2022 IL App (1st) 200308-U

THIRD DIVISION
June 30, 2022

No. 1-20-0308

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. 18 CR 13442
	)	
MARLIN EDWARDS,	)	Honorable
	)	Ursula Walowski,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Gordon and Justice McBride concurred in the judgment.

ORDER

¶ 1 *Held*: Evidence sufficient to prove defendant used or threatened force, as required for aggravated criminal sexual assault conviction. But where two convictions for aggravated offense both based on charged conduct causing victim's pregnancy, one count reduced to lesser-included offense of criminal sexual assault. Affirmed in part; vacated in part; remanded for resentencing.

¶ 2 Defendant Marlin Edwards was convicted of sexually assaulting his daughter, M.E., numerous times over the course of roughly two years, culminating in M.E. becoming pregnant at the age of 15. The resulting charges alleged three distinct acts, on three separate occasions: contact with M.E.'s breasts, for which defendant was convicted, after a bench trial, of aggravated

criminal sexual abuse; and two acts of vaginal penetration, for which defendant was convicted of two counts of aggravated criminal sexual assault, and two counts of the lesser-included offense of criminal sexual assault, which the trial court merged into the aggravated counts at sentencing.

¶ 3 Defendant argues that the evidence was insufficient to convict him of aggravated criminal sexual assault because the State failed to prove that he used or threatened force in committing the act of penetration that caused M.E.'s pregnancy. We disagree. But we do agree—and the State concedes—that only one conviction for *aggravated* criminal sexual assault may stand, since the aggravating factor alleged in both counts of this offense was causing M.E.'s pregnancy. Since M.E. only became pregnant once, that result, logically speaking, cannot be attributed to both acts of penetration. Thus, one of defendant's convictions for aggravated criminal sexual assault should be reduced to the lesser-included offense of criminal sexual assault. We remand to the trial court for resentencing on that offense.

¶ 4 BACKGROUND

¶ 5 The victim, M.E., was 13 years old in October 2014. Defendant was her biological father, though M.E. hardly knew him, having met him only a couple of times, some years before. M.E. and one of her brothers, M.S., who was a year or so older than her, went to stay with defendant during their mother's extended hospitalization.

¶ 6 On the third night of their stay, M.E. went to sleep on defendant's couch. She awoke to find defendant with his mouth on her breasts. Defendant said, "it's going to be okay." M.E. was "shocked," and just laid on the couch with her eyes closed.

¶ 7 The next morning, M.E. either called or texted defendant to say that she knew what he did to her and was going to tell her mother. Just then, defendant walked into the room. He told M.E. that if she said anything, she would have nowhere to live. Defendant also threatened to hurt

M.E., her mother, and her siblings. M.E. believed that these threats were real. Scared, she said nothing further of the incident.

¶ 8 M.E. soon decided to sleep in the bed with her brother, instead of alone on the couch. But a few nights later, while M.E. was sleeping beside her brother, defendant climbed on top her, pulled down her clothes, and "started forcing his penis inside [her] vagina." Defendant again told her that "it's going to be okay." M.E. was too scared to do or say anything. She did not think that her brother was awakened by, or aware of, the incident.

¶ 9 M.E. remained terrified and did not know what to do. As she explained, "I just never been in no situation whereas I had to sit there and decide like if I run and tell would this happen or would that happen." In particular, M.E. was worried about her mother, whom defendant had threatened, and who had recently been released from jail (only to end up in the hospital). So M.E. said nothing, and just told herself, over and over, that "this cannot be happening."

¶ 10 M.E. testified that defendant continued to force his penis into her vagina, about three or four times a week, always at night, while she had been asleep. This pattern of conduct lasted until M.E.'s mother was discharged from the hospital and came to live in defendant's apartment, along with some of M.E.'s other siblings. The sexual assaults stopped, albeit briefly, during that time.

¶ 11 Before long, M.E.'s mother got her own apartment in the same building. But it was too small for all eight of her children. And M.E. was still scared that defendant might harm her mother or siblings. For these reasons, M.E, along with her brother M.S., stayed upstairs with defendant. (At least part of the time—M.E. split her nights, and her belongings, between the two units.) When the others moved out, the sexual assaults resumed, with defendant once again climbing on top of her while she was asleep and forcing his penis inside her vagina.

¶ 12 At some later date, M.E., her mother, and her siblings all moved into a different building. But M.E. remained in contact with defendant. She sometimes stayed at his apartment for a night or two at a time, during which the sexual assaults continued in the now-familiar manner.

¶ 13 All told, the sexual assaults spanned roughly two years, from October 2014 until the fall of 2016. In September or October of that year, M.E. discovered that she was pregnant. She kept it a secret—until she couldn't—and even then refused to tell anyone who the father was.

¶ 14 When a visibly pregnant M.E. eventually confronted defendant, he got angry and waved a gun around. He called M.E. a "bitch," demanded to know why she did not say anything sooner, and threatened to kill her. As scared as ever, if not more so, M.E. told defendant that someone else was the father, which was not true. She continued to hide the truth from everyone else because of defendant's previous threats, and because, as she put it, "[she] already knew about guns and all of that."

¶ 15 Defendant gave birth to K.E., defendant's son and grandson, on May 30, 2017. Six days later, she told her older half-sister, Shanai Seay, that defendant was the father. She "felt like it was time" to tell the truth, since, as she aptly explained, "I was out of this situation because my baby was all my evidence."

¶ 16 Although Shanai was not defendant's child (Shenai and M.E. had the same mother), she was familiar with him, and immediately called to confront him about M.E.'s disclosure. Shenai testified about that conversation. She told defendant that he was "sick" and asked how he could do something like this. Defendant said, "I don't care" and hung up. When Shenai called back and berated him, defendant replied, "I did it to all my daughters."

¶ 17 The parties stipulated to the results of a paternity test performed by a forensic scientist with the Illinois State Police. In sum, the probability that defendant is K.E.'s father, as compared

to an untested, unrelated male, is 99.99 percent.

¶ 18 The trial court entered guilty findings on six counts. Counts 1 and 2 charged defendant with aggravated criminal sexual assault. The aggravating factor charged in both counts was the bodily harm caused by defendant's conduct—specifically, M.E.'s pregnancy. The charging language in the indictment made clear that Counts 1 and 2 were based on two distinct acts of penetration. Counts 5 and 6 charged defendant with criminal sexual assault, based on the same conduct charged in Counts 1 and 2, but without the aggravating factor of pregnancy. Count 14 charged defendant with aggravated criminal sexual abuse, based on the initial incident, in which defendant put his mouth on M.E.'s breasts.

¶ 19 At sentencing, the trial court merged Counts 5 and 6 into Counts 1 and 2 and imposed an aggregate sentence of 65 years in prison. That sentence comprised mandatory consecutive terms of 30 years each on Counts 1 and 2, and 5 years on Count 3.

¶ 20 ANALYSIS

¶ 21 I. Sufficiency of the evidence

¶ 22 The offense of criminal sexual assault, in its simple or aggravated form, requires proof of an "act of sexual penetration" committed by "force or threat of force." 720 ILCS 5/11-1.20(a)(1), 11-1.30(a) (West 2014). And to qualify as an *aggravated* criminal sexual assault, as that offense was charged by the State and found by the trial court here, the act of forcible sexual penetration also had to cause M.E.'s pregnancy, which is defined by statute as a form of "bodily harm." *Id.* §§ 11-0.1, 11-1.30(a)(2). Defendant argues that the State failed to offer proof of any one act of sexual penetration that was both forcible and the cause of M.E.'s pregnancy.

¶ 23 The crux of his argument is this. Because K.E. was born on May 30, 2017, the act of sexual penetration that resulted in M.E.'s pregnancy had to take place sometime around August

or September 2016. But the only acts of sexual penetration to which M.E. testified in enough detail for a trier of fact to even arguably find the use or threat of force were the acts that took place early in M.E.'s stay with defendant, back in October 2014. Thus, there was no proof of an act of sexual penetration that satisfied both required elements. And for that reason, the evidence was insufficient to convict him of aggravated criminal sexual assault.

¶ 24 As an initial matter, citing *People v. Smith*, 191 Ill. 2d 408, 411 (2000), defendant asserts that we review this question *de novo*, because the relevant "facts are not in dispute." But of course they are. The question is whether a trier of fact could infer that defendant used or threatened force in committing the act of sexual penetration that caused M.E.'s pregnancy. Defendant says there was no evidence of that; the State says there was. That is a factual dispute. See *People v. Gonzalez*, 2019 IL App (1st) 152760, ¶ 38 ("The question of whether force or threat of force was used is best left to the trier of fact ***.")

¶ 25 As we have explained before, *Smith* held that a sufficiency challenge is reviewed *de novo* when there is no dispute about the *inferences* to be drawn from the evidence, so that the only question on appeal is whether the statute criminalizes conduct that, by agreement of the parties, was proven at trial. *People v. Loggins*, 2019 IL App (1st) 160482, ¶¶ 30-32 (discussing *Smith*). And *that* question is reviewed *de novo* because it is a legal question, one of statutory interpretation. *Id.* ¶ 31. Here, however, we are presented with no such question of statutory interpretation. Granted, M.E.'s testimony may have been uncontradicted, but the inferences to be drawn from it are still contested. *Id.* ("Here, the facts are not undisputed, in the sense intended in *Smith*, because the parties disagree about the inferences that can be drawn from the trial evidence," thus making *de novo* review inappropriate). So the deferential *Jackson* standard, rather than *de novo* review, must govern. *Id.*; see *Jackson v. Virginia*, 443 U.S. 307 (1979).

¶ 26 We thus ask whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could have found an act of sexual penetration (1) in which force was used or threatened, and (2) that caused M.E.'s pregnancy. See *Jackson*, 443 U.S. at 319; *People v. Ross*, 229 Ill. 2d 255, 272 (2008). The trier of fact's findings regarding the credibility of the witnesses and the inferences to be drawn from the evidence are not conclusive, but they are entitled to significant deference. *Ross*, 229 Ill. 2d at 272.

¶ 27 Our starting point is an act of sexual penetration committed by defendant, sometime in August or September 2016, that caused M.E.'s pregnancy. The paternity test, K.E.'s undisputed date of birth, and M.E.'s testimony about a pattern of continuing sexual assaults around that time leave no doubt that these elements and aggravating circumstances were all proven. And there is no dispute about any of that. The only dispute is whether there was sufficient evidence of the use or threat of force in the commission of *these* assaults.

¶ 28 True, we cannot know precisely which act of sexual penetration caused the pregnancy. But that has less to do with a failure of proof attributable to the State than with the frequency of the sexual assaults committed by defendant. And as M.E. described them, the assaults were all cut from the same cloth. M.E. testified to a pattern of conduct in which defendant repeatedly did the same thing: he climbed on top of M.E. as she slept and "forc[ed]" his penis into her vagina—all while M.E., a terrified child in her early-to-mid teenage years, lived with defendant's threats of violence hanging over her head and felt powerless to assert herself against him. A rational trier of fact could find that whichever specific act of penetration caused the pregnancy, it was part of this ongoing pattern of conduct, and thus had elements of both the *use* and the *threat* of force.

¶ 29 As defined by statute, "force or threat of force" includes, but is not limited to, situations

in which the accused (1) "threatens to use force or violence on the victim or on any other person, and the victim under the circumstances reasonably believes that the accused has the ability to execute that threat;" or (2) "overcomes the victim by use of superior strength or size, physical restraint, or physical confinement." 720 ILCS 5/11-0 (West 2014).

¶ 30 Let's start with the second situation. As noted above, defendant would climb on top of M.E. at night, as she slept, and "forc[e]" his penis into her vagina. To be clear, the required force must be "something more than the force inherent in the sexual penetration itself." *People v. Alexander*, 2014 IL App (1st) 112207, ¶ 54. But it need not be anything more than the assailant's use of his "superior strength or size" to render the victim powerless to stop him. 720 ILCS 5/11-0.1 (West 2014). In *Alexander*, 2014 IL App (1st) 112207, ¶ 54, for example, cited here by the State, the victim awoke to find the defendant on top of her, with his penis inside of her; she tried to move but couldn't, because his weight was bearing down on her. That was sufficient proof of force. *Id.*

¶ 31 Here, defendant used "force," within the meaning of the statute, by exploiting his double advantage over M.E. For one, defendant was a grown man preying on a teenage girl, enjoying the superior size and strength that entails. But he was also a grown man preying on a *sleeping* teenage girl—one who, much like the victim in *Alexander*, would wake up at night to find an assuredly uninvited defendant on top of her, precisely when she was least able to defend herself (if she ever was at all) and was thus most vulnerable to his assaults.

¶ 32 Granted, the victim in *Alexander* tried, unsuccessfully, to stop the sexual assault, if only by trying to move. *Id.* Here, there is no evidence that M.E. offered any active resistance. But the law does not demand any from her. A victim's lack of resistance generally does not show that an act of sexual penetration was not forcible and coercive, since the acquiescence may itself be a

product of the coercive force used to commit the assault. See 720 ILCS 5/11-0.1 (West 2014) ("Lack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent.")

¶ 33 Nor does the law demand futile (or worse, self-defeating) acts of resistance by those who are outmatched. *People v. Bolton*, 207 Ill. App. 3d 681, 686 (1990); *In re C.K.M.*, 135 Ill. App. 3d 145, 151 (1985). And lastly, it bears emphasis that M.E. was a child—an adolescent, not a small child, but a child nonetheless—and we do not expect a child to mount the same resistance that might be typical of an adult woman in similar circumstances. *In re C.K.M.*, 135 Ill. App. 3d at 151.

¶ 34 All in all, the fact that M.E. did not resist defendant only shows, as in fact she testified, that she was too scared to do or say anything in response to a grown man—her own father, no less—climbing on top of her at night and doing as he pleased, knowing full well that the child had no realistic hope of stopping him. A rational trier of fact could find that defendant used force by exploiting his size and strength advantages over a teenage girl and by attacking her in her sleep, when she was at her most vulnerable.

¶ 35 It is true that when M.E. described how defendant would climb on top of her at night, she was describing, in the first instance, the sexual assaults that took place in October 2014, when she first moved into defendant's apartment. And those were not the sexual assaults that caused her pregnancy. The "details" of those later assaults, defendant says, were "remarkably absent" from the State's case.

¶ 36 M.E.'s testimony was in various ways truncated and elliptical, but we don't think it left much doubt about what happened. After describing the initial incidents in 2014 in some detail, M.E. went on to testify that defendant continued to force his penis into her vagina for "a year and

a half, two years, something like that." And when asked, "Was it always at night when you were sleeping?" she answered, "Yes." In short, the sexual assaults continued in the same manner, from October 2014, when M.E. first moved in, until the fall of 2016, when M.E. became pregnant. A rational trier of fact could find that the act of sexual penetration that caused M.E.'s pregnancy in the fall of 2016 was a forcible act, just like the earlier ones that M.E. described more explicitly.

¶ 37 In addition to *using* force, in the sense we just described, defendant also *threatened* force of another variety. In particular, he "threatened to use force or violence on the victim," M.E., *and* on "any other person," namely, M.E.'s mother and siblings. 720 ILCS 5/11-0.1 (West 2014). The day after she awoke to find defendant's mouth on her breasts, M.E. confronted defendant and said that she was going to tell her mother what happened. Defendant warned M.E., in response, that she would have nowhere to live if she didn't remain mum. Defendant then "threatened [M.E.]" and said that he "would hurt [her] mama and [her] brothers and sisters." And M.E. was quite clear that she believed these threats were real, that she was "scared" on their account, and that she acquiesced in defendant's continued assaults out of fear of what he might otherwise do.

¶ 38 Defendant focuses much of his attention on the "threat," so to speak, to put M.E. out on the street. That was October 2014, when M.E.'s mother was in the hospital and she had nowhere else to live. But the assault that caused her pregnancy came nearly two years later, in August or September 2016. By then, M.E. had moved into a new place with her mother and siblings. So this "threat," he says, had run its course. Fair enough.

¶ 39 But we cannot agree with defendant's assertion that the only threat of physical violence came after M.E. was already pregnant—specifically, when she told defendant she was pregnant and defendant responded by waving a gun around and threatening to kill her. Defendant no doubt renewed and, worse yet, escalated his threats of violence on that occasion. All the same, he *had*

threatened to "hurt" (albeit not "kill") M.E., her mother, and her siblings, in the past. And he did so for the obvious purpose of coercing M.E. into quietly submitting to his sexual demands. Thus, the question is whether those threats still exerted coercive power over M.E. in the fall of 2016—since it is true, as defendant points out, that M.E. did not testify to any explicit renewal of those threats around the time that defendant impregnated her.

¶ 40 In defendant's view, that question shouldn't even arise, because the holding of *People v. Giraud*, 2012 IL 113116, establishes a bright-line rule that "the aggravating circumstances of an aggravated criminal sexual assault must occur during the commission of the offense." This rule is irrelevant.

¶ 41 The use or threat of force is not an "aggravating circumstance" that elevates a criminal sexual assault to an aggravated criminal sexual assault. The statute expressly provides that any such aggravating circumstance (with one exception not relevant here) must "exist during the commission of the offense." 720 ILCS 5/11-1.30(a). In *Giraud*, 2012 IL 113116, ¶¶ 1, 9-10, for example, the HIV-positive defendant sexually assaulted his teenage daughter without wearing a condom; the State alleged that he thus "act[ed] in a manner that threatens or endangers the life of the victim or any other person," by knowingly exposing his daughter to the risk of contracting HIV, a potentially fatal disease. 720 ILCS 5/11-1.30(a)(3). But to expose someone to a risk is not yet to make a "threat[ ]"; and if the daughter's life was ultimately "endanger[ed]" by the risk of fatal disease, that circumstance did not yet "exist during the commission of the offense." *Giraud*, 2012 IL 113116, ¶¶ 14-18. For this aggravating factor to apply, the victim's life had to be in jeopardy *during* the sexual assault; the statute itself plainly says so. *Id.* ¶¶ 11-13. So the offense in *Giraud* was not an *aggravated* criminal sexual assault, at least not on the State's theory of the offense.

¶ 42 In contrast, the use or threat of force is an *element* of a criminal sexual assault. 720 ILCS 5/11-1.20(a)(1) (West 2014). It is not governed by the statutory provision, interpreted in *Giraud*, that an aggravating circumstance must exist during the commission of the offense. And there is no similar provision in the statute that applies to this element. *Giraud* does not help defendant at all.

¶ 43 The guiding principle here is quite different. It is simply the point that threats generally precede the conduct they facilitate: they coerce the about-to-be victim into silence, submission, or even assistance, as the case may be, and thus pave the way for the assailant to do as he will. As we said in *People v. Smith*, 2019 IL App (1st) 161246, ¶ 31, "[a] threat of force precedes the sexual penetration by some amount of time; it lingers over the victim, who is subdued precisely because the victim has a reasonable belief that the accused has the ability to execute that threat of force." (Citation and quotation marks omitted.)

¶ 44 By how long may the threat precede the conduct? Or, put differently, for how long can a threat linger over a victim? There are no hard-and-fast rules, no bright lines to be drawn as a matter of law. The question is a factual one, calling for a case-by-case determination.

¶ 45 At one extreme, and in perhaps the typical case, the offense commences immediately, more or less, after the threat is issued: A man approaches a woman, brandishing a knife, and threatens to hurt her if she does not submit; in short order, he sexually assaults her. That is the basic fact pattern, or at least the opening scene, of *Smith* (*id.* ¶¶ 35-37), a case defendant is keen to distinguish on its facts, and fairly so.

¶ 46 But it would be absurd to suggest that a threat always is, or must be, followed in such short order by the offense it facilitates. Credible threats can have staying power; they can continue to coerce their victims for some indeterminate time. (Just how much staying power will

depend on the circumstances.) Consider the sexual assaults that commenced in October 2014, not long after defendant threatened to harm M.E. and her family. Those acts of sexual penetration did not follow within minutes of the threat, as in *Smith*, but they were not far removed either—at most two or three days. It is hard to imagine that M.E., a child living under defendant's roof, was not still in the grip of those threats. And so we would be hard-pressed to deny that a threat of physical violence was one means by which defendant committed *those* sexual assaults.

¶ 47 The sexual assault that caused M.E.'s pregnancy, in August or September 2016, was at a much greater remove from defendant's threat of physical violence. Nearly two years, not just a couple of days, had passed. That may seem like a long time for a threat to linger—and it is—but if it still gripped M.E., if she continued to believe, sincerely and reasonably, that defendant might hurt her or her family if she did not continue to acquiesce in his sexual demands, then his threat proved durable, indeed, as threats sometimes do.

¶ 48 It would not be unreasonable for a trier of fact to reach that conclusion here. There is ample evidence that M.E. remained terrified long after defendant first issued his threat. For starters, M.E. continued to live with defendant, at least part time, after her mother secured her own apartment downstairs in the building. Granted, the apartment was too small for all eight siblings, so someone had to find other accommodations. But why would M.E. go along with *this* arrangement, without so much as a protest (at least as far as we know)? As she explained, "The reason why I stayed upstairs is because I was scared. I was terrified, and I just did anything that he asked me." When asked to clarify exactly what she was afraid of, she continued, "I was afraid that he was going to harm my mama and my brothers and my sisters."

¶ 49 At some point, M.E., her mother, and her siblings all moved out of the building. Yet M.E. not infrequently returned to spend the night at defendant's apartment, where the sexual assaults

continued and eventually culminated in her pregnancy. M.E. was never asked, and therefore did not explicitly testify, as to why she kept returning to a residence, no longer her own, where she was subjected to chronic sexual assaults. But there's no great mystery here. It's not as if M.E. returned because she *wanted* to, as if to say that she became a willing sexual partner. (Even defendant doesn't suggest *that*.) It is a reasonable, if not an obvious, inference that M.E. still felt threatened and coerced—that she was still scared of what defendant might do, to her or to her family, if she did not continue to submit to him. In a word, nothing had changed.

¶ 50 We do not mean to suggest that a threat, once issued, always lingers in perpetuity. But its staying power will depend, in part, on the wherewithal of its victim. With the passage of time and a change of residence, an adult might not have felt threatened into submission any longer. But children are more easily cowed and manipulated. And M.E., as we have emphasized, was a child, all of 15 years old, scared out of her wits and lacking the maturity and fortitude of a grown woman. It is not hard to believe, in these circumstances, that she would continue to submit to defendant because of the fear that his threats (not to mention his conduct itself) engendered.

¶ 51 And lest one think that something might have changed on defendant's end, recall what he did upon learning that M.E. was pregnant, and thus that her sexual subservience appeared to be over: he brandished a gun and threatened to kill her, thus renewing, and escalating, his prior threat of violence.

¶ 52 Even if we are wrong, and that prior threat was too remote in time or other circumstances to still be operative in the sexual assault that caused M.E.'s pregnancy, it remains true that the sexual assaults always happened in the same manner, a manner that involved the use of force in its own right. So either way, through the use of force, the threat of force, or a combination of the two, a rational trier of fact had sufficient evidence to convict defendant of aggravated criminal

sexual assault.

¶ 53 II. Multiple convictions for aggravated criminal sexual assault

¶ 54 The trial court entered judgment on two counts of aggravated criminal sexual assault. The same aggravating factor was alleged in each count: causing M.E.'s pregnancy, a form of bodily harm. 720 ILCS 5/11-0.1, 11-1.30(a)(2) (West 2014). Defendant argues, and the State concedes, that only one of these two convictions may stand.

¶ 55 We appreciate and accept the State's concession. There is no evidence that M.E. became pregnant more than once. And logically speaking, a single pregnancy can only be caused by a single act of sexual penetration. Thus, one of defendant's convictions for aggravated criminal sexual assault must be vacated. *People v. Bishop*, 218 Ill. 2d 232, 248-49 (2006).

¶ 56 And we agree with the State that one of defendant's two convictions for the lesser-included offense of criminal sexual assault, which the trial court merged into the two aggravated counts at sentencing, should now be reinstated. The indictment alleges two distinct acts of forcible sexual penetration. One act is alleged in its aggravated form in Count 1, and in its simple form in Count 5. The other act is alleged in its aggravated form in Count 2, and in its simple form in Count 6. Counts 2 and 6 are both expressly based on "an act separate from the act set forth in the other count." And while only one act of sexual penetration could have caused M.E.'s pregnancy, the State proved—and the trial court found—two distinct acts of forcible sexual penetration. The act that caused M.E.'s pregnancy was an aggravated criminal sexual assault. The act that did not was a criminal sexual assault.

¶ 57 Defendant argues that the aggravated count should be vacated, and that should be that; his conviction for the corresponding lesser-included offense should not be reinstated, and he should not be resentenced for that offense. In *Bishop*, he says, the supreme court did *not* reinstate

a conviction for the lesser-included offense of criminal sexual assault (which the appellate court had vacated) after vacating one of the two convictions for aggravated criminal sexual assault, on the ground that they were both based on the aggravating factor of causing the victim's single pregnancy. *Id.*

¶ 58 Defendant's argument plays fast and loose with the facts of *Bishop*. Those facts are a bit complicated, but the basic point is simple. The indictment charged four different counts based on vaginal penetration—the two counts of aggravated criminal sexual assault, and two counts of criminal sexual assault. *Id.* at 236. But all four of those counts were based on a single alleged *act* of vaginal penetration, charged under four different legal theories. See *id.* at 247-48. The four remaining counts, two aggravated and two simple criminal sexual assaults, were based on two alleged acts of anal penetration. *Id.* at 236, 247-48. So when the dust settled, the defendant could only be sentenced for *one* act of vaginal penetration, and two acts of anal penetration—which is exactly what the supreme court ordered. *Id.* at 236, 254. There was no basis for reinstating a criminal sexual assault based on vaginal penetration, because there was no second act of vaginal penetration on which defendant could be sentenced. Here, there is.

¶ 59 But we decline the State's invitation to sentence defendant to the maximum non-extended sentence for that offense. The usual, and better, course is to remand to the trial court for resentencing on the lesser-included offense. We do so here. We note that mandatory consecutive sentencing will still apply. 730 ILCS 5/5-8-4(d)(2) (West 2014).

¶ 60 CONCLUSION

¶ 61 For these reasons, we remand this case to the trial court with the following directions: Vacate one of defendant's convictions for aggravated criminal sexual assault (either Count 1 or Count 2, to be determined by the trial court); reinstate the corresponding conviction for criminal

sexual assault (either Count 5 or Count 6); and resentence defendant on that count. The judgment of the circuit court is otherwise affirmed.

¶ 62 Affirmed in part; vacated in part; remanded with directions.