No. 124797

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- ALEJANDRO REVELES-CORDOVA Defendant-Appellant	))))))))))	Appeal from the Appellate Court of Illinois, No. 3-16-0418. There on appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois, No. 10-CF-2429. Honorable Sarah F. Jones, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

JAMES E. CHADD
State Appellate Defender

PATRICIA MYSZA
Deputy Defender

BRIAN W. CARROLL
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

ORAL ARGUMENT REQUESTED

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Carolyn Taft Grosboll
SUPREME COURT CLERK

POINT AND AUTHORITIES

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NATURE OF THE CASE

Alejandro Reveles-Cordova was convicted of home invasion and criminal sexual assault after a jury trial and was sentenced to consecutive prison terms of 11 years and nine years, respectively.

This is a direct appeal from the judgment of the court below. No issue is raised challenging the charging instrument.

ISSUE PRESENTED FOR REVIEW

Whether Alejandro Reveles-Cordova's conviction for criminal sexual assault should be vacated as a lesser-included offense of his home invasion conviction predicated on that same criminal sexual assault.

STATUTES INVOLVED

Home Invasion (720 ILCS 5/12-11 (West 2010)):

(a) A person who is not a peace officer acting in the line of duty commits home invasion when without authority he or she knowingly enters the dwelling place of another when he or she knows or has reason to know that one or more persons is present or he or she knowingly enters the dwelling place of another and remains in such dwelling place until he or she knows or has reason to know that one or more persons is present and

> (1) While armed with a dangerous weapon, other than a firearm, uses force or threatens the imminent use of force upon any person or persons within such dwelling place whether or not injury occurs, or
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> (2) Intentionally causes any injury, except as provided in subsection (a)(5), to any person or persons within such dwelling place, or
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> (3) While armed with a firearm uses force or threatens the imminent use of force upon any person or persons within such dwelling place whether or not injury occurs, or
>
> (4) Uses force or threatens the imminent use of force upon any person or persons within such dwelling place whether or not injury occurs and during the commission of the offense personally discharges a firearm, or
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> (5) Personally discharges a firearm that proximately causes great bodily harm, permanent disability, permanent disfigurement, or death to another person within such dwelling place, or
>
> (6) Commits, against any person or persons within that dwelling place, a violation of Section 12-13, 12-14, 12-14.1, 12-15, or 12-16 of the Criminal Code of 1961.1

* * * *

(c) Sentence. Home invasion in violation of subsection (a)(1), (a)(2) or (a)(6) is a Class X felony. A violation of subsection (a)(3) is a Class X felony for which 15 years shall be added to the term of imprisonment imposed by the court. A violation of subsection (a)(4) is a Class X felony for which 20 years shall be added to the term of imprisonment imposed by the court. A violation of subsection (a)(5) is a Class X felony for which 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court.

Criminal Sexual Assault (720 ILCS 5/12-13 (West 2010)):

(a) The accused commits criminal sexual assault if he or she:

(1) commits an act of sexual penetration by the use of force or threat of force; or

* * * *

(b) Sentence.

(1) Criminal sexual assault is a Class 1 felony.

(2) A person who is convicted of the offense of criminal sexual assault as defined in paragraph (a)(1) or (a)(2) after having previously been convicted of the offense of criminal sexual assault or the offense of exploitation of a child, or who is convicted of the offense of criminal sexual assault as defined in paragraph (a)(1) or (a)(2) after having previously been convicted under the laws of this State or any other state of an offense that is substantially equivalent to the offense of criminal sexual assault or to the offense of exploitation of a child, commits a Class X felony for which the person shall be sentenced to a term of imprisonment of not less than 30 years and not more than 60 years. The commission of the second or subsequent offense is required to have been after the initial conviction for this paragraph (2) to apply.

(3) A person who is convicted of the offense of criminal sexual assault as defined in paragraph (a)(1) or (a)(2) after having previously been convicted of the offense of aggravated criminal sexual assault or the offense of predatory criminal sexual assault of a child, or who is convicted of the offense of criminal sexual assault as defined in paragraph (a)(1) or (a)(2) after having previously been convicted under the laws of this State or any other state of an offense that is substantially equivalent to the offense of aggravated criminal sexual assault or the offense of criminal predatory sexual assault shall be sentenced to a term of natural life imprisonment. The commission of the second or subsequent offense is required to have been after the initial conviction for this paragraph (3) to apply.

(4) A second or subsequent conviction for a violation of paragraph (a)(3) or (a)(4) or under any similar statute of this State or any other state for any offense involving criminal sexual assault that is

substantially equivalent to or more serious than the sexual assault prohibited under paragraph (a)(3) or (a)(4) is a Class X felony.

(5) When a person has any such prior conviction, the information or indictment charging that person shall state such prior conviction so as to give notice of the State's intention to treat the charge as a Class X felony. The fact of such prior conviction is not an element of the offense and may not be disclosed to the jury during trial unless otherwise permitted by issues properly raised during such trial.

STATEMENT OF FACTS

Alejandro Reveles-Cordova (Reveles) and J. B. had a 15-year relationship that ended in January 2010 when he moved out of the house they shared in Romeoville, Illinois. Reveles was charged with criminal sexual assault and home invasion predicated on that criminal sexual assault, for allegedly entering J. B.'s house in November 2010 and assaulting her. (C. 3–4.) He was also charged with aggravated domestic battery for allegedly strangling J. B. (C. 6.)

According to the State's evidence, on the evening of November 20, 2010, J. B. was alone at her home getting ready for a date with her new boyfriend when Reveles burst into her bedroom and accused her of ruining his life. (R. 1073, 1079–85.) He was very upset that she was seeing someone new. (R. 1085–91.) During the altercation, he pushed her onto an ottoman and penetrated her vagina with his penis. (R. 1091–93.) He then pushed her onto the bed and started choking her. (R. 1094.) He fled after J. B. told him that her neighbor knew to call the police if she saw Reveles's truck outside her house. (R. 1099–1101.)

The jury found Reveles guilty of criminal sexual assault and home invasion, but not guilty of aggravated domestic battery. (R. 1526.) Reveles filed a posttrial motion arguing that because the home invasion charge was predicated on the criminal sexual assault, the criminal sexual assault conviction should merge into the home invasion count. (C. 629–32.) The trial court denied the motion. (R. 1567.)

The trial court then sentenced Reveles to consecutive prison terms of 11 years on the home invasion count, and nine years on the criminal sexual assault count. (C. 682.) Reveles filed a motion to reconsider sentence, arguing that the sentences should be reduced and, because the home invasion count fully encompassed the criminal sexual assault count, the sentences should be concurrent or the counts should merge. (C. 677.) The motion was denied. (R. 1593.)

On appeal, Reveles argued, among other things, that, under the abstract-elements test adopted by this Court in *People v. Miller*, 238 Ill. 2d 161 (2010), his criminal sexual assault conviction should be vacated under one-act, one-crime principles because it constituted a lesser-included offense of his home invasion conviction. The appellate court rejected Reveles's arguments and affirmed his convictions, though it remanded his case for additional *Krankel* proceedings. *People v. Reveles-Cordova*, 2019 IL App (3d) 160418. The court concluded that because home invasion can theoretically be committed without committing criminal sexual assault, criminal sexual assault was not a lesser-included offense. *Id.* ¶ 65. Reveles's petition for rehearing was denied.

This Court granted leave to appeal on September 25, 2019.

ARGUMENT

The abstract-elements test for lesser-included offenses adopted by this Court in *People v. Miller* should be limited to a comparison of the specific statutory provisions under which the defendant was charged, which is consistent with how this Court has historically applied the test, with the intent of the legislature, and with the principles underlying the one-act, one-crime doctrine.

In *People v. Miller*, 238 Ill. 2d 161 (2010), this Court adopted the abstract-elements test for determining whether one charged offense was an included offense of another charged offense for purposes of the one-act, one-crime doctrine. Under this test, a court is to compare the statutory provisions of each offense and determine whether each requires proof that the other does not; if so, they are separate offenses. However, this Court did not clarify *which* statutory provisions were to be compared: the specific provisions under which the defendant was charged, or every provision set forth in the statute, regardless of whether they apply to the case at hand.

Since *Miller* was decided, two lines of cases have developed in the appellate court. In one line of cases (the *Skaggs* line of cases), the appellate court looked to how this Court has traditionally applied the abstract-elements test, as well as how the United States Supreme Court has applied the equivalent *Blockburger* test, and determined that only the statutory provisions the defendant was actually charged under should be compared. *People v. Skaggs*, 2019 IL App (4th) 160335, ¶¶ 33–39; *People v. Curry*, 2018 IL App (1st) 152616, ¶¶ 26–28; *People v. Gillespie*, 2014 IL App (4th) 121146, ¶¶ 10–23. These cases hold that if one offense as charged requires the State to prove all of the elements of the second offense as charged, the second offense is a lesser-included of the first. *Skaggs* 2019 IL App (4th) 160335, ¶ 39 (criminal sexual assault is a lesser-included offense of home invasion predicated on criminal sexual assault); *Curry*, 2018 IL App (1st) 152616, ¶ 28 (intent to deliver drugs while armed with a dangerous weapon was lesser-included offense of armed violence); *Gillespie*, 2014 IL App (4th) 121146, ¶ 23 (robbery is lesser-included

offense of aggravated criminal sexual assault predicated on robbery); *see also People v. Schmidt*, 405 Ill. App. 3d 474, 487 (3d Dist. 2010) (possession of methamphetamine was a lesser-included offense of unlawful use of property under *Miller*).

The other line of cases (the *Bouchee* line of cases) concluded that the statutes as a whole must be compared, not just the charged provisions. *People v. Bouchee*, 2011 IL App (2d) 090542, ¶¶ 10–11; *People v. Fuller*, 2013 IL App (3d) 110391, ¶18–23 (following *Bouchee* without conducting independent analysis). These cases hold that even if one offense as charged requires proof of all the elements of the second offense as charged, they are separate offenses so long as it is possible under any uncharged provision of the statutes to commit each offense without committing the other. *Bouchee*, 2011 IL App (2d) 090542, ¶¶ 10–11; *Fuller*, 2013 IL App (3d) 110391, ¶22–23.

In this case, Reveles was charged with both home invasion predicated on committing a criminal sexual assault, and the underlying criminal sexual assault. (C. 3–4.) After a jury trial, he was convicted and sentenced separately on both offenses. (C. 682.) On appeal, he argued that because the State was required to prove every element of the criminal sexual assault in order to prove him guilty of the home invasion, the criminal sexual assault was a lesser-included offense and should be vacated under the one-act, one-crime doctrine. However, the appellate court followed the *Bouchee* line of cases and held that because uncharged provisions of the home invasion statute provide that the offense can be committed without committing criminal sexual assault, criminal sexual assault is not a lesser-included offense. *People v. Reveles-Cordova*, 2019 IL App (3d) 160418, ¶ 65.

The appellate court's decision in this case is erroneous, as it is the *Skaggs* line of cases, rather than the *Bouchee* line, that correctly applies the abstract-elements test. First, this Court has historically compared only the statutory provisions as charged when applying the abstract-elements test, and has continued

to do so since deciding *Miller*. Furthermore, the legislature has indicated its approval of this approach by its acquiescence to this Court's decisions holding that defendants may not be convicted and sentenced on both a greater offense and its predicate offense absent explicit indication from the legislature that it intended for cumulative punishment. Finally, limiting the abstract-elements test to a comparison of the charged statutory provisions is more in keeping with the one-act, one-crime doctrine's goal of preventing a defendant from being punished multiple times for the same act. Under a correct application of the abstract-elements test, Reveles's criminal sexual assault conviction must be vacated as a lesser-included offense because the home invasion charge required the State to prove every element of the criminal sexual assault, and there is no clear indication that the legislature intended for cumulative punishment. Accordingly, this Court should expressly hold that the abstract-elements test involves a comparison of only the specific statutory provisions under which a defendant is charged, and should vacate Reveles's criminal sexual assault conviction as a lesser-included offense of his home invasion conviction.

Whether one of multiple convictions must be vacated under the one-act, one-crime rule is a question of law reviewed *de novo*. *People v. Artis*, 232 Ill. 2d 156, 161 (2009).

A. Limiting the abstract-elements test to a comparison of the specific statutory provisions charged, rather than comparing every possible permutation of the statutes, is consistent with this Court's historical application of the test, the legislature's intent, and the principles of the one-act, one-crime doctrine.

This Court adopted the one-act, one-crime doctrine in *People v. King*, 66 Ill. 2d 551, 566 (1977). In *King*, this Court held that:

> Prejudice results to the defendant only in those instances where more than one offense is carved from the same physical act. Prejudice, with regard to multiple acts, exists only when the defendant is

> convicted of more than one offense, some of which are, by definition, lesser included offenses. *Id.*

Applying the doctrine involves a two-step analysis. *People v. Miller*, 238 Ill. 2d 161, 165 (2010). First, the court ascertains whether the defendant's conduct consisted of a single act or multiple acts. *Id.* at 165. If a single act, then only a single conviction may stand. *Id.* If the court determines that the defendant committed multiple acts, the court then moves on to the second step and determines whether any of the offenses are lesser-included offenses. *Id.* If an offense is a lesser-included offense, multiple convictions are improper. *Id.* Because this case involves multiple acts, the question is whether Reveles's conviction for criminal sexual assault was an included offense of his home invasion conviction.

Under section 2-9 of the Criminal Code, an included offense is one "established by proof of the same or less than all of the facts or a less culpable mental state (or both), than that which is required to establish the commission of the offense charged." 720 ILCS 5/2-9(a) (2010). In *Miller*, this Court held that, when determining whether a charged offense is a lesser-included offense of another charged offense, courts must apply what is known as the abstract-elements test, which is equivalent to the same-elements test, or *Blockburger* test, employed by the United States Supreme Court for determining whether an offense is a lesser-included offense for double jeopardy purposes. *Miller*, 238 Ill. 2d at 173–75 (citing *Brown v. Ohio*, 432 U.S. 161 (1977)). The test is based on the presumption that the legislature ordinarily does not intend to punish the same offense under different statutes. *Whalen v. United States*, 445 U.S. 684, 691–92 (1980).

Under the abstract-elements test, a comparison is made of the statutory elements of the two charged offenses. *Miller*, 238 Ill. 2d at 166. If all of the elements of one offense are included within a second offense, and the first offense contains no element not included in the second offense, the first offense is deemed a lesser-included offense of the second. *Id.* In other words, it must be impossible

to commit the greater offense without necessarily committing the lesser offense. *Id*.

The *Bouchee* line of cases, which was followed by the appellate court in this case, interprets *Miller* as holding that it must be impossible to commit the greater offense without committing the lesser under every possible permutation of the relevant statutes, not merely under the provisions with which the defendant was charged and convicted. *See Bouchee,* 2011 IL App (2d) 090542, ¶¶ 9–10. However, this is inconsistent with how the abstract-elements test has historically been applied by this Court, and leads to results contrary to the intent of the legislature.

1. In applying the abstract-elements test, this Court has long compared only the statutory provisions that the defendant was charged under, not all of the various permutations of the statute, when determining whether a defendant can be conviction and sentenced for both an offense and its predicate offense.

When this Court adopted the abstract-elements test in *Miller*, the test was not new to Illinois law. Rather, it had been applied by this Court multiple times over several decades. Thus, it is instructive to look how this Court has historically applied the test.

In *People v. Donaldson*, 91 Ill. 2d 164 (1982), this Court held that under the abstract-elements test, aggravated battery was a lesser-included offense of armed violence predicated on the same aggravated battery. At the time, the armed violence statute provided that "[a] person commits armed violence when, while armed with a dangerous weapon, he commits any felony defined by Illinois law." Ill. Rev. Stat., 1978 Supp., ch. 38, par. 33A-2. The State argued that aggravated battery was not a lesser-included offense of armed violence under *Blockburger*. *Donaldson*, 91 Ill. 2d at 168. This Court disagreed, observing that "[t]he underlying felony charge here, aggravated battery causing great bodily harm, does not require

proof of a fact in addition to those required to prove the offense of armed violence based on the underlying felony of aggravated battery causing great bodily harm." *Id.* at 170. Accordingly, although by statute, armed violence could theoretically be predicated on any felony, not just aggravated battery, this Court held that "[t]he alleging of [aggravated battery] in the armed violence charge has the effect, upon conviction, of making it a necessarily included offense" for the purposes of *Blockburger* analysis. *Id.* This Court noted that "[i]f it were its intention the legislature could have expressly provided for separate convictions and sentences on charges of armed violence and its predicate or underlying felony." *Id.* at 168.

This Court has applied the abstract-elements test in similar fashion to the first degree murder statute. Like the home invasion statute, the statute describing the offense of first degree murder provides that the offense can be committed in a number of different ways:

> A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death:
>
> (1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or
>
> (2) he knows that such acts create a strong probability of death or great bodily harm to that individual or another; or
>
> (3) he is attempting or committing a forcible felony other than second degree murder. 720 ILCS 5/9-1(a) (West 2018).

Although one may commit first degree murder without committing any particular forcible felony, or any forcible felony at all, this Court has long held that where a defendant is charged under the felony murder provision, the felony that serves as the predicate is a lesser included offense of the murder under the principles set forth in *King*, and, therefore, the predicate felony will not support a separate conviction or sentence. *People v. Smith*, 183 Ill. 2d 425, 431–33 (1998); *People v. Coady*, 156 Ill. 2d 531, 537 (1993).

In *Coady*, this Court held that under *Donaldson*, the defendant's conviction for armed robbery was a lesser included offense of his conviction for felony murder predicated on that same armed robbery. *Coady*, 156 Ill. 2d at 537. In *Smith*, this Court reaffirmed its holdings in *Coady* and *Donaldson*. *Smith*, 183 Ill. 2d at 431–32. There, the State argued that the defendant's convictions for both felony murder predicated on armed robbery and the underlying armed robbery were proper under the independent-motivation test. *Id.* at 432. This Court dismissed the State's contention, noting that the independent-motivation test had been rejected in *King*. *Id.* at 432–33. This Court held that under the principles set for in *King*, the armed robbery underlying the felony murder charge was a lesser-included offense. *Id.* at 431–32. *See also People v. Leratio Smith*, 233 Ill. 2d 1, 16–17 (2009) (holding that, because a defendant cannot be convicted and sentenced on both felony murder and the underlying felony, the trial court erred in denying defendant's request that separate verdict forms for intentional/knowing murder and felony murder, rather than a general verdict form, by given to the jury).

Thus, this Court has consistently looked to how the offenses were actually charged in the given case, not how they theoretically be could charged, when determining whether a predicate offense was an included offense under the abstract-elements test. *See also People v. Gray*, 214 Ill. 2d 1, 6–8 (2005) (comparing statutory provisions as charged when applying *Blockburger* test); *People v. Sienkiewicz*, 208 Ill. 2d 1, 10–11 (2003) (same); *People v. Totten*, 118 Ill. 2d 124, 138 (1987) (comparing statutory provisions "as alleged in this case" when applying the *Blockburger* test).

In *Miller* itself, this Court compared only that statutory provision under which the defendant was charged. While burglary can be committed by entering either a building, housetrailer, watercraft, aircraft, motor vehicle, or railroad car, 720 ILCS 5/19-1(a) (West 2004), this Court considered only that the defendant

was charged with entering a building. *Miller*, 238 Ill. 2d at 163, 175–76. Similarly, while retail theft may theoretically be committed in numerous different ways, 720 ILCS 5/16A-3(a)–(h) (West 2004), this Court considered only the provision of subsection (a) under with the defendant was charged. *Id.* at 163, 176.

In addition, this Court cited *Lemke v. Rayes*, 213 Ariz. 232, 141 P.3d 407 (Ariz. Ct. App. 2006), approvingly. *Miller*, 238 Ill. 2d at 175. In *Lemke*, the court applied the same elements test and concluded that armed robbery is the same offense as felony murder predicated on armed robbery "because armed robbery does not contain an element that is not also contained in felony murder." *Lemke*, 141 P.3d at 414. In doing so, the court stated "[t]hat armed robbery is typically only one of several felonies that may be the predicate for felony murder does not matter." *Id.*

Since *Miller*, this Court has continued to compare only the charged statutory subsections when applying the abstract-elements test. Although armed robbery can in theory be committed without the use of a firearm, 720 ILCS 5/18-2(a)(1) (West 2000) (committing a robbery while "armed with a dangerous weapon other than a firearm"), in *People v. Stevie Smith*, 2019 IL 123901, this Court noted that under the abstract-elements test adopted in *Miller*, aggravated battery with a firearm charged under the subsection 12-4.2(a)(2) of the Criminal Code of 1961 (720 ILCS 5/12-4.2(a)(2) (West 2000)) was a lesser-included offense of armed robbery charged under subsection 18-2(a)(4) ("he or she, during the commission of the [robbery], personally discharges a firearm that proximately causes great bodily harm, permanent disability, permanent disfigurement, or death to another person") for purposes of the one-act, one-crime doctrine. *Stevie Smith*, 2019 IL 123901, ¶ 32. What is more, as the appellate court in *Skaggs* and *Gillespie* noted, this is also how the United States Supreme Court has applied the same-elements test.

Skaggs, 2019 IL App (4th) 160335, ¶¶ 36–37; *Gillespie*, 2014 IL App (4th) 121146, ¶ 19–20.

The Supreme Court in *Harris v. Oklahoma*, 433 U.S. 682 (1997), held that the defendant could not be prosecuted for robbery after being convicted of felony murder predicated on that robbery because the robbery was a lesser-included offense of the felony murder. *Id.* at 682–83. In *Illinois v. Vitale*, 447 U.S. 410 (1980), the Court explained the holding in *Harris* by noting that while it recognized that the Oklahoma felony-murder statute did not on its face necessarily require proof of a robbery, it "did not consider the crime generally described as felony murder as a separate offense distinct from its various elements," and therefore, "the robbery [w]as a species of lesser-included offense." *Id.* at 420.

Later, in *Whalen v. United States*, 445 U.S. 684, 694 (1980), the Supreme Court explicitly rejected the argument that, because felony murder can in theory be predicated on various different felonies, felony murder and its predicate felony were not separate offenses under the same-elements test. There, the defendant was convicted and sentenced for both felony murder predicated on rape and the underlying rape. *Id.* at 687. The Government argued that the two offenses were not the same offense under *Blockburger* because felony murder could theoretically be predicated on a felony other than rape (for example, robbery or kidnapping). *Id.* at 694. While acknowledging that felony murder could be committed by other means, the Supreme Court, citing *Harris*, noted that "*[i]n the present case*, however, proof of rape *is* a necessary element of proof of the felony murder, and we are unpersuaded that this case should be treated differently from other cases in which one criminal offense requires proof of every element of another offense." *Id.* (emphasis added). Given that this Court stated in *Miller* that the abstract-elements test is equivalent of the same-elements test, it makes sense that abstract-elements test should be applied in the same way.

The *Bouchee* court's contention that limiting the abstract-elements test to the charged statutory provisions would be a return to the charging-instruments test is unfounded. *Bouchee*, 2011 IL App (2d) 090542, ¶ 11. Under the charging-instrument test, a court looks to the particular factual allegations in the charging instrument, not just the charged statutory subsections, to determine whether the description of the greater offense contains the outlines the lesser offense. *Miller*, 238 Ill. 2d at 166. Comparing the particular charged statutory provisions does not involve an inquiry into the factual allegations; Reveles's contention is that the court should consider only that he was charged with committing criminal sexual assault, not *how* he allegedly committed the assault. Thus, comparing only the charged statutory provision is not a return to the charging-instrument approach, and, as discussed above, is completely consistent with how this Court has historically applied the abstract-elements test.

Moreover, the dissent in *Skaggs* is wrong in contending that limiting the abstract-elements test to a comparison of the specific statutory provisions charged would be contrary to this Court's holding in *People v. King*, 66 Ill. 2d 551 (1977). *Skaggs*, 2019 IL App (4th) 160335, ¶ 79. The defendant in *King* was charged with burglary with intent to commit rape and the underlying rape. *King*, 66 Ill. 2d at 555. In order to commit the burglary, the defendant simply needed to enter the residence with the intent to commit a rape; whether or not the rape was in fact committed was irrelevant for purposes of proving the burglary. Ill. Rev. Stat. 1973, ch. 38, par. 19-1(a). Thus, the burglary as charged did not contain all the elements of rape. Nor did the rape contain all the elements of burglary, as there is no requirement of an unauthorized entry. Ill. Rev. Stat. 1973, ch. 38, pars. 11-1(a) ("A male person of the age of 14 years and upwards who has sexual intercourse with a female, not his wife, by force and against her will, commits rape."). And

so, neither is an included offense of the other under a comparison of the charged statutory provisions—a result completely consistent with the holding in *King*.

The approach of the *Bouchee* line of cases is completely inconsistent with how Illinois courts have traditionally applied the abstract-elements test, and adopting it would require overthrowing decades of this Court's precedent. There is no indication that that is what this Court intended to do in *Miller*. Rather, this Court should reaffirm the abstracts-elements test as it has been understood and applied for decades.

2. Limiting the abstract-elements test to a comparison of the charged statutory provision is consistent with both the legislature's intent and the principles underlying the one-act, one-crime doctrine.

It has been over 30 years since this Court decided *Donaldson*, and over 20 years since it decided *Coady*, and the legislature has not abrogated by statute either of those decisions. The one-act, one-crime doctrine is not of constitutional dimension, *People v. Artis*, 232 Ill. 2d 156, 164 (2009), and as such, the legislature would have been well within its power to amend the relevant statutes to allow for cumulative punishment if it disagreed with either decision. In fact, in *Donaldson*, this Court essentially invited the legislature to change the law if it so desired. *Donaldson*, 91 Ill. 2d at 168. Yet, it has not. "It is well-understood that when the legislature chooses not to amend a statute to reverse a judicial construction, it is presumed that the legislature has acquiesced in the court's statement of the legislative intent." *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 77. Thus, it can be presumed that the legislature approved of how this Court applied the abstract-elements test in those cases to suss out whether or not it intended for separate offenses and cumulative punishment. Accordingly, this Court should continue to apply the abstract-elements test in the same way—that is, by comparing only the statutory provisions charged—in order to best reflect the intent of the legislature.

In contrast, adopting the interpretation of the abstract-elements test promoted by the *Bouchee* line of cases would require this Court to overturn *Donaldson* and *Coady*. Because armed violence and first degree murder can theoretically be committed without committing the specific predicate felony charged in a given case, the predicate felony would not be a lesser-included offense under the *Bouchee* line of reasoning, and therefore, separate convictions and sentences would be allowed. Indeed, under *Bouchee*, no predicate felony could ever be a lesser-included of a greater offense. This would be directly contrary to the intent of the legislature as demonstrated by its acquiescence of the holdings in *Donaldson* and *Coady*. It is the prerogative of the legislature to determine the nature and extent of punishments for the various offenses. *People v. Taylor*, 102 Ill. 2d 201, 205 (1984). This Court should not adopt a test that defeats the intent of the legislature. *See Miller*, 238 Ill. 2d at 173.

Limiting the abstract-elements test to a comparison of the charged statutory provisions is also more in keeping with the principles underlying the one-act, one-crime doctrine. The doctrine had its genesis in this Court's holding, in *People v. Schlenger*, 13 Ill. 2d 63 (1958), that a defendant should not receive multiple punishments for the same act. *King*, 66 Ill. 2d at 560, 564–66. Because the purpose of the doctrine is to prevent cumulative punishment, it follows that where multiple acts are involved, the doctrine should come into play where the punishment for one offense already punishes the defendant for all the acts that constitute the predicate offense.

A person commits home invasion by committing two separate acts: an unauthorized entry and one of the acts set forth in subsection (b) of the statue. 720 ILCS 5/12-11(a)–(b) (2012). Accordingly, the sentence imposed for committing home invasion punishes the defendant for each of those acts. As such, here, the sentence Reveles received on the home invasion count punished him both for

committing the unauthorized entry into the dwelling, *and* for committing the criminal sexual assault. Allowing a separate conviction and sentence on the criminal sexual assault count, as the *Bouchee* line of cases would do, would therefore punish him a second time for that same act, in contravention of the purpose behind the one-act, one-crime doctrine. *See Gillespie*, 2014 IL App (4th) 121146, ¶ 24 (noting that sentencing the defendant on both aggravated criminal sexual assault and its predicate felony would punish him twice for the underlying felony). On the other hand, limiting the application of the abstract-elements to a comparison of the statutory provisions under which the defendant was charge would prevent such cumulative punishment, except where the legislature has explicitly stated its intent to allow for cumulative punishment.

B. Under a proper application of the abstract-elements test, Reveles's criminal sexual assault charge was a lesser-included offense of the home invasion charge and there is no clear indication that the legislature intended for cumulative punishment.

Here, Reveles was charged with home invasion predicated on criminal sexual assault and criminal sexual assault. (C. 3–4.) The relevant portion of the home invasion statute provides:

> A person who is not a peace officer acting in the line of duty commits home invasion when without authority he or she knowingly enters the dwelling place of another * * * and remains in such dwelling place until he or she knows or has reason to know that one or more persons is present and * * * Commits, against any person or persons within that dwelling place, a violation of Section 12-13 * * * of the Criminal Code of 1961. 720 ILCS 5/12-11(a)(6) (West 2010).

The home invasion charge fully encompassed the offense of criminal sexual assault, 720 ILCS 12-13 (West 2010), such that the criminal sexual assault charge did not require proof of any fact in addition to those required to prove the home invasion charge. Because all of the elements of criminal sexual assault were included within

the home invasion charge and the criminal sexual assault contained no element not included in the home invasion, the criminal sexual assault was a lesser-included offense of the home invasion. *See Miller*, 238 Ill. 2d at 166. In other words, the allegation of criminal sexual assault in the home invasion charge necessarily made criminal sexual assault an included offense. *See Donaldson*, 91 Ill. 2d at 170.

Because the criminal sexual assault charge is a lesser-included offense of the home invasion charge, Reveles cannot be convicted and sentenced for both offenses, absent clear indication that the legislature intended for cumulative punishment. *Skaggs*, 2019 IL App (4th) 160335, ¶ 40; *see also Whalen*, 445 U.S. at 691–92. Because there is no clear indication of such legislative intent, cumulative punishment is not authorized and Reveles's criminal sexual assault conviction and sentence should be vacated. *Skaggs*, 2019 IL App (4th) 160335, ¶ 47.

There is nothing in the plain language of the home invasion statute clearly indicating a legislative intent for cumulative punishment. *People v. Clark*, 2019 IL 122891, ¶ 20 ("The most reliable indicator of legislative intent is the language of the statute."). The statute simply states that a person commits home invasion when he or she enters the dwelling of another and "[c]ommits, against any person or persons within that dwelling place, a violation of Section 12-13, 12-14, 12-14.1, 12-15, or 12-16 of the Criminal Code of 1961." 720 ILCS 5/12-11(a)(6) (West 2010). There is no mention of cumulative punishment anywhere in the statute. Further, the language of the home invasion statute is similar to that of the armed violence statute that this Court found not to indicate a legislative intent for cumulative punishment. Ill. Rev. Stat., 1978 Supp., ch. 38, par. 33A-2 ("A person commits armed violence when, while armed with a dangerous weapon, he commits any felony defined by Illinois law."); *Donaldson*, 91 Ill. 2d at 170 ("In the absence of a clear legislative expression to the contrary we hold that multiple convictions for both armed violence and the underlying felony cannot stand.").

Had the legislature wished for the predicate offense to be punished separately from home invasion, it would have stated so explicitly in the statute. *See Donaldson*, 91 Ill. 2d at 169 ("If it were its intention the legislature could have expressly provided for separate convictions and sentences on charges of armed violence and its predicate or underlying felony."). The legislature added subsection (a)(6) to the home invasion statute well after this Court issued its decisions in *Donaldson* and *Coady*. Public Act 91-928 § 5 (eff. June 1, 2001). It must be presumed that the legislature was aware of this Court's treatment of predicate offenses when it added the provision. *Illinois Landowners Alliance, NFP v. Illinois Commerce Comm'n*, 2017 IL 121302, ¶ 44 ("We may presume that the legislature is aware of decisions we issue."). Accordingly, the legislature's decision not to include language explicitly allowing for cumulative punishment should be interpreted as being purposeful.

Indeed, in the very same legislative term during which it added subsection (a)(6) to the home invasion statute, the legislature also amended the armed violence statute to explicitly state that when a defendant is convicted of armed violence predicated on one of several listed offenses, "the court shall enter the sentence for armed violence to run consecutively to the sentence imposed for the predicate offense." Public Act 91-404 §5 (eff. Jan. 1, 2000) (adding subsection (d) to 720 ILCS 5/33A-3). This demonstrates that when the legislature intends for a predicate offense to be punished separately from the greater offense, it says so explicitly, and the absence of such language indicates a lack of such intent.

There is also nothing in the legislative history of the relevant home invasion provision that hints at a desire to impose cumulative punishments. The only comment on the provision was that "it adds as the predicate offense to a home invasion, a sex offense, that is entering a facility and committed a sex offense constitutes a home invasion." 91st Gen. Assem., House Proceedings, March 2,

2000, at 105 (statements of Representative O'Connor regarding House Bill 4537).[1] There was no mention made of cumulative punishment.

The *Bouchee* court concluded, erroneously, that the legislature must have intended for cumulative punishment because the predicate offense for home invasion is not necessarily a "lesser" offense in terms of sentencing range. *Bouchee*, 2011 IL App (2d) 090542, ¶ 16. However, the same is true of felony murder. For example, a conviction for criminal sexual assault after having previously been convicted of aggravated criminal sexual assault carries a mandatory sentence of natural life in prison, 720 ILCS 5/11-1.20(b)(1)(B) (West 2018), while a conviction for felony murder predicated on that same criminal sexual assault has a minimum sentence of 20 years in prison. 730 ILCS 5/5-4.5-20(a) (West 2018). Thus, this is not a clear indication of legislative intent.

The legislature's 2000 amendment to the armed violence statute is again instructive on this point. The offense of armed violence while armed with a Category I weapon is a Class X felony with a minimum sentence of 15 years in prison. 720 ILCS 5/33A-3(a) (West 2000). On the other hand, solicitation of murder for hire is a Class X felony carrying a minimum prison sentence of 20 years and a maximum prison sentence of 40 years. 720 ILCS 5/8-1.2(b) (West 2000). However, rather than relying on the fact that solicitation of murder for hire had a higher sentencing range than armed violence to indicate its intent, the legislature amended the armed violence statute to explicitly state that armed violence predicated on solicitation

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[1]House Bill 4537 was subsequently reintroduced as House Bill 861, which become Public Act Public Act 91-928. 91st Gen. Assem., House Proceedings, April 13, 2000, at 32–33 (statements of Representative Winkel) ("This passed out previously out of this chamber as House Bill 4537, unanimously. Comes back to us as an amendment to this bill, having unanimously passed the Senate.").

of murder for hire and the underling solicitation of murder for hire are to be sentenced separately and consecutively. Public Act 91-404 §5 (eff. Jan. 1, 2000); 720 ILCS 5/33A-3(d) (West 2000). This shows that when the legislature intends for cumulative punishments, it does not simply rest on indirect signaling in hopes that the judiciary will correctly infer its intent—it states its intent directly in the language of the statute.

The *Bouchee* court attempted to distinguish home invasion from felony murder by noting that in felony murder, the predicate felony supplies the mental state for the murder while home invasion requires an act and mental state ("knowingly enters the dwelling place of another when he or she knows * * * that one or more persons is present") in additional to that required by the predicate offense. *Bouchee*, 2011 IL App (2d) 090542, ¶¶ 14–15. However, this distinction does not clearly indicate a legislative intent for separate punishments. Armed violence, like home invasion, has as elements an act (being armed with a weapon) and mental state (knowledge of being armed) in addition to the elements of the predicate offense. 720 ILCS 5/33A-2(a); *People v. Adams*, 265 Ill. App. 3d 181, 186 (4th Dist. 1994) (a defendant's knowledge that he is armed is an element of armed violence). Nevertheless, this Court in *Donaldson* found that there was no indication that the legislature intended for separate punishments. *Donaldson*, 91 Ill. 2d at 170.

The *Bouchee* court also asserted that because the underlying felony supplies the mental state for felony murder, "it is literally 'included'" in the offense. *Bouchee*, 2011 IL App (2d) 090542, ¶ 15. But that is not a distinguishing factor at all. The offense of home invasion is comprised of two separate physical acts—an unauthorized entry and one of the acts set forth in subsection (b) of the statue—and is not completed until both acts have been committed. 720 ILCS 5/12-11(a)–(b) (2012); *see People v. Stokes*, 281 Ill. App. 3d 972, 981 (1st Dist. 1996) (home invasion based on intentionally causing injury to person within dwelling not completed until the

defendant both unlawfully enters the dwelling and intentionally causes injury to a person within). Because in this case the criminal sexual assault supplied the necessary second act, it also was "literally" included in the home invasion.

Thus, contrary to the claim of the *Bouchee* line of cases, there is no clear indication that the legislature intended for the predicate offense of home invasion to support a separate conviction and sentence. The home invasion statute is no different than the felony murder or armed violence statute, and if the legislature wanted home invasion to be treated differently, it would have stated so explicitly. It did not. To the extent that it is unclear whether the legislature intended to provide for separate convictions and sentences for home invasion and its predicate offense, the rule of lenity mandates that the ambiguity be resolved in Reveles's favor. *See Donaldson*, 91 Ill. 2d at 170 (noting that when the statutory language leaves to the courts the task of imputing to the legislature an undeclared will, the ambiguity should be resolved in favor of lenity); *see also Whalen*, 445 U.S. at 694 ("To the extent that the Government's argument persuades us that the matter is not entirely free of doubt, the doubt must be resolved in favor of lenity.")

C. Conclusion.

In sum, the appellate court's conclusion that Reveles's criminal sexual assault charge was not a lesser-included offense of the home invasion charge under the one-act, one-crime doctrine is erroneous. The *Bouchee* line of cases reasoning that the abstract-elements test adopted in *Miller* requires a comparison of all permutations of the relevant statutes, rather than a comparison of the specific provisions charged, is contrary to this Court's historic application of the test, the intent of the legislature, and the principles underlying the one-act, one-crime doctrine. Under a proper application of the abstract-elements test, the criminal sexual assault charge in this case is a lesser-included offense because it does not

require proof of any fact in addition to those required to prove the home invasion charge.

Accordingly, in order to resolve the conflict in the appellate court regarding the proper application of the abstract-elements test, this Court should expressly hold that the test calls for a comparison of only the specific statutory provisions charged, reverse the appellate court's decision affirming Reveles's conviction and sentence for criminal sexual assault, and vacate that conviction and sentence.

CONCLUSION

For the foregoing reasons, Alejandro Reveles-Cordova, defendant-appellant, respectfully requests that this Court vacate his conviction and sentence for criminal sexual assault.

Respectfully submitted,

PATRICIA MYSZA
Deputy Defender

BRIAN W. CARROLL
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

CERTIFICATE OF COMPLIANCE

I, Brian W. Carroll, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 26 pages.

/s/Brian W. Carroll
BRIAN W. CARROLL
Assistant Appellate Defender

APPENDIX TO THE BRIEF

Alejandro Reveles-Cordova No. 124797

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STATE OF ILLINOIS UNITED STATES OF AMERICA COUNTY OF WILL

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS
VS.
ALEJANDRO REVELES

Case Number 2010CF002429

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Defendant's Exhibit Description	Offered	Admitted
Exhibit # - 1 - Det. Kelley Henson report	R470	

2019 IL App (3d) 160418

Opinion filed January 17, 2019
Modified Upon Denial of Rehearing March 27, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-16-0418 Circuit No. 10-CF-2429
ALEJANDRO REVELES-CORDOVA,	)	
Defendant-Appellant.	)	Honorable Sarah F. Jones, Judge, Presiding.

PRESIDING JUSTICE SCHMIDT delivered the judgment of the court, with opinion.
Justices Carter and O'Brien concurred in the judgment and opinion.

OPINION

¶ 1 A jury found defendant, Alejandro Reveles-Cordova, guilty of criminal sexual assault and home invasion. 720 ILCS 5/12-11(a)(6) (West 2010); *id.* § 12-13(a)(1)). On direct appeal, defendant argues this court should reverse his convictions, remand for further proceedings, or modify his convictions because (1) the trial court committed plain error by failing to comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), where the evidence was closely balanced, (2) trial counsel denied defendant effective assistance of counsel, (3) the trial court did not adequately address defendant's *pro se* claims of ineffective assistance as required by *People v. Krankel*, 102 Ill. 2d 181 (1984), and (4) defendant's conviction for criminal sexual assault

should be vacated under the one-act, one-crime rule. We affirm in part, reverse in part, and remand.

¶ 2 BACKGROUND

¶ 3 On November 22, 2010, the State charged defendant with home invasion (720 ILCS 5/12-11(a)(6) (West 2010)), criminal sexual assault (*id.* § 12-13(a)(1)), aggravated domestic battery (*id.* § 12-3.3(a-5)), and violation of an order of protection (*id.* § 12-30(a)(1)). The charging instrument alleged defendant committed these acts against his former girlfriend and mother of his children, J.B., on November 20, 2010.

¶ 4 In July 2012, the State tried defendant for the first time. Defendant took the stand in his defense. The jury found defendant guilty on all four counts. Defendant appealed that conviction. This court reversed and remanded for a new trial, finding defendant received ineffective assistance of counsel. *People v. Reveles-Cordova*, 2014 IL App (3d) 120887-U, ¶ 38.

¶ 5 In February 2016, the State retried defendant. In opening statements, defense counsel told the jury "[t]he issue in this case is going to be consent." He also told the jury that the State has the burden of proof; the defendant is presumed innocent. He informed the jury:

> "I don't have to present any evidence. I may do so. I may not. Either way, please wait until I have had a chance to make my closing argument."

He assured the jury that the State could not meet their burden in proving defendant guilty beyond a reasonable doubt.

¶ 6 I. The State's Case-in-Chief

¶ 7 The State called J.B. as its first witness. J.B. testified she had a 15-year relationship with defendant. J.B. and defendant ended their romantic relationship in January 2010. J.B. remained

in the Grassy Knolls house the two shared with their children. J.B. obtained an order of protection against defendant in October 2010 that was to remain effective until May 2011. The order of protection covered their formerly shared residence.

¶ 8 On November 20, 2010, J.B. was home alone getting ready for a date with Ben Marshall. She testified she locked the door to her bedroom and took a shower. While drying off, J.B. heard someone coming up the stairs. She heard the person trying to open the door. Defendant kicked open the door. He began rummaging through the room as if he was looking for something.

¶ 9 J.B. repeatedly told defendant to leave because of the order of protection. Defendant grabbed and pushed her. He took her phone when she received a text message. Defendant asked J.B. who Marshall was. J.B. said defendant called Marshall and said, "I'm going to kill you, motherfucker." J.B.'s phone records do not show a call was placed to Marshall in the time frame J.B. described.

¶ 10 Defendant took a vase of roses Marshall bought for J.B. and threw them on the floor. He pushed J.B. onto an ottoman. There was conflicting evidence as to whether she was on her back or her stomach. Defendant pulled a tampon out of J.B.'s vagina and penetrated her with his penis. J.B. did not consent to having intercourse with defendant. Defendant finished and began choking J.B. She tried to push defendant away. J.B. testified she felt her body becoming "weak and warm." She said things were "going dark." J.B. lost her breath and stopped fighting back. J.B.'s cell phone began to ring; defendant released his hands from around her neck. J.B.'s neighbor called. J.B. told defendant her neighbor knew to call if she saw defendant's truck at J.B.'s house because of the order of protection. Defendant became nervous and left.

¶ 11 J.B. got dressed and called Marshall. Marshall told her to call the police. J.B. called 911. The audio recording of this call was played for the jury. J.B. can be heard coughing and crying

throughout the call. She is unintelligible at points as she tried to speak in between sobs. J.B. told the 911 dispatcher that she was calling because her ex-boyfriend broke into her house. J.B. said she did not need an ambulance; she was calling to make a report that he raped her. In response to the dispatcher's questions regarding the rape allegation, J.B. stated, "he didn't touch me physically, like punch me or anything." The dispatcher asked if J.B. was coughing because she was strangled. J.B. responded that defendant tried grabbing her by the neck but she could also be coughing because she was scared. After the State played the call, J.B. said she did not initially say defendant choked her because she was confused and nervous. J.B. went to the hospital; she submitted to a rape kit.

¶ 12 The State called Marshall to the stand. Marshall testified he received a call from J.B.'s cell phone on the night of November 20, 2010. A man called and said he was going to kill Marshall. He said he could hear J.B. in the background screaming "leave me alone." Marshall testified J.B. called him back to explain what defendant had done. She sounded "very fearful, very afraid." He told her to call the police.

¶ 13 Romeoville police officer Christopher Swiatek testified he responded to J.B.'s 911 call. He described her as crying and shaking. He did not observe any visible injuries. He noted the vase on the floor of the bedroom, as well as a bloody tampon by the bed. Swiatek testified that J.B. said her ex-boyfriend assaulted her. She did not mention being strangled.

¶ 14 Romeoville police officer Brandon Helton testified that he took photographs of the Grassy Knolls home. He said a first floor-window was unsecured; someone could have come in and out of that window. He said the door to the master bedroom appeared to have been forced open. He noted the door frame seemed to be dislodged. Helton saw paint chips on the floor

surrounding the door. Helton took pictures of the vase, tampon, and flowers strewn on the floor. He observed the master bedroom was disheveled but the rest of the house was neat and orderly.

¶ 15 Romeoville Detective Kelley Henson testified he met J.B. at the hospital on November 20, 2010, to discuss her claims of sexual assault. He said J.B. looked like she had been crying. He did not notice any markings on J.B. J.B. never told him that defendant struck her.

¶ 16 Firefighter paramedic William O'Connor testified that he treated J.B. on the night of November 20, 2010. He said J.B. reported being raped and choked but denied sustaining any injuries. O'Connor examined J.B.'s neck. He reported no signs of injuries. He testified it is not uncommon for victims of choking to show no injuries.

¶ 17 The parties stipulated that J.B. completed a sexual assault kit. The attending doctor found no injuries to J.B.'s vagina, vulva, or cervix. A lab technician identified defendant's deoxyribonucleic acid (DNA) from samples taken from J.B.'s vagina. The parties stipulated forensic reports showed defendant's fingerprints on the vase and J.B.'s phone.

¶ 18 II. Defendant's Case-in-Chief

¶ 19 Defendant called only Alejandro Jr. to testify. He is defendant and J.B.'s eldest son. He testified that, to his knowledge, defendant had a key to the Grassy Knolls residence. He could not remember if J.B. changed the locks in 2010 following the order of protection. Alejandro Jr. testified that he often lost his key. J.B. left a window unlocked so that he could climb in and out. The family knew the window was unsecured.

¶ 20 Alejandro Jr. testified that the lock on J.B.'s door was not working; someone could push hard and open it. Alejandro Jr. found an envelope filled with cash sometime around November 2010. He did not know exactly how much was in the envelope. On November 20, 2010, defendant called Alejandro Jr. At this point, Alejandro Jr. had not heard from J.B. Defendant told

him to tell J.B. not to press charges against him because she was lying. Alejandro Jr. described J.B. as having trouble getting the words out when she told him what happened on November 20.

¶ 21 Ultimately, defendant decided not to testify. Defense counsel sought a ruling on whether the State could impeach defendant with testimony regarding the money. During the first trial, defendant did not testify regarding the money Alejandro Jr. found. At this trial, defendant was going to maintain he went to the Grassy Knolls residence that night to get the money. Counsel argued defendant's lack of testimony regarding the money should not be available for impeachment purposes because it was part of first trial counsel's strategy to leave it out. Counsel also expressed concern about calling the first trial counsel as a witness. Counsel said he did not raise the issue in a motion *in limine* because he did not think the State could impeach defendant with the money testimony. He also said he had not decided whether to elicit testimony regarding the money before the start of trial. The State responded that it never received discovery concerning the money. This indicated defendant created the story to foster his claim that he and J.B. engaged in consensual intercourse after he innocently stopped by to retrieve the money. The court ruled the State would be allowed to impeach defendant with his prior testimony if he chose to take the stand. However, defendant would be able to testify to conversations with first trial counsel to make the claim that she advised defendant against discussing the money in the first trial. His waiver of his attorney-client privilege would be for the limited purpose of trial strategy regarding the money. First trial counsel was not permitted to testify. Defendant had the option to call an investigator who could testify that the money was not a recent fabrication.

¶ 22 Trial counsel informed the court that defendant would not take the stand due to concerns of possible impeachment. Defendant responded "yes" when the trial court asked if counsel

informed him of his right to testify or remain silent. Defendant also responded affirmatively when the trial court asked defendant if he realized the decision was his and his alone.

¶ 23 During discussions for jury instructions, the trial court informed defense counsel that the jury would not receive an instruction regarding consent unless defendant testified as to consent. Because defendant chose not to testify, the jury would not be instructed on the issue. The court cautioned counsel not to introduce the idea of consent in closing arguments. Defendant was present for this discussion.

¶ 24 In closing arguments, counsel for defendant conceded that defendant did have sex with J.B. He urged the jury to find the State did not prove beyond a reasonable doubt that defendant threatened or used force to have sex with J.B. Counsel highlighted J.B.'s inconsistencies and maintained she was not credible.

¶ 25 The jury found defendant guilty of sexual criminal assault and home invasion. The jury found defendant not guilty of aggravated domestic battery.

¶ 26 Defendant filed two posttrial motions. One motion argued the court erred in allowing the State to impeach defendant with his prior testimony that did not mention the money found at the Grassy Knolls residence. The other motion argued the one-act, one-crime rule defendant raises on appeal. The court denied both motions.

¶ 27 Defendant filed a *pro se* motion alleging trial counsel provided ineffective assistance. He argued trial counsel did not give him the option to have a bench trial. Defendant framed his motion in terms of *Strickland v. Washington*, 466 U.S. 668 (1984). At the *Krankel* hearing, the court questioned him regarding his claims of ineffective assistance as well as the *Strickland* standard. The court denied defendant's motion.

¶ 28 At sentencing, defendant attempted to raise additional claims of ineffective assistance. The trial court refused to hear defendant's claims. The trial court sentenced defendant to 11 years' imprisonment on the home invasion count and 9 years' imprisonment on the criminal sexual assault count, to run consecutively.

¶ 29 This appeal followed.

¶ 30 ANALYSIS

¶ 31 On appeal, defendant argues (1) we should remand for a new trial where the trial court committed plain error in failing to comply with Rule 431(b), (2) trial counsel provided ineffective assistance, (3) the trial court conducted an inadequate inquiry under *Krankel*, and (4) his convictions should merge under the one-act, one-crime rule.

¶ 32 I. Illinois Supreme Court Rule 431(b)

¶ 33 Rule 431(b) requires the trial court to inquire whether each potential jury member both understands and accepts four principles referred to as the *Zehr* principles. Ill. S. Ct. R. 431(b) (eff. July 1, 2012); see *People v. Zehr*, 103 Ill. 2d 472, 477 (1984). The jury must acknowledge that the defendant is presumed innocent, the State is required to prove guilt beyond a reasonable doubt, the defendant is not required to put on a case, and the jury cannot hold defendant's decision not to testify against him or her. See Ill. S. Ct. R. 431(b) (eff. July 1, 2012); *Zehr*, 103 Ill. 2d at 477 (1984).

¶ 34 Defendant argues, and the State concedes, that the trial court erred in failing to properly instruct the jury regarding the *Zehr* principles. The trial court did not question the jury for the principle that a defendant's lack of testimony could not be held against him. It also asked the jury whether it disagreed with the principle that the defendant is not required to put on evidence. The court did not affirm that the jury understood and accepted this principle. Although defendant did

not preserve this issue in a posttrial motion, he argues this court should analyze the issue under the plain-error doctrine.

¶ 35 The plain-error doctrine provides a means for appellate review where defendant would have otherwise forfeited his right to appeal of an issue. Ill. S. Ct. R. 651(a) (eff. July 1, 2017). Plain-error review is appropriate in two circumstances. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Defendant urges this court to find plain error where "a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error." *Id.* The State concedes error occurred. The next inquiry is whether the evidence was so closely balanced that the trial court's failure to properly inquire of the *Zehr* principles prejudiced defendant's right to a fair trial.

¶ 36 Plain-error analysis under the claim that the evidence was closely balanced is similar to analysis used in evaluating claims of ineffective assistance. *People v. Herron*, 215 Ill. 2d 167, 178 (2005). Defendant must show prejudice, meaning "the evidence is so closely balanced that the alleged error alone would tip the scales of justice against him, *i.e.*, that the verdict 'may have resulted from the error and not the evidence' properly adduced at trial." *People v. White*, 2011 IL 109689, ¶ 133 (quoting *Herron*, 215 Ill. 2d at 178).

¶ 37 We do not find the evidence was closely balanced after reviewing the record. The State's case was replete with evidence that defendant committed both home invasion and criminal sexual assault. Multiple witnesses testified that J.B. was upset and verbalized that her ex-boyfriend assaulted her. From Marshall, the first person she spoke with, to the staff at the hospital, J.B. consistently said defendant penetrated her without consent. The conflicting evidence as to whether defendant strangled J.B. does not negate other evidence of force.

Criminal sexual assault requires "force or [the] threat of force." 720 ILCS 5/12-13(a)(1) (West 2010). J.B. testified that she asked defendant to leave immediately upon realizing he was in the house. J.B. struggled with defendant as he ransacked the bedroom. Defendant threw a vase of flowers onto the ground. Defendant pushed J.B. down onto the ottoman, removed her tampon, and inserted his penis into her vagina despite her protests. The police photographs corroborate J.B.'s version of events by documenting the vase, tampon, and flowers on the floor. Marshall testified that he could hear J.B. on the phone yelling "leave me alone." J.B. had an active order of protection against defendant that extended to the Grassy Knolls home. The 911 recording of J.B.'s call indicated she was upset to the point of crying and coughing. She accused defendant of rape in the call. Each piece of evidence indicated to the jury that defendant forced himself upon J.B.

¶ 38 Defendant argues J.B.'s testimony is suspect due to inconsistencies, as well as a lack of physical injury. Because credibility of witnesses is an issue left to the jury, and the trial court improperly questioned the jury under Rule 431(b), defendant argues this means the trial court's error changed the outcome of the trial. We do not agree.

¶ 39 Defense counsel told the jury that defendant did not have to put on a case at all; the State had the burden of proof that the defendant was not required to rebut. Although these statements do not cure the error, it does show the jury was informed of the principles. Failure to comply with Rule 431(b) does not automatically require remand for a new trial. *People v. Thompson*, 238 Ill. 2d 598, 608-16 (2010). Defendant must still show the evidence was closely balanced. Defendant states in his brief that he intended to testify J.B. consented to having sex with him; he was only in the house to retrieve the money he hid there. J.B. never omitted or denied her allegation that defendant nonconsensually penetrated her. Defendant, after leaving the Grassy

Knolls home but before being picked up by police, called Alejandro Jr. He requested his son ask his mother not to press charges. He insisted she was lying. Alejandro Jr. had not heard from his mother at this point. He had no idea what she claimed happened. Alejandro Jr.'s testimony indicated to the jury that defendant knew what he had done; he did not think J.B. consented to having sex with him. He was covering his tracks immediately after leaving the home. Defendant cannot show that the trial court's error prejudiced him; his sole witness's testimony did the most damage in independently corroborating J.B.'s version of events. See *People v. McCovins*, 2011 IL App (1st) 081805-B, ¶ 39 (finding the evidence against the defendant was not closely balanced even where he impeached witnesses, presented alibis, and argued dark conditions could not permit accurate identification).

¶ 40 We do not find the evidence was so closely balanced that the trial court's error in instructing the jury regarding Rule 431(b) constituted plain error.

¶ 41 II. Ineffective Assistance of Counsel

¶ 42 Defendant argues trial counsel denied him effective assistance. Specifically, defendant maintains trial counsel erred by (1) not seeking a ruling on the State's ability to impeach defendant regarding the money prior to opening statements and (2) abandoning the consent defense after obtaining an adverse ruling.

¶ 43 A criminal defendant has a constitutional right to effective assistance of counsel. U.S. Const., amend. VI. Claims alleging ineffective assistance of counsel are governed by *Strickland*. *Strickland*, 466 U.S. 668. The Illinois Supreme Court adopted *Strickland* in *People v. Albanese*, 104 Ill. 2d 504, 526 (1984). To show ineffective assistance, a defendant must show "counsel's representation fell below an objective standard of reasonableness and that counsel's shortcomings were so serious as to 'deprive the defendant of a fair trial.' " *Id.* at 525 (quoting

Strickland, 466 U.S. at 687). "[A] defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v. Domagala*, 2013 IL 113688, ¶ 36 (quoting *Strickland*, 466 U.S. at 694). " 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *People v. Coleman*, 2015 IL App (4th) 131045, ¶ 80 (quoting *Strickland*, 466 U.S. at 694). We review claims of ineffective assistance *de novo*. *Id.* ¶ 66.

¶ 44 A. Motion on the State's Ability to Impeach Defendant

¶ 45 Defendant claims trial counsel told the jury he would be presenting a consent defense and then abandoned such defense, amounting to *per se* ineffective assistance. See *People v. Patterson*, 192 Ill. 2d 93, 120-21 (2000). This claim is not borne out by the record. Trial counsel told the jury the issue in the case would be consent, in that the State would not be able to prove beyond a reasonable doubt that defendant used force to have sex with J.B. and did not receive consent. He never claimed he would be presenting a case demonstrating J.B. consented to intercourse. In fact, he explicitly told the jury he might not present a case at all, as it was within defendant's rights to present no evidence and let the State's case speak for itself. The claim that trial counsel abandoned a promised defense is belied by the record.

¶ 46 Defendant also argues trial counsel should have obtained a ruling on the State's ability to impeach defendant before opening statements. Our finding that defense counsel did not promise a consent defense in opening statements disposes of this argument as well.

¶ 47 B. Abandoning the Consent Defense

¶ 48 In his petition for rehearing, defendant argues that this court misapprehended the second part of his allegation of ineffective assistance. Defendant maintains trial counsel denied him

effective assistance of counsel by abandoning the consent defense after obtaining an adverse ruling.

¶ 49 Defendant claims that trial counsel's decision to abandon the consent defense was objectively unreasonable for several reasons. First, any threat of impeachment would have been neutralized had the first trial counsel's investigator testified that the omission of the money at defendant's first trial was a strategic decision—not a recent fabrication. Second, trial counsel was wrong to be concerned about attorney-client disclosures because the trial court limited the disclosure to a discussion of the money. Finally, defendant contended he always wanted to testify, he said so during the hearing on his *pro se* posttrial motion, and his explanation would have further discredited J.B.'s testimony. Essentially, defendant argues he wanted to testify and could have done so without damaging his position at trial.

¶ 50 Defendant maintains he should have taken the stand, regardless of the adverse ruling, because he would have provided some evidence of consent. In his first trial, defendant took the stand to offer his testimony that J.B. consented to sex. Notably, the jury there also convicted defendant of aggravated domestic battery. Clearly, defendant's decision to testify did not work in his favor at the first trial. After reading the record, it appears the jury did not find defendant guilty of aggravated domestic battery in this trial because J.B. reported the strangling inconsistently.

¶ 51 The defendant retains authority over the decision of whether to testify. *Rock v. Arkansas*, 483 U.S. 44, 53 (1987). Defendant made the choice not to testify. The record shows the court asked him questions regarding this right and the information trial counsel gave him about the right to testify. Defendant at all times affirmed that he knowingly waived the right to testify. Trial counsel could not have supported a consent defense without defendant's testimony. The

court informed counsel, in front of defendant, that the jury would not be instructed on consent unless defendant took the stand.

¶ 52 In arguing that counsel provided an objectively unreasonable performance in abandoning the consent defense, defendant cites *People v. Bryant*, 391 Ill. App. 3d 228, 241 (2009). *Bryant* is instructive in whether counsel acts unreasonably in promising and then failing to deliver a defense, an issue we have already addressed. It does not impact our analysis here.

¶ 53 Because defendant cannot show that trial counsel's actions were objectively unreasonable, we find defendant received effective assistance.

¶ 54 III. *Krankel* Hearing

¶ 55 Defendant claims that the trial court applied the wrong standard in determining whether to appoint new counsel at the *Krankel* hearing. Additionally, defendant submits that the trial court erred in failing to address his subsequent claims of ineffective assistance. Whether the trial court properly conducted a *Krankel* hearing is a legal question that we review *de novo*. *People v. Jolly*, 2014 IL 117142, ¶ 28.

¶ 56 In *Krankel*, our supreme court held that a defendant is entitled to new counsel during posttrial hearings if he demonstrates trial counsel's ineffective assistance. *Krankel*, 102 Ill. 2d 181. The trial court must conduct an adequate inquiry into the factual basis of the defendant's claim. *People v. Banks*, 237 Ill. 2d 154, 213 (2010). The trial court must examine defendant's *pro se* claims to determine whether they have merit or concern matters of purely trial strategy. *People v. Moore*, 207 Ill. 2d 68, 78 (2003). "[I]f the defendant's allegations show possible neglect of the case, new counsel should be appointed to fully prosecute the ineffectiveness claim before the trial court." *People v. Jackson*, 2016 IL App (1st) 133741, ¶ 69. "The operative

concern for the reviewing court is whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel." *Moore*, 207 Ill. 2d at 78.

¶ 57 Defendant contends that the trial court erred in moving directly to the *Strickland* test at the hearing without first establishing the factual basis of defendant's claims. The record shows the court did ask defendant about his motion and his reference to *Strickland*. When reading the complete transcript from this hearing, it is clear the court asked defendant questions regarding *Strickland* to elicit a response from defendant as to who wrote his motion. Once defendant explained to the court that he was not primarily responsible for his motion, the court engaged defendant in a series of questions about trial counsel's behavior and the specific basis for defendant's claim of ineffective assistance.

¶ 58 Defendant argues his claim is bolstered by the court's ruling that *counsel was not ineffective* and substitute counsel would not be appointed. Although the ruling references a *Strickland* inquiry, it also addresses the heart of a *Krankel* hearing: whether the court should appoint new counsel to represent the defendant in his posttrial motions. The trial court did not find that trial counsel neglected defendant's case. We find support for this ruling after reviewing the transcript of defendant's *Krankel* hearing.

¶ 59 Defendant's main claim, that trial counsel did not give him the option to proceed with a bench trial, was unsupported during the hearing. Trial counsel testified that he had a conversation with defendant about his options at trial and advised against a bench trial. A memo in trial counsel's case file documented conversations regarding a bench trial; defendant chose to proceed before a jury at both the first and second trial. Defendant never mentioned an issue with the jury despite being present at every step of the proceeding. The trial court did not find that trial

counsel took the decision of whether to have a bench trial away from defendant. Based on the record, we find support for that ruling.

¶ 60 Finally, defendant argued he made subsequent claims of ineffective assistance, which the trial court ignored. At oral argument, the State conceded the trial court should have inquired into defendant's additional claims. Defendant attempted to raise additional claims of ineffective assistance at sentencing. The court denied defendant's motion to continue sentencing, emphasizing defendant already had a *Krankel* hearing. The court never inquired into the bases of defendant's additional claims.

¶ 61 This court recently addressed "whether the court [is] required, under *Krankel* and its progeny, to conduct another preliminary *Krankel* inquiry to address the subsequent claims defendant raised." *People v. Horman*, 2018 IL App (3d) 160423, ¶ 26. We held that public policy considerations require the court afford a defendant the opportunity to raise additional claims of ineffective assistance. In order to properly address a defendant's claims, the trial court must conduct successive *Krankel* proceedings.

> "The preliminary *Krankel* inquiry is a way for the court to efficiently consider a defendant's allegations of ineffective assistance of counsel close in time to when they occurred and create a record that could be used on appeal. Such an inquiry is not burdensome on the court as it does not take much time." *Id.* ¶ 28.

This court went onto to hold that allowing only one *Krankel* inquiry would lead to absurd results, foreclosing a defendant from receiving the benefit of effective assistance at all stages in the proceeding. Remand is required here, where the court failed to make any inquiry into defendant's subsequent claims of ineffective assistance. *People v. Ayres*, 2017 IL 120071, ¶ 26.

¶ 62 IV. One-Act, One-Crime

¶ 63 Finally, defendant argues his convictions of home invasion and criminal sexual assault must merge. Defendant submits because his conviction of home invasion was predicated on criminal sexual assault, criminal sexual assault was a lesser-included offense that cannot stand on its own under the one-act, one-crime rule. Defendant raised this issue in a posttrial motion. Thus, it was properly preserved. The State urges this court to follow *People v. Fuller*, 2013 IL App (3d) 110391, as it is directly on point and controlling in this district.

¶ 64 Under the one-act, one-crime rule, a defendant may only be convicted and sentenced for the most serious offense if multiple charges arise out of the same act. *People v. King*, 66 Ill. 2d 551, 565 (1977). If a defendant committed multiple acts, the court must determine whether any of the offenses are completely encompassed by a greater offense. *Id.* If so, multiple convictions and sentences are improper. *Id.*

¶ 65 Defendant argues because criminal sexual assault was a predicate offense to the home invasion charge, he cannot be convicted and sentenced for both. This court has held otherwise. In *Fuller*, the defendant was also charged with home invasion predicated on criminal sexual assault. *Fuller*, 2013 IL App (3d) 110391, ¶ 16. This court, using the abstract elements test, determined that because it was possible to commit home invasion without committing criminal sexual assault, the convictions did not merge. *Id.* ¶ 18. See also *People v. Bouchee*, 2011 IL App (2d) 090542, ¶ 10. Defendant asks us to find *Fuller* was wrongly decided. We decline to do so. We reject defendant's one-act, one-crime argument.

¶ 66 CONCLUSION

¶ 67 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed in part, reversed in part, and remanded.

¶ 68 Affirmed in part and reversed in part; cause remanded.

NOTICE OF APPEAL

APPEAL TAKEN FROM THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN WILL COUNTY, ILLINOIS

APPEAL TAKEN TO THE APPELLATE COURT, THIRD JUDICIAL DISTRICT, ILLINOIS

The People of the State of Illinois

Plaintiffs-Appellees,
-vs-
Alejandro Reveles
Defendant-Appellant

Case No. 10 CF 2429

☐ Joining Prior Appeal / ☑ Separate Appeal / ☐ Cross Appeal
(Mark One)

An appeal is taken from the Order of Judgment described below:

(1) Court to which appeal is taken is the Appellate Court.

(2) Name of Appellant and address to which notices shall be sent.
NAME: Alejandro Reveles
ADDRESS: 1111 Cedar Rd Glendale Heights, IL 60139

(3) Name and address of Appellant's Attorney on appeal.
NAME: Peter A. Carusona, Deputy Defender
Office of the State Appellate Defender
Third Judicial District
770 E. Etna Rd.
Ottawa, Illinois 61350

If Appellant is indigent and has no attorney, does he/she want one appointed?
Yes

FILED
16 JUL 20 PM 1:35
CLERK, CIRCUIT COURT
WILL COUNTY, ILLINOIS

(4) Date of Judgment or Order: February 26, 2016
(a) Sentencing Date: July 19, 2016
(b) Motion for New Trial: NA
(c) Motion to Vacate Guilty Plea: NA
(d) Other:
Motion to reconsider sentence - denied (July 19, 2016)

(5) Offense of which convicted:
CT I Home Invasion Class X, CT II Crim Sexual Assault Class 1

(6) Sentence:
11 years DOC Count I, 9 years DOC Count II, Consecutive

(7) If appeal is not from a conviction, nature of order appealed from:

(8) If the appeal is from a judgment of a circuit court holding unconstitutional a statute of the United States or of this state, a copy of the court's findings made in compliance with Rule 18 shall be appended to the notice of appeal.

(Signed) Pamela J. McGuire / jmkk
(May be signed by appellant, attorney, or clerk of circuit court.)
PAMELA J. McGUIRE
Clerk of the Circuit Court
NOAPL

cc: State's Attorney
Attorney General

No. 124797

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- ALEJANDRO REVELES-CORDOVA Defendant-Appellant	)	Appeal from the Appellate Court of Illinois, No. 3-16-0418. There on appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois, No. 10-CF-2429. Honorable Sarah F. Jones, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, eserve.criminalappeals@atg.state.il.us;

Mr. Thomas D. Arado, Deputy Director, State's Attorneys Appellate Prosecutor, 628 Columbus, Suite 300, Ottawa, IL 61350, 3rddistrict@ilsaap.org;

James Glasgow, Will County State's Attorney, 121 N. Chicago St., Joliet, IL 60432;

Mr. Alejandro Reveles-Cordova, Register No. M32470, Centralia Correctional Center, P.O. Box 7711, Centralia, IL 62801

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On January 13, 2020, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system, one copy is being mailed to the defendant-appellant and one copy is being mailed to Will County State's Attorney in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Ashley N. Downing
LEGAL SECRETARY
Office of the State Appellate Defender
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
Service via email is accepted at
1stdistrict.eserve@osad.state.il.us