleep. Defendant denied telling C.T. that she was hot and ready.

¶ 28 On December 3, 2009, Berg interviewed defendant. When Berg asked him what he knew about the investigation, defendant said that he had been told that C.T. had reported that he had touched her inappropriately and that she feared he would rape her. Defendant stated that after he had learned of that he apologized to C.T. He explained that he had discussed with C.T. the "ways of the world," such as dating and potential sexual conduct. He had encouraged C.T. to come to him for advice regarding boys. Defendant told Berg that if in doing so he had made C.T. uncomfortable he was sorry.

¶ 29 Regarding the lotion incident, defendant explained that while C.T. was putting lotion on his back she began to lean into him. She also put lotion on his stomach. Her doing both made him uncomfortable.

¶ 30 On December 11, 2009, Berg interviewed defendant again. Defendant indicated that he was sorry if he had done or said things that were misunderstood. He also stated that he was glad that the incidents had been revealed, because it was a "wakeup call for him." At one point during the discussion of C.T.'s allegations about his touching her sexually, defendant acknowledged that he "may have gone a little bit over the line." He further acknowledged that he had slept next to C.T. and that his hand might have touched her and, if so, he was sorry. According to Berg, defendant stated that he was going to talk with his pastor and was willing to participate in family counseling.

¶ 31 During cross-examination, Berg admitted that defendant denied deliberately touching C.T. Berg denied repeatedly telling defendant that he had gone over the line. He could not recall praying with defendant.

¶ 32 Kathy Byrne, a child protection investigator with DCFS, was present when Berg initially interviewed defendant. She denied seeing Berg pray with defendant.

¶ 33 Defendant testified that, because of the bedbug problem in 2009, he slept in all the bedrooms, the living room, and the bathroom.

¶ 34 Defendant described himself as a fair, but firm, disciplinarian. He expected the family to participate in family game days.

¶ 35 According to defendant, C.T. had exhibited behavioral problems. He explained that she did not like doing chores and would "get an attitude." She would take her anger out on one of her brothers. Although they did not argue, defendant and C.T. "squabbled."

¶ 36 Defendant would not allow C.T. to date boys. He did not permit her to run around the neighborhood, because of the high crime rate and gang activity. He would allow C.T. to go to the mall but only at a decent hour. C.T.'s mother told defendant that he was too strict, and he agreed to ease back a little. C.T. and the other children would complain about their lack of freedom.

¶ 37 Defendant acknowledged that he had two conversations with C.T. about sex. C.T.'s mother was present during one of those and was in the apartment during the other. Defendant told C.T. that if she wanted to have sex or use alcohol or drugs she should feel comfortable talking to him or her mother first.

¶ 38 Defendant explained that, because of a serious medical condition, he required the occasional application of lotion. Therefore, he would have all of the family members apply lotion on his back. C.T.'s mother was aware of that.

¶ 39 Regarding the lotion incident, defendant had asked C.T. to put lotion on his back. He raised up his shirt, and she rubbed lotion on his back in a circular motion. Then, without his permission, she began to rub his stomach without any lotion. Her doing so made him feel uncomfortable.

¶ 40 Later that morning, defendant "educated [C.T.] about rapists and molesters." He told her that if her mother should end up with another man she should be aware of potential sexual problems and keep watch on her sister. Defendant told her that rapists and molesters could hurt their victims but that he loved her like a daughter and would never hurt her. Defendant also told C.T.'s mother that the lotion incident had made him uncomfortable.

¶ 41 According to defendant, the family would often pray for each other. Defendant asked C.T. to pray for him if he had done anything to make her feel uncomfortable by his sleeping in her room and invading her privacy.

¶ 42 Defendant denied telling Berg that he touched C.T. for sexual gratification. Berg had repeatedly asked him if he went "over the line or overboard." Because defendant felt intimidated and believed that Berg wanted to hear "something pleasing to his ear," he told him that he "might have went overboard just a little bit." Berg responded that he then believed defendant and left the room. Defendant explained that what he meant by going overboard was that he had invaded C.T.'s privacy and disrespected her by sleeping in her room. He told Berg that the situation was a wake-up call, because he was facing jail time, he had been separated from his family, and he

had suffered a loss. Defendant denied telling Berg that he had slept near C.T. or that he was willing to attend counseling.

¶ 43 Defendant denied ever going into C.T.'s room for sex. He denied ever putting his hand inside of her underwear, telling her that he could have sex with her, or touching her for sexual gratification.

¶ 44 On cross-examination, defendant explained that, on the nights that he slept in C.T.'s room, he would not lie next to her and he would be wearing clothes. When asked if he ever touched her "accidently," defendant answered that he could not testify to what he might have done while sleeping, but that he was testifying to not "touching her, period." He denied ever touching her breasts when he was lying next to her. When asked if it could have happened when he was sleeping, defendant answered that he did not believe so.

¶ 45 According to defendant, there was a family meeting at which C.T. said that she misunderstood a conversation that he had had with her about molesters and rapists. When asked if he ever asked C.T. to pray for him about things that he had done the night before, defendant said not so much the night before but about anything that he might have done that made her or anyone else uncomfortable.

¶ 46 In June or July of 2009, after C.T.'s mother told defendant that C.T. was uncomfortable about his coming into her bedroom at night, defendant stopped going into her room to sleep. He admitted, however, that on one occasion he went into her room in the early morning to tidy up. C.T. was lying down but awake. Defendant left and returned with lotion for her to put on his back. He sat on the floor, and C.T. sat behind him. At one point, he started to fall asleep and leaned back into C.T.

¶ 47 In rebuttal, Berg denied that defendant told him that he had slept in the boys' bedroom, the living room, or the bathroom. Berg also denied telling defendant, after defendant had stated that he might have crossed the line, that he then believed him. Defendant told him that he slept next to C.T. and that he might have inadvertently touched her.

¶ 48 During closing argument, the State, in discussing the sequence of events, referred to the incident in which defendant put his hand inside C.T.'s underwear. In discussing the elements of aggravated criminal sexual abuse, the State pointed out that one of the issues was whether defendant committed an act of sexual conduct. In that regard, the State pointed to C.T.'s testimony that defendant had touched her breast "two separate times" in 2009. The State told the jury that the court would instruct them that sexual conduct meant any intentional or knowing touching of the victim's breast for the purpose of sexual gratification or arousal. The State argued that to assess sexual gratification or arousal the jury must look at all of the circumstances. To that end, the State pointed to the fact that defendant "not only place[d] his hand upon her breast, but he grope[d] it, he actually squeeze[d]," and that it was not simply a brush.

¶ 49 The State also argued that the jury could consider the course of conduct. It noted that there was an escalating pattern that began with defendant touching C.T.'s breast and progressed to his trying to touch her private part, having her rub lotion on him, and telling her that he could have sex with her. The State urged the jury to consider all of defendant's conduct in regard to whether it had proved sexual gratification or arousal regarding defendant having touched C.T.'s breast.

¶ 50 In regard to whether there was a knowing touching of C.T.'s breast, the State noted defendant's admission that he might have crossed the line, that defendant initiated the conversation with C.T. the next morning, that the incident occurred within a minute or two of his

coming into the bedroom, and that it occurred before he fell asleep. The State argued that it was not an accident and was not unknowing, because it happened more than once.

¶ 51 Defendant argued that the reason that C.T. never told her mother was that C.T. had exaggerated his actions. Defendant explained that as to count I the jury must decide whether he touched C.T.'s breast and that as to count II it must decide the same thing.

¶ 52 Defendant told the jury that there was no charge based on the allegations regarding his having put his hand inside of C.T.'s underwear and that the State was allowed to tell them about that incident without having to prove it. In that regard, he argued that the jury should question the integrity of the trial and ask why the State would introduce that evidence yet not ask the jury to find that it constituted a crime.

¶ 53 In rebuttal, the State reiterated that on two occasions defendant touched C.T.'s breast and that another time he tried to touch her private part.

¶ 54 The trial court instructed the jury that, as to each count, the State must prove that defendant, among other things, committed an act of sexual conduct against C.T. The court read the definition of sexual conduct, which included any intentional or knowing touching or fondling of the victim's breast for the purpose of sexual gratification or arousal.

¶ 55 The trial court submitted a verdict form for each count. The form for count I included the language "5-year difference—breast" and the form for count II included "family member—breast."

¶ 56 During deliberations, the jury submitted several questions to the trial court. They asked if they could see the letter C.T. wrote to her counselor, which was not in evidence. They also asked for a definition of reasonable doubt and to see a transcript of Berg's testimony. After being told that they could not have the letter or a definition of reasonable doubt and that it would

take an hour to provide them with the transcript, but before they received the transcript, they found defendant guilty of both counts.

¶ 57 Defendant filed a motion for a judgment notwithstanding the verdict (JNOV). He argued, among other things, that he had been denied a fair trial when the jury was allowed to hear evidence of "other sex crimes." He further argued that the trial court erred in not finding that the probative value of that evidence was outweighed by its prejudicial effect. He did not mention section 115-7.3 or the court's prior ruling as to that provision. At the hearing on the motion for a JNOV, defendant offered no additional argument. The State responded that the court properly ruled as to the balancing test. The court denied the motion for a JNOV, based on its "previous ruling *** as to other sex crimes evidence."

¶ 58 The trial court sentenced defendant to concurrent terms of three years' imprisonment. The court ruled that the two convictions did not merge, because C.T. testified that defendant touched her breast on "two separate and independent nights."

¶ 59 In his motion to reconsider, defendant argued that the two convictions should merge under the one-act, one-crime rule because the verdict forms did not clarify that they were referring to two different incidents. The court denied the motion to reconsider, and defendant filed this timely appeal.

¶ 60 II. ANALYSIS

¶ 61 On appeal, defendant raises two issues. First, he contends that the trial court erred in admitting, pursuant to section 115-7.3, the uncharged incident involving his having put his hand in C.T.'s underwear, because it was an attempt only, which does not qualify as a sex offense under that provision. Second, he contends that one of his convictions must be vacated under the

one-act, one-crime rule, because it was possible that the jury found him guilty of only one instance of having touched C.T.'s breast and yet attributed that single act to both counts.

¶ 62 We begin by addressing the State's assertion that defendant forfeited the issue of whether it was error to have admitted the evidence under section 115-7.3. Specifically, the State argues that, because defendant never objected to the admission of the evidence at trial, the mere fact that he opposed the State's motion *in limine* was insufficient to preserve the issue for appeal. Alternatively, the State argues that, because defendant did not raise the issue in his posttrial motion, he forfeited the issue.

¶ 63 Because defendant responded to the State's motion *in limine*, he did not forfeit the issue by failing to object at trial. See *People v. Denson*, 2014 IL 116231, ¶ 11.

¶ 64 However, he failed to raise the issue in his posttrial motion. To preserve an issue for appeal, a defendant must make both a contemporaneous objection and a written posttrial motion raising the issue. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). If not, the issue is forfeited. *People v. Jones*, 235 Ill. App. 3d 342, 350 (1992).

¶ 65 Here, although defendant filed a motion for a JNOV, he did not raise the issue of whether an attempted sex offense may be admitted pursuant to section 115-7.3. The only argument he raised regarding the other-crime evidence was that the trial court did not properly balance the probative value against the prejudicial effect. Therefore, he forfeited the issue he now seeks to raise under section 115-7.3.

¶ 66 Nonetheless, defendant contends that we may review the issue under the plain-error doctrine. Although defendant did not argue plain error in his opening brief, he has done so in his reply, which is sufficient. See *People v. Ramsey*, 239 Ill. 2d 342, 412 (2010).

¶ 67 The plain-error doctrine provides that a forfeited claim may be reviewed when there is either: (1) a clear or obvious error and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) a clear or obvious error and that error was so serious that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the strength of the evidence. *People v. Johnson*, 238 Ill. 2d 478, 484 (2010). Clear or obvious means that the law is well settled at the time of trial. *In re M.W.*, 232 Ill. 2d 408, 431 (2009). If the law was unclear at the time of trial, but becomes clear or settled during the appeal, then the error is not "plain" for purposes of the doctrine. *Id.* at 431.

¶ 68 The plain-error doctrine is not a general saving clause, but rather is considered a narrow and limited exception to the forfeiture rule applicable to unpreserved claims of error. *Johnson*, 238 Ill. 2d at 484. When seeking plain-error review, a defendant has the burden to persuade the court that the forfeiture should be excused. *Johnson*, 238 Ill. 2d at 485. If the defendant fails to meet that burden, the issue will be forfeited. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010).

¶ 69 First, as to whether any error was clear or obvious, the law is certainly not well settled regarding whether section 115-7.3 includes attempted sex offenses. The parties cite no cases deciding that issue, and we have found none. Indeed, it is an issue of first impression. Therefore, any error was not clear or obvious. Thus, defendant has not established the threshold requirement for plain-error review.

¶ 70 In any event, defendant relies on the closely balanced prong of the plain-error doctrine. The evidence in this case, however, was not closely balanced.

¶ 71 C.T. testified unequivocally that on two separate occasions in 2009 defendant came into her bedroom in the night and touched her breast. In doing so, she provided details that demonstrated her clear recollection of the events. C.T.'s testimony was corroborated by her

mother, who testified that C.T. had complained to her twice that defendant had entered her bedroom at night. Although C.T. did not elaborate to her mother as to why she was complaining, she explained at trial that she was uncomfortable doing so and believed that her mother would not have taken action.

¶ 72 C.T. also testified that one time defendant entered her bedroom in the early morning hours and asked her to rub lotion on his back, chest, and stomach. When she did so, defendant leaned back against her and told her that she was hot and ready. Even if defendant did not say that she was hot and ready, the lotion incident certainly was not benign and was inappropriate, sexually related behavior. Although defendant contends that it was normal for family members to apply lotion to his body to alleviate pain, it was not normal for him to ask C.T. to do so in her bedroom in the early morning hours when no one else was awake. Likewise, his account that it was C.T. who initiated the rubbing of his stomach, which made him feel uncomfortable, was dubious at the very best. See *People v. Hart*, 214 Ill. 2d 490, 520 (2005) ("If a defendant chooses to give an explanation for his incriminating situation, he should provide a reasonable story or be judged by its improbabilities.").

¶ 73 The evidence showed that defendant slept in C.T.'s bedroom on numerous occasions in 2009. Although defendant explained that he did so because there were fewer bedbugs there, that explanation was intrinsically suspect, considering that the bedbugs were apparently located throughout the apartment. See *Hart*, 214 Ill. 2d at 520.

¶ 74 Moreover, defendant incriminated himself when he told Reed that he sometimes slept next to C.T. He also told Berg that if his hand touched C.T. he was sorry. He admitted to Berg that he might have done some things that were misunderstood and that he was glad that the situation had been exposed, because it was a wake-up call. More importantly, he told Berg that

he might have crossed the line. All of those statements, in conjunction with the other evidence, showed that defendant had touched C.T. inappropriately. Although defendant offered various explanations for what he meant by his statements, those explanations were essentially incredible.

¶ 75 Defendant contends that, because the jury requested to see C.T.'s letter, a transcript of Berg's testimony, and a definition of reasonable doubt, it considered the evidence closely balanced. We disagree. That the jury asked for guidance during its deliberations merely shows that it took its job seriously and conscientiously came to a just result. See *People v. Minniweather*, 301 Ill. App. 3d 574, 580 (1998).

¶ 76 The evidence was not closely balanced. Rather, there was ample evidence upon which the jury could have found that defendant touched C.T.'s breast on two occasions and did so for the purpose of sexual gratification or arousal. Because the evidence was not closely balanced, defendant has not persuaded us that the forfeiture should be excused. See *Johnson*, 238 Ill. 2d at 485. Thus, we do not review as plain error the challenge to the evidence under section 115-7.3.

¶ 77 We next address defendant's contention that one of his convictions must be vacated under the one-act, one-crime rule. That rule provides that multiple offenses may not be based on the same physical act. *People v. King*, 66 Ill. 2d 551, 566 (1977). Whether a defendant's convictions violate the one-act, one-crime rule is a question of law to be reviewed *de novo*. *People v. Strawbridge*, 404 Ill. App. 3d 460, 462 (2010).

¶ 78 In this case, it is impossible to say that the jury did not find that defendant had touched C.T.'s breast only once and yet found defendant guilty of both counts. See *Strawbridge*, 404 Ill. App. 3d at 463. Although there was adequate evidence to support a finding that defendant touched C.T.'s breast on two separate occasions, it is not our prerogative to place ourselves in the position of the jury and try to determine how they reached their verdict. See *id.* at 463.

Simply put, we cannot tell whether the jury found that defendant committed both acts or only one act and attributed that single touching to both counts. Therefore, we cannot say that the multiple convictions were not based on the same act. Thus, both convictions cannot stand. See *id*.

¶ 79 We disagree with the State that, based on the charges and arguments, the jury must have understood that for them to have found defendant guilty on both counts they necessarily must have found that he touched C.T.'s breast on two occasions. Our review of the record shows that at most the State urged the jury to find that defendant touched C.T.'s breast on two occasions. That was insufficient alone, however, to prevent the jury from finding defendant guilty on both counts even if they found that he touched the victim's breast only one time.

¶ 80 Of course, had the State opted to word the counts such that each was based on one of the specific instances of defendant having touched C.T.'s breast, that would have prevented a violation of the one-act, one-crime rule. Instead, the State did not distinguish the acts in the two counts. Rather, in each count it simply referred to defendant having touched C.T.'s breast.

¶ 81 Nor did the jury instructions differentiate between the two acts. Indeed, the two verdict forms referred to the counts as "family member—breast" and "5 year difference—breast." Therefore, the jury was allowed to find that defendant touched C.T.'s breast only once and yet find defendant guilty of both counts.

¶ 82 The State's reliance on *People v. Stull*, 2014 IL App (4th) 120704, and *People v. Span*, 2011 IL App (1st) 083037, is misplaced. *Stull* is distinguishable, because there the State differentiated between the various acts and attributed them to specific charges. *Stull*, 2014 IL App (4th) 120704, ¶¶ 51-54. Similarly, *Span* is distinguishable, because in that case the State sought to apportion defendant's acts among the various charges. *Span*, 2011 IL App (1st)

083037, ¶ 87. Moreover, in *Span*, there was a bench trial. The reviewing court emphasized that, unlike a jury, the trial court would understand the need to consider whether there was sufficient evidence to conclude that the defendant's various acts supported separate offenses. *Span*, 2011 IL App (1st) 083037, ¶ 88.

¶ 83 Because the jury here could have found that defendant committed only one act and yet found him guilty of both offenses, defendant's convictions violated the one-act, one-crime rule. Because the convictions were of the same offense and defendant received identical sentences on both, we cannot determine which offense was the less serious. Therefore, we remand for the trial court to make that determination and to vacate the conviction of the less serious offense. See *In re Samantha V.*, 234 Ill. 2d 359, 379-80 (2009).

¶ 84 III. CONCLUSION

¶ 85 For the reasons stated, we hold that defendant forfeited the issue of the admissibility of his prior sexual conduct under section 115-7.3 and that defendant's convictions violated the one-act, one-crime rule, and we remand for the trial court to determine which offense was less serious and to vacate the conviction of that offense.

¶ 86 Remanded with directions.