2025 IL App (4th) 240212-U

NO. 4-24-0212

FILED
February 4, 2025
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
JOHN A. GILLIN,	)	No. 21CF841
Defendant-Appellant.	)	
	)	Honorable
	)	William A. Yoder,
	)	Judge Presiding.

JUSTICE DOHERTY delivered the judgment of the court.
Justices Knecht and Vancil concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence at trial was insufficient to support defendant's conviction on count 2 beyond a reasonable doubt, requiring reversal of defendant's conviction and sentence on that count; the trial court did not abuse its discretion in refusing defendant's tendered lesser-included offense instruction; and defendant's consecutive sentences on the remaining counts were not improper.

¶ 2 Defendant John A. Gillin was convicted of eight counts of criminal sexual assault and sentenced to eight consecutive terms of 10 years in prison. On appeal, he argues that (1) the jury's verdict on count 2 was against the manifest weight of the evidence; (2) the trial court abused its discretion in refusing defendant's tendered jury instruction referencing a lesser-included offense; and (3) the trial erred as a matter of law in sentencing defendant to eight consecutive terms of imprisonment, in violation of section 5-8-4(f)(2) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-8-4(f)(2) (West 2022)).

¶ 3 We affirm in part, and reverse and vacate in part.

¶ 4 I. BACKGROUND

¶ 5 In August 2021, the State charged defendant by indictment with nine counts of criminal sexual assault (720 ILCS 5/11-1.20(a)(3) (West 2018)) involving E.S., a minor.

¶ 6 Counts 1 through 3 related to events occurring on or about June 26, 2019, and alleged that defendant knowingly committed an act of sexual penetration involving his penis and E.S.'s mouth (count 1) and vagina (count 2) and his hand and E.S.'s vagina (count 3).

¶ 7 Counts 4 and 5 related to events occurring on or about July 7, 2019, and alleged that defendant knowingly committed an act of sexual penetration involving his penis and E.S.'s mouth (count 4) and vagina (count 5).

¶ 8 Counts 6 through 9 related to events allegedly occurring between December 31, 2018, through June 25, 2019, and charged that defendant knowingly committed an act of sexual penetration involving his penis and E.S.'s anus (count 6), his penis and E.S.'s mouth (count 7), his mouth and E.S.'s vagina (count 8), and his penis and E.S.'s vagina (count 9).

¶ 9 All charges are Class 1 felonies.

¶ 10 A. Trial

¶ 11 The case proceeded to a jury trial in August 2023. The primary witnesses were E.S., her mother Krystle S., and defendant. Krystle was dating defendant and was living with him at the time of the events set forth below.

¶ 12 1. *911 Call*

¶ 13 On July 8, 2019, 14-year-old E.S. called 911 and reported that her stepfather had been raping her. According to the recording, which was played for the jury, E.S. said, "It's actually been happening for a while, but I never had the guts to call you." She was asked when the last time

had been and she answered, “Yesterday he bribed me with something,” and added, “Yesterday, last night. At midnight.” She told the operator that this had been “going on for like two years.” Likewise, she testified at trial that the rapes had been going on since she was 12 years old, when she and her family were living in Spring Valley, Illinois.

¶ 14 2. *Three Periods Referenced in the Indictments*

¶ 15 The indictments against defendant alleged various acts of criminal sexual assault occurring on two specific days (June 26 and July 8, 2019) and over the period of time running from December 31, 2018, through, June 25, 2019. At all relevant times, E.S. was between 12 and 14 years of age.

¶ 16 a. June 26, 2019 (Counts 1-3)

¶ 17 E.S. testified that she was in her bedroom when defendant texted her and asked her to come downstairs into the basement. Although others were in the house at the time, no one else was in the basement. E.S. said that defendant asked her “for an oral favor,” which she said meant “a blow job.” She said she “put it in [her] mouth.” She did not remember whether defendant had ejaculated into her mouth.

¶ 18 She recalled other physical contact that evening, stating that defendant had put “his fingers in my vagina.” E.S. testified:

> “Q. What happened after he put his fingers in your vagina?
>
> A. Can you elaborate on that, please. If you can.
>
> Q. I just need you to think about that night. Okay? What if anything happened after he put his fingers in your vagina?
>
> A. I remember he would move his fingers. That’s all I remember.
>
> Q. Did he at some point take his fingers out of your vagina?

A. Yes.

Q. Then what happened?

A. I don't remember."

She did not remember any other physical contact on that night, and she described no instance of penis to vagina penetration as charged in count 2. After the encounter with defendant, she went back upstairs.

¶ 19 b. July 7, 2019 (Counts 4 and 5)

¶ 20 E.S. testified that she was in the basement around midnight on July 7, 2019, and that her mother and brothers were home. When asked what prompted her to go to the basement that night, E.S. said, "Normally he would call me down there." However, she could not recall what brought her to the basement that particular night. E.S. said she and defendant engaged in intercourse—"his penis in my vagina" and "his penis in my mouth"—that evening and that afterwards, "we cleaned up and I went back up to my room as if nothing happened." She said they engaged in oral sex before intercourse, and that defendant had finished in her mouth. E.S.'s examination proceeded as follows:

"Q. Did you ever tell anyone on—that on July 7th, when you first had intercourse, penis and vagina, and then just before he was about to cum, he put his penis in your mouth?

A. I do remember that."

¶ 21 She elaborated on cross-examination, stating that defendant's penis was in her mouth:

"Q. And you said that this time it was an oral favor and you described that as a blow job; is that right?

A. Yes.

Q. And that would be—you described that as his penis in your mouth; is that correct?

A. Yes.

Q. Okay. When—when that happened—do you know what the term ejaculation means?

A. Yes.

Q. Did he ejaculate into your mouth?

A. Yes.

Q. And what happened after that?

A. I swallowed, and then we cleaned up.

Q. And what do you mean by 'cleaned up'?

A. There was a rag or something to clean me up and—clean me up and go to bed."

E.S. said that she had sex with defendant that night in exchange for a Dragon Ball Z action figuretoy.

¶ 22 c. December 31, 2018, to June 25, 2019 (Counts 6-9)

¶ 23 E.S. testified to the two specific dates discussed above, but she also testified there were other times that something physical happened between her and defendant. E.S.'s examination continued:

"Q. Okay. What type of physical contact happened between you and [defendant], in addition to these two incidents?

A. Intercourse.

Q. Intercourse. When you say 'intercourse,' previously you said that means penis inside your vagina. Is that what you mean now?

A. Yes.

Q. Okay. Other than the two incidents that we went through, how many times did that occur here in Bloomington?

A. At least three times. I don't know."

¶ 24 E.S. said defendant used a code phrase when he wanted to have intercourse—"training"—which was a phrase from an anime program they enjoyed watching together called Dragon Ball Z. She said the two would have intercourse after he asked her that question. E.S. further testified:

"[E.S.], you had told us with these two incidents where his penis went into your mouth. Other than those two incidents, did his penis ever go into your mouth while living here in Bloomington?

A. Yes.

Q. Other than those two incidents, approximately how many times did that happen?

A. I don't know.

Q. More than those two times?

A. Yes. Yes."

¶ 25 She then testified:

"Q. Other than the time that you described already, about [defendant's] hand to your vagina, did that ever happen other than that time?

A. Yes.

Q. Okay. Approximately how many times in Bloomington did that happen?

A. At least ten."

¶ 26 E.S. was also asked:

"Other than his penis going into your vagina and your mouth, did his penis ever touch any other part of your body?

A. Yes.

Q. What part of your body?

A. My—you said vagina?

Q. Yes.

A. My mouth.

Q. Yes.

A. A few times it was my butt.

Q. Butt. Okay."

¶ 27 On this latter incident, E.S. was asked on cross-examination to explain further:

"Q. You were asked about some other acts between you and [defendant], and I'm going to go over them with you.

A. Okay.

Q. You said that a few times that he placed his penis in your butt; is that right?

A. Yes.

Q. How old were you when that happened?

A. 12.

Q. And all of those times that you're talking about when he put his penis in your butt, you would only have been 12?

A. Most of the time, yes.

Q. What about the other times?

A. I believe I was 14.

Q. Okay. Now, when you were 12, you were not living in Bloomington; is that right?

A. Right.

Q. And when you were 14, part of the time you were living in Spring Valley; is that correct?

A. Yes.

Q. Okay. Because that was right before you moved to Bloomington?

A. Yes.

Q. Okay. And the two times that happened—that you say happened when you were 14, you were in Spring Valley; is that correct?

A. I was in Bloomington.

Q. Bloomington?

A. Yes.

Q. And on those occasions that you say [defendant] placed his penis in your butt, did he—did it go all the way in?

A. Once it did; one time it didn't.

Q. Okay. When was the time that it went all the way in?

A. When I was 12. When I was 12.

Q. Okay. And the two times that you say it happened when you were 14 years old, what happened there?

A. It hurt too much and I didn't want to do it. So he didn't go all the way in."

¶ 28 d. Defendant's Testimony

¶ 29 Defendant testified that he was 39 years old and had been in a relationship with E.S.'s mother Krystle from the middle of 2014 through the middle of 2021, or a period of "[r]oughly seven years." He had three children with Krystle, all of whom were younger than E.S., and two children from another relationship. He lived with Krystle off and on but was living in the residence with E.S. during the time of these allegations. Defendant earned advertising revenue by streaming video games via YouTube from a workstation in the basement of the home where he and E.S. resided.

¶ 30 Defendant was asked and answered the following concerning the allegations against him:

"Q. You've heard [E.S.] talk about incidents involving you placing your penis in her anus; is that correct?

A. Yes.

Q. At any point did you put your penis into her anus?

A. No.

Q. Did you ever put your penis in her vagina?

A. No.

Q. Did you ever put your mouth on her vagina?

A. No.

Q. Did she ever put her mouth on any part of your genitalia?

A. No.

Q. Did you molest or sexually touch [E.S.]?

A. Absolutely not."

¶ 31 B. Jury Instructions

¶ 32 During the jury instruction conference, defense counsel asked the trial court to give a lesser-included offense instruction on all counts, each of which alleged that defendant committed an act of sexual penetration in various forms. Specifically, defendant objected to the State's tendered instruction 20, which read, in part: "The defendant is charged with the offense of criminal sexual assault." Defendant's counsel tendered an alternative instruction on criminal sexual abuse, defendant's tendered instruction 2 (based on non-Illinois Pattern Jury Instructions, Criminal, No. 26.01(q) (approved Dec. 8, 2011)), which stated that defendant had been charged with the offense of criminal sexual assault, and further explained as follows: "Under the law, a person charged with criminal sexual assault may be found (1) not guilty of criminal sexual assault and not guilty of aggravated criminal sexual abuse; or (2) guilty of criminal sexual assault; or (3) guilty of criminal sexual abuse." The tendered alternative instruction also discussed the appropriate verdict forms.

¶ 33 The trial court overruled defendant's objections to the State's instruction 20 and refused to give the alternative lesser-included offense instructions. The court utilized the charging instrument method and said that under this method, "it would seem to the Court, would only indicate on Count 3 that a—that offense being an allegation of hand and vagina, that would apply to possibly be interpreted as sexual conduct." The court added:

"Those offenses, the case law seems to support the argument that contact between hand and vagina could be interpreted potentially by a jury as when the charging

instrument method could constitute sexual conduct. I agree with Ms. Wong's analysis that the sexual gratification portion according to case law can be inferred by the conduct.

So the Court believes that if you use the charging instrument method only Count 3 would include the possible lesser-included offense of aggravated criminal sexual abuse because the contact of the other charges by its very nature constitutes penetration, but for argument's sake, but for argument's sake if we were then to progress this step two of that charging instrument approach and look at those charges based on the evidence that was presented, the defendant denies all contact of a sexual nature. He denies any contact. The only allegations of contact, and the evidence flows from the testimony of [E.S.], the victim in this case."

¶ 34 The trial court then reiterated the definition of sexual conduct and stated, "Within that definition, as the Court has previously mentioned, it seems to the Court that only Count 3, hand, vagina, could possibly fall into that category." The court then defined sexual penetration, and stated:

"When you look at those two definitions, and for purposes of this argument, even though I've indicated that I believe only Count 3 meets the first criteria of this test, I'm assuming for argument's sake that all nine counts, the second portion would apply to all nine counts when you look at the testimony of the victim.

So the only evidence in this case, the only evidence of any sexual conduct or penetration in this case is from the victim. ***

The only evidence in this case, the only evidence involves testimony of actual penetration, specifically finger to vagina penetration as it relates to Count 3,

> and the other forms of penetration as it relates to Counts 1 and 2 and 4 through 9. There is no testimony or evidence of a simple touching of finger to vagina. In other words, the outer portions of the vagina, there's no evidence of that whatsoever. There's nothing that might allow a jury to find the defendant guilty of the lesser-included offense and not guilty of the greater offense. If there's no evidence that would allow a jury to find the defendant guilty of only the lesser offense, then the giving of that lesser-included offense would be improper, and the Court's going to deny the lesser-included offense."

The court then ruled that the State's tendered instruction 20 be given over defense counsel's objection.

¶ 35 C. Verdict

¶ 36 On August 18, 2023, the jury returned a verdict, finding defendant guilty on counts 1 through 7 and 9, but not guilty on count 8.

¶ 37 D. Posttrial

¶ 38 Defendant filed a timely motion notwithstanding the verdict, or in the alternative, for a new trial, which raised the issue, *inter alia*, of the trial court's refusal to give a lesser-included offense instruction. Defendant's motion was denied.

¶ 39 E. Sentencing

¶ 40 On November 2, 2023, defendant was sentenced to 10 years in prison for each count, to be served consecutively, for a total of 80 years. A timely motion to reconsider was filed, challenging the sentences and arguing that the offenses were "committed as part of a single course of conduct" and that the consecutive sentences, therefore, could not exceed a cumulative length of 60 years. Defendant's motion was denied.

¶ 41 This appeal followed.

¶ 42 II. ANALYSIS

¶ 43 Defendant challenges the trial court's judgment on appeal, arguing that: (1) the jury's verdict on count 2 was against the manifest weight of the evidence; (2) the court erred by refusing to give a lesser-included instruction; and (3) the court erred in sentencing defendant to consecutive terms of imprisonment. We address each in turn.

¶ 44 A. Sufficiency of the Evidence on Count 2

¶ 45 Defendant initially argues that there was insufficient evidence to prove him guilty beyond a reasonable doubt on count 2 of the indictment, which alleged that defendant knowingly committed an act of sexual penetration with E.S. involving his penis and the minor's vagina on June 26, 2019. When considering a challenge to the sufficiency of the evidence of a defendant's guilt, it is not the function of this court to retry the defendant. *People v. Tenney*, 205 Ill. 2d 411, 428 (2002) (citing *People v. Smith*, 177 Ill. 2d 53, 73 (1997)). Rather, it is the function of the jury, as the trier of fact, to assess the credibility of the witnesses, the weight to be given their testimony, and the inferences to be drawn from the evidence. *People v. Leger*, 149 Ill. 2d 355, 389-90 (1992). It is also for the trier of fact to resolve conflicts or inconsistencies in the evidence. *People v. Bull*, 185 Ill. 2d 179, 204-05 (1998); *People v. Young*, 128 Ill. 2d 1, 51 (1989).

¶ 46 A criminal conviction will not be set aside on appeal unless the evidence is so improbable or unsatisfactory that there remains a reasonable doubt of the defendant's guilt. "The question on review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational fact finder could have found defendant guilty beyond a reasonable doubt." *Tenney*, 205 Ill. 2d at 427 (citing *People v. Brown*, 185 Ill. 2d 229, 247 (1998)). This standard of review applies in all criminal cases, whether the evidence is direct or circumstantial.

Id. at 428. Count 2 charged defendant with criminal sexual assault under section 11-1.20(a)(3) of the Criminal Code of 2012 (Criminal Code), which provides that: "A person commits criminal sexual assault if that person commits an act of sexual penetration and *** is a family member of the victim, and the victim is under 18 years of age." 720 ILCS 5/11-1.20(a)(3) (West 2018).

¶ 47 The State argues that it was not required to prove that a crime was committed on a particular date unless the allegation of a particular time is an essential element of the offense or a statute of limitations question is involved. See *People v. Thrasher*, 383 Ill. App. 3d 363, 368 (2008); *People v. Suter*, 292 Ill. App. 3d 358, 363 (1997). "Where the proof at trial [establishes or] suggests the offense occurred on a date other than the one charged, IPI Criminal 3d No. 3.01 serves to inform the jury that the difference in dates is not material." *Suter*, 292 Ill. App. 3d at 363. As this court has held, giving Illinois Pattern Jury Instructions, Criminal, No. 3.01 (approved Oct. 17, 2014) (hereinafter IPI Criminal No. 3.01) "prevents a defendant from arguing that he should be acquitted simply because of a nonfatal variance between the charging information and the proof at trial." *Thrasher*, 383 Ill. App. 3d at 368. In this case, IPI Criminal No. 3.01 was given as People's instruction 12B, and informed the jury that, "If you find the offense[s] charged [were] committed, the State is not required to prove that it was committed on the particular date charged."

¶ 48 However, we distinguish this instant case from *Tenney* because the issue here is not just the calendar date the offense charged in count 2 occurred, but that it was charged as having occurred on the *same day* as the events charged in counts 1 and 3. The State charged that all three offenses occurred as part of a series of three acts on the same day, but E.S. testified to only the events charged in counts 1 and 3, and not the penis to vagina penetration charged in count 2:

> "Q. Was there any other—other than the oral favor, was there any other physical contact on this June 26th date?

A. Yes.

Q. What contact?

A. Fingers—his fingers in my vagina.

Q. Okay. Did you say in your vagina?

A. Yes.

Q. Was there any other physical contact?

A. I don't remember."

¶ 49 She was also asked, "Before you went upstairs, did anything else occur between your body and John's body?" to which she answered, "I don't remember." Finally, she was asked, "Before we move on, is there anything else about this June 26th incident that you do remember?" E.S. answered, "No."

¶ 50 Although the State contends there was ample evidence that E.S. was assaulted via vaginal penetration on other dates—E.S. testified that there were three additional instances in the period between December 31, 2018, through June 25, 2019—these unspecified dates are consumed in the remaining counts and cannot be said to reference the events alleged to have occurred together on July 26. Although giving IPI Criminal No. 3.01, as was done here, typically prevents a defendant from claiming that he should be acquitted because of a variance between the charging instrument and the proof at trial (*id.*), we cannot rely on that instruction here because the defect is not the failure of the evidence to support a specific date, but that it failed to support one of three acts alleged to have occurred the *same day*.

¶ 51 For these reasons, we reverse outright defendant's conviction on count 2. Pursuant to Illinois Supreme Court Rule 615(b) (eff. Jan. 1, 1967), we vacate the sentence imposed on count 2.

¶ 52 B. Lesser-Included Instruction

¶ 53 Defendant next argues the trial court erred by denying his request for a jury instruction on the lesser-included offense of criminal sexual abuse because some evidence supported the instruction as an alternative to criminal sexual assault as alleged in the indictment.

¶ 54 1. *Lesser-Included Instruction Analysis*

¶ 55 Determining whether the trial court erred in refusing to instruct the jury on a lesser-included offense entails a two-pronged inquiry. *People v. Hill*, 2020 IL App (1st) 162119, ¶ 17. As applied to this case, we must determine first whether criminal sexual abuse is a lesser-included offense of criminal sexual assault. *Id.* "[T]he charging instrument approach applies when determining whether an uncharged offense is a lesser-included offense of a charged offense." *People v. Kennebrew*, 2013 IL 113998, ¶ 32.

¶ 56 Under the charging instrument approach, we determine whether the allegations in the charging instrument describing the greater offense contain a "broad foundation" or "main outline" of the lesser offense. (Internal quotation marks omitted.) *People v. Kolton*, 219 Ill. 2d 353, 361 (2006). Even if the indictment does not specify the elements of the lesser-included offense, a lesser-included offense can be found if those elements can be reasonably inferred from the indictment's allegations. *Id.* at 364. This is an issue of law we review *de novo*. *Kennebrew*, 2013 IL 113998, ¶ 18.

¶ 57 If we answer the foregoing question in the negative, the inquiry is concluded. *People v. Ceja*, 204 Ill. 2d 332, 360 (2003). If, however, we answer the first question affirmatively, we must then consider whether "the evidence reveals that it would permit a jury to rationally find the defendant guilty of the lesser offense yet acquit the defendant of the greater offense." *People v. Hamilton*, 179 Ill. 2d 319, 324 (1997). "It is well-settled that where there is even slight evidence

in the record which, if believed by the jury, would reduce the crime to a lesser-included offense, an instruction defining the lesser offense should be given." *People v. Upton*, 230 Ill. App. 3d 365, 374 (1992). We review the trial court's refusal to give such an instruction for an abuse of discretion. *People v. McDonald*, 2016 IL 118882, ¶ 32. "An abuse of discretion occurs only where the trial court's decision is arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it." *People v. Rivera*, 2013 IL 112467, ¶ 37.

¶ 58 2. *First Step Analysis*

¶ 59 In applying the test articulated by *Kolton*, we begin by addressing whether the allegations in the charging instrument describing the greater offense contain a "broad foundation" or "main outline" of the lesser offense. *Kolton*, 219 Ill. 2d at 361. Here, the indictments alleged that defendant "knowingly committed an act of sexual penetration with a minor child" involving his penis and E.S.'s mouth (counts 1, 4, and 7), vagina (counts 2, 5, and 9), and anus (count 6); count 3 alleged penetration involving defendant's hand and her vagina. Count 8, which alleged penetration involving defendant's mouth and her vagina, resulted in a not guilty verdict and is not relevant here.

¶ 60 As charged in the indictment, criminal sexual assault is defined under section 11-1.20(a)(3) of the Criminal Code as follows: "A person commits criminal sexual assault if that person commits *an act of sexual penetration* and: *** is a family member of the victim, and the victim is under 18 years of age." (Emphasis added.) 720 ILCS 5/11-1.20(a)(3) (West 2018). Aggravated criminal sexual abuse is governed by section 11-1.60(b), which provides: "A person commits aggravated criminal sexual abuse if that person commits *an act of sexual conduct* with a victim who is under 18 years of age and the person is a family member." (Emphasis added.) *Id.* § 11-1.60(b).

¶ 61 As noted, defendant contends the trial court erred in refusing to instruct the jury on the lesser-included offense of sexual abuse, which involves "sexual conduct" rather than "sexual penetration." The statutory definition of "sexual penetration" is

> "any contact, however slight, between the sex organ or anus of one person and an object or the sex organ, mouth, or anus of another person, or any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person, including, but not limited to, cunnilingus, fellatio, or anal penetration." *Id.* § 11-0.1.

¶ 62 "Sexual conduct" is defined as

> "any knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus, or breast of the victim or the accused, or any part of the body of a child under 13 years of age, or any transfer or transmission of semen by the accused upon any part of the clothed or unclothed body of the victim, for the purpose of sexual gratification or arousal of the victim or the accused." *Id.*

¶ 63 The trial court felt that only the charges stated in count 3, which asserts that defendant committed an act of sexual penetration with a minor involving defendant's hand and "the vagina of E.S.," could possibly include the lesser-included offense of aggravated criminal abuse. However, our review is *de novo,* and we conclude that the "broad foundation" of the crime of sexual conduct can be found within the parameters of all eight counts. Sexual penetration of specified parts of the victim's body inevitably involves "touching" of those same areas. Furthermore, while sexual conduct requires that the touching be done "for the purpose of sexual gratification or arousal of the victim or the accused," *Kolton* leads us to conclude that the charges

stated in the indictment permit us to infer this element. *Kolton*, 219 Ill. 2d at 369-370. We find that the trial court did not abuse its discretion in determining that the first step of the *Kolton* analysis was satisfied as to count 3, but we further conclude that the trial court should have found the first step was satisfied for all counts.

¶ 64 3. *Second Step Analysis*

¶ 65 Although the trial court determined that only count 3 potentially supported the sexual abuse as a lesser-included offense under the first prong of *Kolton*, it nevertheless made a clear determination under the second prong that there was no evidence that would permit the jury to rationally find the defendant guilty of the lesser offense yet acquit him of the greater offense for any of the eight counts in question.

¶ 66 As *Hamilton* instructs, "[a] defendant is entitled to a lesser included offense instruction only if an examination of the evidence reveals that it would permit a jury to rationally find the defendant guilty of the lesser offense yet acquit the defendant of the greater offense." *Hamilton*, 179 Ill. 2d at 324. However, where there is no evidence to support a jury rationally finding defendant guilty only of the lesser offense, a trial court does not abuse its discretion in refusing the lesser included offense instruction. *Id.*

¶ 67 E.S.'s testimony clearly indicated penetration occurred as to all eight offenses in question, while defendant denied any inappropriate contact with her at all. There was no evidence that would permit a jury to rationally find defendant guilty of the lesser offense yet acquit him of the greater. See *id.* at 327-28 ("[D]efendant would be entitled to a lesser[-]included offense instruction on theft only if the evidence presented at trial could rationally support a finding that defendant was guilty of theft but innocent of residential burglary."). Therefore, the trial court did not abuse its discretion in refusing to instruct the jury as to the lesser-included offense.

¶ 68 C. Sentencing

¶ 69 On appeal, defendant asserts that the trial court erred when it imposed an aggregate sentence of 80 years in prison (*i.e.*, 10 years on each of eight convictions, to be served consecutively). Defendant argues that this sentence violates section 5-8-4(f)(2) of the Unified Code (730 ILCS 5/5-8-4-(f)(2) (West 2022)), which limits the aggregate total for consecutive sentences to the sum of the maximum terms of the two most serious felonies involved if the offenses were committed as part of a single course of conduct during which there was no substantial change in the criminal objective.. According to defendant, the court erroneously concluded there were three courses of conduct corresponding to the dates alleged in the indictments. Defendant suggests there was no evidence of an independent motivation for the alleged acts and asks for a remand; in the alternative, he seeks a reduction in his sentence to 60 years, which he claims is the appropriate aggregate maximum.

¶ 70 We note that a trial court's determination of whether a defendant's actions constitute a single course of conduct is reviewed under the manifest weight of the evidence standard. *People ex rel. Illinois v. Historic Preservation Agency v. Zych*, 186 Ill. 2d 267, 278 (1999). So long as the trial court's conclusion is supported by the record, *i.e.*, not unreasonable or arbitrary, we will not reverse it. *People v. Daniel*, 311 Ill. App. 3d 276, 287 (2000).

¶ 71 1. *Sentencing Below*

¶ 72 We initially observe that our vacation of defendant's sentence on count 2 reduces his total sentence from 80 years' imprisonment to 70.

¶ 73 Defendant's offenses were classified as Class 1 felonies, punishable by 4 to 15 years in prison. 720 ILCS 5/11-1.20(b) (West 2018); 730 ILCS 5/5-4.5-30(a) (West 2022). Defendant was eligible for Class X sentencing, raising the sentencing range from 6 to 30 years for

each count. 730 ILCS 5/5-4.5-25(a) (West 2022). Here, the trial court sentenced defendant to 10 years on each count; the question then turns to whether the imposition of those sentences consecutively is subject to an upper limit.

¶ 74 According to section 5-8-4(d)(2) of the Unified Code, the sentences for these particular offenses must run consecutively. *Id.* § 5-8-4(d)(2). The same statute, however, sets forth a "cap" on the aggregate length of the cumulative sentences that can be imposed: the sum of the maximum terms authorized for the two most serious felonies involved. *Id.* § 5-8-4(f); see *People v. Hatter*, 2021 IL 125981, ¶ 31. Here, each count brings a maximum sentence of 30 years' imprisonment, so the cap on the aggregate length of sentencing—if applicable to all counts—would be 60 years. 730 ILCS 5/5-8-4(f)(2) (West 2022). Finally, the cap on the aggregate term comes with its own limitation: it shall not apply to "offenses that were not committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective." *Id.*

¶ 75 2. *Single Course of Conduct*

¶ 76 Here, there can be no doubt that defendant's criminal objective never changed during the commission of the various offenses at issue. The question, however, is whether the offenses were part of a "single course of conduct." The term "conduct" is defined in the Criminal Code as "an act or series of acts, and the accompanying mental state." 720 ILCS 5/2-4 (West 2018); *People v. Daniel*, 311 Ill. App. 3d 276, 287 (2000). "A 'course of conduct' is not necessarily confined to a single incident but may encompass a range of activity." *Daniel*, 311 Ill. App. 3d at 287. The determination of whether defendant's actions constituted a single course of conduct is a question of fact. *Id.*

¶ 77 Here, the trial court found that there were two separate courses of conduct that

occurred on two specific days, one on June 26, 2019, and the other on July 7, 2019. The events of each day had a definite beginning and end and were separated in time from the events of the other day. See *People v. Schneider*, 2024 IL App (4th) 230524-U, ¶¶ 70-72 (finding that events committed close in time on the same day constituted a single course of conduct, but events separated by years did not). We conclude the trial court's finding that the offenses committed on two dates constitute two separate courses of conduct is not against the manifest weight of the evidence.

¶ 78 However, the trial court's finding that the various offenses occurring at unspecified dates between December 31, 2018, and June 25, 2019, constituted a "single course of conduct" is not supported by the evidence. The fact that the specific date of each offense is unknown may make that conclusion impossible. Each such offense may have been committed on the same day, or some offenses could have occurred five months apart. Regardless, we conclude that the application of the cap on consecutive sentencing is not implicated here. Even if the cap on consecutive sentences were triggered, it would limit the aggregate sentences for this group of offenses to no more than 60 years (*i.e.*, the maximum sentence for the two most serious offenses). As the sentence imposed for those offenses was 30 years, the result is unchanged.

¶ 79 Therefore, we find the trial court's sentencing of defendant to consecutive prison terms for the three independent periods of conduct was not against the manifest weight of the evidence.

¶ 80 III. CONCLUSION

¶ 81 For the reasons stated, we affirm defendant's convictions on counts 1, 3, 4, 5, 6, 7, and 9 and his consecutive sentences on those counts, but we reverse his conviction on count 2 and vacate the sentence imposed thereon. This ruling reduces defendant's aggregate sentence to 70

years in prison.

¶ 82 Affirmed in part and reversed and vacated in part.