No. 129425

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	))	Appeal from the Appellate Court of Illinois, No. 2-21-0690.
	)	
Plaintiff-Appellee,	))	There on appeal from the Circuit Court of the Twenty-Second
-vs-	))	Judicial Circuit, McHenry County, Illinois, No. 19 CF 578.
	)	
KOREM M. JOHANSON,	))	Honorable Michael E. Coppedge,
Defendant-Appellant.	)	Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

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NATURE OF THE CASE

After a bench trial, Korem Johanson was convicted of predatory criminal sexual assault of a child and was sentenced to 16 years in prison.

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 section (a)(1) of the predatory criminal sexual assault statute and section (c)(1) of the aggravated criminal sexual abuse statute share identical elements and are unconstitutionally disproportionate?

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STATUTES INVOLVED

720 ILCS 5/11-0.1 (2019)

§ 11-0.1. Definitions.

> "Sexual conduct" means 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.

720 ILCS 5/11-1.40 (2019)

§ 11-1.40. Predatory criminal sexual assault of a child.

> (a) A person commits predatory criminal sexual assault of a child if that person is 17 years of age or older, and commits an act of contact, however slight, between the sex organ or anus of one person and the part of the body of another for the purpose of sexual gratification or arousal of the victim or the accused, or an act of sexual penetration, and:
>
> > (1) the victim is under 13 years of age[.]

720 ILCS 5/11-1.60 (2019)

§ 11-1.60. Aggravated criminal sexual abuse.

> (c) A person commits aggravated criminal sexual abuse if:
>
> > (1) that person is 17 years of age or over and: (i) commits an act of sexual conduct with a victim who is under 13 years of age[.]

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STATEMENT OF FACTS

Korem Johanson was charged in a multi-count indictment with four counts of predatory criminal sexual assault, one count of aggravated criminal sexual abuse, and one count of unlawful possession of a firearm without a FOID card. (CI. 44–47). Johanson pled guilty to the gun charge, and, following a bench trial, was acquitted of four of the sex charges. (CI. 325, 331). The court found Johanson guilty of Count 3, a Class X felony offense of predatory criminal sexual assault of a child. (CI. 331). The indictment for Count 3 charged:

> That between the dates of July 1, 2019, and July 22, 2019, in McHenry County, State of Illinois, Korem M. Johanson, defendant, committed the offense of predatory criminal sexual assault, in that the said defendant, who was seventeen years of age or older, knowingly committed an act of contact with A.J., [a minor], who was under thirteen years of age when the act was committed, in that said defendant caused defendant's sex organ (penis) to make contact with the hand of A.J. for the purpose of the defendant's sexual gratification or arousal, in violation of Chapter 720, Section 5/11-1.40(a)(1) of the Illinois Compiled Statutes.

(CI. 45).

At the trial, Jamie Casas testified that she had two children with Johanson, A.J. and D.J. (RI. 985). She and Johanson shared 50-50 custody of their children after their divorce in 2018. (RI. 987). On July 18, 2019, an incident occurred where D.J. kissed Casas's breast and, when Casas told him it was inappropriate, D.J. said, "Why? Daddy lets me kiss his penis." (RI. 988–89). After she put D.J. to bed, Casas spoke with A.J., who demonstrated a hand gesture appearing to mimic masturbation. (RI. 990–91). Casas filed a police report the next day. (RI. 991).

Anna Krause worked at the Child Advocacy Center of McHenry County and interviewed A.J. on July 22, 2019. (RI. 93, 936–37). During their interview,

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A.J. initially denied touching anyone's private parts but later said that Johanson had showed her his private parts. (Ex. 2, at 12:15–13:30; 15:40). A.J. wore blue gloves and touched Johanson's private parts. (Ex. 2, at 18:22–20:15). She said that she massaged Johanson and put lotion on his penis, and he said it felt good. (Ex. 2, at 21:20–24:45). A.J. started giving Johanson massages after her parents divorced but the penis massage was a "couple of weeks ago." (Ex. 2, at 25:25–26:40).

A.J. was 10 years old at the time of trial and had not seen Johanson for two years. (RI. 965–66). A.J. watched the videos of her interview with Krause at the CAC and said that she told the truth. (RI. 970–71). A.J. liked to give massages and asked to massage Johanson when she stayed at his house. (RI. 972). These massages happened more than one time. (RI. 972). A.J. massaged Johanson's back, arms, legs, and sometimes around his private area. (RI. 969). Johanson normally wore boxers during the massages and A.J. did not remember if he took them off. (RI. 972). On cross-examination, A.J. said that Johanson sometimes said, "hey that feels pretty good sweetie" while being massaged. (RI. 977). A.J. said she had touched Johanson's penis two or three times. (RI. 978).

Patrick Prendergast was serving a four-year sentence for a "domestic" and was previously housed at McHenry County Jail with Johanson in February 2020. (RI. 919–20). Prendergast said Johanson told him "he would worry that [his] daughter was going to end up exploring with other guys, so he figured it would be better if she explored with him, so basically he had her put a condom on him and rub lotion on him." (RI. 921–22). Prendergast contacted a detective about Johanson's statement and asked if he could get probation for his own case. (RI.

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923–24). On cross-examination, Prendergast agreed he hoped he would receive a benefit for his statement. (RI. 929).

Police officers testified to executing a search warrant on Johanson's home and seizing items including lotion, Vaseline, and blue latex gloves. (RI. 1020–23).

The State played a phone call made by Johanson from jail to his mother Tracy, which was recorded on July 25, 2019. (RI. 1038–40). In the call, Tracy noted that Johanson was "naked and open" around his children and Johanson asked Tracy not to say things she found "eerie" between him and the children. (Ex. 22).

Tracy Johanson testified for Johanson's defense. (RI. 1054). Tracy described an incident on Mother's Day of 2019, where she told Jamie Casas "that she was inappropriate with the children[.]" (RI. 1058). Tracy told Casas if they did not talk about the issue, Tracy would call DCFS. (RI. 1058).

Johanson testified in his defense. (RI. 1066). He heard A.J.'s testimony about touching his penis and saw the video of the CAC interview. (RI. 1079). He recalled an incident where A.J. had touched his penis: "I was taking a shower with both of my children . . . and out of nowhere my daughter touched [me] and that was what made it that we no longer showered with daddy." (RI. 1081). Johanson also described an incident where A.J. touched his penis while giving him a massage about a week before Johanson's arrest. (RI. 1082). A.J. asked to massage Johanson and Johanson said okay, took off his shorts, and laid on his stomach on a blanket. (RI. 1083). A.J. put lotion on Johanson and massaged him. (RI. 1083). She asked him to turn over and then retrieved and put on blue latex gloves and touched Johanson's testicles. (RI. 1086–87). Johanson "shot up" and asked A.J. if she had

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any questions, and A.J. answered no. (RI. 1087). Johanson did not have an erection during these incidents and never caused his penis to make contact with A.J. for the purpose of sexual gratification or arousal. (RI. 1087–88, 1090).

The trial court found Johanson guilty of Count 3 for predatory criminal sexual assault and not guilty on the remaining counts. (CI. 331; RI. 1149–56).

Defense counsel filed a motion arguing for Johanson to be sentenced to a Class 2 felony offense of aggravated criminal sexual abuse in accordance with the Proportionate Penalties Clause of the Illinois Constitution. (CI. 332). The motion argued that predatory criminal sexual assault of a child and aggravated criminal sexual abuse had identical elements but different sentences. (CI. 333–34). The motion argued that a sentence for a Class X felony offense of predatory criminal sexual assault of a child accordingly would violate the clause. (CI. 335–36).

Following a hearing, the trial court found the two offenses did not have identical elements. (RI. 1179). The court explained:

> TRIAL COURT: Predatory criminal sexual assault requires an act of contact, however slight. For example, an accused could rub his penis on the back of the victim, and if he did so for sexual gratification or arousal, he could be found guilty of predatory criminal sexual assault. The contact must, however, involve the sex organ or anus. Aggravated criminal sexual abuse requires an act of sexual conduct, not any contact. There must be a knowing touching or fondling.
>
> Regarding a child under 13, the touching or fondling does not have to involve the sex organ, anus, or breast. For example, massaging a naked child under the age of 13 for sexual gratification can be aggravated criminal sexual abuse.
>
> The two offenses, while similar, are not identical[.]

(RI. 1179–80). The court denied the motion. (RI. 1180).

The trial court sentenced Johanson to 16 years in prison on Count 3. (CI.

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370; RI. 1296). Defense counsel filed a motion to reconsider sentence and to reconsider the ruling on the proportionate-penalties challenge. (CI. 380). The court denied the motion and Johanson timely appealed. (CI. 387, 392).

On appeal, Johanson argued that his 16-year sentence for predatory criminal sexual assault violated the Proportionate Penalties Clause. *People v. Johanson*, 2023 IL App (2d) 210690, ¶ 8. He argued that predatory criminal sexual assault and aggravated criminal sexual abuse had identical elements but carried different penalties and accordingly were unconstitutionally disproportionate. *Johanson*, 2023 IL App (2d) 210690, ¶¶ 9–10.

The appellate court affirmed Johanson's sentence in a decision issued on January 23, 2023. *Id.*, ¶ 30. To resolve the issue, the appellate court compared the definition of "contact" as used in the predatory criminal sexual assault statute and the definition of "sexual conduct" as used in the aggravated criminal sexual abuse statute. *Id.*, ¶¶ 13–15. The appellate court found that "contact" means "any touching" whereas "sexual conduct" can occur in three distinct ways. *Id.* ¶¶ 13, 18–19. The appellate court said that the identical-elements test does not consider the "facts alleged in a case" but instead objectively compares the elements. *Id.*, ¶¶ 27–28. Because of the difference in the definition in the terms "contact" and "sexual conduct," the appellate court concluded the statutes did not have identical elements. *Id.*, ¶¶ 19, 27–28.

This Court granted leave to appeal on May 24, 2023.

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ARGUMENT

Section (a)(1) of the predatory criminal sexual assault statute and section (c)(1) of the aggravated criminal sexual abuse statute have identical elements but carry different penalties. This Court therefore should find the statutes to be unconstitutionally disproportionate, vacate Korem Johanson's conviction and sentence for predatory criminal sexual assault, enter a conviction for aggravated criminal sexual abuse, and remand for a new sentencing hearing.

Korem Johanson was convicted of a Class X felony offense under section (a)(1) of the predatory criminal sexual assault of a child statute, where the evidence showed that he caused his daughter A.J. to make contact with his penis. (CI. 45, 331). The trial court sentenced Johanson to 16 years in prison on this conviction. (CI. 370). But section (a)(1) of the predatory criminal sexual assault of a child statute shares identical elements with an offense that carries a less severe penalty: section (c)(1) of the Class 2 felony offense of aggravated criminal sexual abuse. 720 ILCS 5/11-1.40(a)(1) (2019); 720 ILCS 5/11-1.60(c)(1), (g) (2019). When punished as aggravated criminal sexual abuse, the same elements warrant only a sentence in the range of three to seven years in prison, whereas a conviction for predatory criminal sexual assault carries a sentencing range of six to 60 years. 730 ILCS 5/5-4.5-35 (a) (2019); 720 ILCS 5/11-1.40(b)(1). As such, Johanson's 16-year sentence for predatory criminal sexual assault of a child violates the Proportionate Penalties Clause of the Illinois Constitution. Ill. Const. 1970, art. I, § 11.

The Proportionate Penalties Clause of the Illinois Constitution provides that "all penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. The Clause mandates that penalties be proportionate

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to the seriousness of the offense. *People v. Ligon*, 2016 IL 118023, ¶ 10; *People v. Guevara*, 216 Ill.2d 533, 543 (2005). A penalty violates the Proportionate Penalties Clause if: (1) it is so cruel, degrading, or disproportionate to the offense that the sentence shocks the moral sense of the community; or (2) it is greater than the sentence for an offense with identical elements. *Ligon*, 2016 IL 118023, ¶ 10.

Where a defendant argues that his or her sentence violates the Proportionate Penalties Clause because it is greater than the sentence for an offense with identical elements, this Court has repeatedly observed that, "[i]f the legislature determines that the exact same elements merit two different penalties, then one of those penalties has not been set in accordance with the seriousness of the offense." *People v. Hernandez*, 2016 IL 118672, ¶ 9; *People v. Clemons*, 2012 IL 107821, ¶ 30; *People v. Sharpe*, 216 Ill.2d 481, 522 (2005). An expectation of identical penalties for identical offenses comports with "common sense and sound logic," *People v. Christy*, 139 Ill.2d 172, 181 (1990), and gives effect to the plain language of the Illinois Constitution. *Clemons*, 2012 IL 107821, ¶ 30. Therefore, where identical offenses do not yield identical penalties, this Court has held that the penalties were unconstitutionally disproportionate and the greater penalty could not stand. *Sharpe*, 216 Ill.2d at 504; *Christy*, 139 Ill.2d at 181.

The constitutionality of a statute is a matter of law and is reviewed *de novo*. *Ligon*, 2016 IL 118023, ¶ 11. As a general rule, a constitutional challenge to a statute can be raised at any time. *People v. Wright*, 194 Ill.2d 1, 23 (2000).

This Court should find that section (a)(1) of the predatory criminal sexual assault of a child statute and section (c)(1) of the aggravated criminal sexual abuse

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statute have identical elements.

A person commits predatory criminal sexual assault of a child, a Class X felony, when (1) he is at least 17 years of age; (2) he commits an act of contact, however slight, between the sex organ or anus of one person and the part of the body of another; (3) the contact is for the purpose of sexual gratification or arousal of the victim or the accused; and (4) the victim is under 13 years of age. 720 ILCS 5/11-1.40(a)(1), (b)(1).

A person commits aggravated criminal sexual abuse, a Class 2 felony, when (1) he is at least 17 years of age; (2) he commits an act of sexual conduct; and (3) the victim is under 13 years of age. 720 ILCS 5/11-1.60(c)(1), (g).

As the appellate court below said, "[d]eciding whether predatory criminal sexual assault of a child and aggravated criminal sexual abuse share the same elements mandates [construction of] the definition of 'sexual conduct.'" *People v. Johanson*, 2023 IL App (2d) 210690, ¶ 15. Courts have defined "contact" as used in the predatory criminal sexual assault of a child statute to mean "any touching." *Johanson*, 2023 IL App (2d) 210690, ¶ 13; *People v. Kitch*, 2019 IL App (3d) 170522, ¶ 51. The term "sexual conduct" as used in the aggravated criminal sexual abuse statute is defined by statute as:

> [A]ny 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.

720 ILCS 5/11-0.1 (2019).

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Here, the State alleged that Johanson "caused [his] sex organ (penis) to make contact with the hand of A.J. for the purpose of [his] sexual gratification or arousal." (CI. 45). The evidence adduced at trial included testimony from A.J. that, when she was eight years old, she touched Johanson's penis two or three times. (RI. 965–66, 978).

This conduct satisfied the elements of both offenses. Specifically, it was "any touching" and therefore contact between Johanson's sex organ and A.J.'s hand that satisfied the elements of section (a)(1) of predatory criminal sexual assault of a child. 720 ILCS 5/11-1.40(a)(1); *Kitch*, 2019 IL App (3d) 170522, ¶ 51. At the same time, the conduct was a knowing touching of Johanson's sex organ by A.J. that constituted sexual conduct under section (c)(1) of the aggravated criminal sexual abuse statute. 720 ILCS 1/11-0.1, 1.60(c)(1). Although Johanson was not charged with aggravated criminal sexual abuse for this conduct, that does not preclude a finding by this Court that the offenses share identical elements:

> [A]lthough the State is not required to proceed on a lesser offense when there is evidence sufficient to convict of a greater offense[,] it is impermissible to allow the constitutional prohibition against disproportionate penalties for identical crimes to be relaxed where the State decides to proceed only with the crime carrying a greater penalty.

People v. Hauschild, 226 Ill.2d 63, 87 (2007).

The appellate court in this case concluded differently by finding that "sexual conduct" occurs in three distinct ways. *People v. Johanson*, 2023 IL App (2d) 210690, ¶¶ 18–19. The appellate court explained that "sexual conduct" occurs when:

> [T]here is (1) knowing touching or fondling of the victim's or the defendant's sex organs, anus, or breast, *or* (2) knowing touching or fondling of any part of the body of a child under age 13, *or*, (3) "any

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> transfer or transmission of semen by the accused upon any part of the clothed or unclothed body of the victim."

Johanson, 2023 IL App (2d) 210690, ¶ 18 (emphasis in original). The appellate court accordingly concluded that "sexual conduct" is broader than the conduct prohibited by the predatory criminal sexual assault statute and that the offenses do not have identical elements. *Id.*, ¶ 19. In other words, the appellate court found that "the predatory-criminal-sexual-assault-of-a-child statute requires more than the aggravated-criminal-sexual-abuse statute" and that the statutory elements are not identical. *Id.*, ¶¶ 22–23.

But this Court has explained that "the identical elements test has *never required* that the two offenses be equally specific." *Clemons*, 2012 IL 107821, ¶ 23 (emphasis added). For example, in *Hauschild*, this Court compared section 18-2(a)(2) of the armed robbery statute with section 33A-2(a) of the armed violence statute to determine whether the offenses shared identical elements. *Hauschild*, 226 Ill.2d at 85. This Court found the statutory elements to be identical between armed robbery and armed violence as predicated on robbery while armed with certain statutorily-defined categories of weapons:

> A person commits [the offense of armed robbery while armed with a firearm] when he "takes property * * * from the person or presence of another by the use of force or by threatening the imminent use of force" [citation], and he "carries on or about his * * * person or is otherwise armed with a firearm" [citation]. A person commits the offense of armed violence predicated on robbery when, "while armed with a dangerous weapon, he commits robbery" [citations]. A person is considered to be "armed with a dangerous weapon" in the context of the armed violence statute "when he or she carries on or about his or her person or is otherwise armed with a Category I, Category II, or Category III weapon." [citation]. Clearly, the statutory elements of these offenses are identical, and proportionate penalties analysis is therefore appropriate. [citation].

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> Given that we have determined the elements of armed robbery while armed with a firearm and armed violence *predicated on robbery with a category I or category II weapon are identical*, "common sense and sound logic would seemingly dictate that their penalties be identical."

Id. at 86 (emphasis added). *See also People v. Lewis*, 175 Ill.2d 412, 418 (1996) (finding identical elements between robbery while armed with a handgun and armed violence predicated on robbery committed with a category I weapon, despite the armed violence statute dividing dangerous weapons into three categories); *People v. Woolley*, 178 Ill.2d 175, 204–06 (1997) (same).

The identical elements test is an objective test that "simply compares the elements of the two offenses to determine if the offenses are the same." *People v. Williams*, 2015 IL 117470, ¶ 19. In *Ligon*, 2016 IL 118023, ¶ 18, for example, this Court compared the offenses of aggravated vehicular hijacking when armed with a dangerous weapon and armed violence while armed with a category III weapon to determine if they shared identical elements in a proportionality challenge raised by defendant. The indictment in *Ligon* charged that defendant had committed aggravated vehicular hijacking while armed with "a bludgeon" and the definition of a category III weapon in the armed violence statute included "a bludgeon." *Id.*, ¶ 19. This Court explained that the term "dangerous weapon" as used in the aggravated vehicular hijacking statute "includes not only objects that are *per se* dangerous, but objects that are used or may be used in a dangerous manner," whereas the dangerous weapons in the armed violence statute were limited to those identified in the statute. *Id.*, ¶¶ 22–23. As such, this Court found the offenses did not have identical elements because "the BB gun with which defendant herein was armed *cannot* be considered a bludgeon or other dangerous weapon of like

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character under the armed violence statute." *Id.*, ¶¶ 24–25 (emphasis in original).

Here, by contrast, the conduct of committing an act of contact between the sex organ or anus of one person and the part of the body of another is found in both the predatory criminal sexual assault of a child statute and the aggravated criminal sexual abuse statute. Unlike *Ligon*, where the defendant *could not* have been convicted of armed violence because he did not use a category III weapon, Johanson's conduct satisfied the elements of both offenses. The appellate court's decision accordingly puts a square peg in a round hole by asserting that the offense of predatory criminal sexual assault of a child "requires more" than aggravated criminal sexual abuse. *Johanson*, 2023 IL App (2d) 210690, ¶ 21. Specifically, the appellate court said, "Predatory criminal sexual assault of a child requires proof of a knowing touching of a sex organ or anus for sexual gratification or arousal when the victim is under 13, where aggravated criminal sexual abuse does not require knowing touching of such specific areas when the victim is under 13." *Id.*, ¶ 22. But the appellate court was incorrect—under the definition of "sexual conduct" used in the aggravated criminal sexual abuse statute, a knowing touching or fondling of the sex organs, anus, or breast *is* required. 720 ILCS 5/11-0.1.

The appellate court's decision unpersuasively attempted to analogize this case with this Court's decision in *People v. Williams*, 2015 IL 117470. *Johanson*, 2023 IL App (2d) 210690, ¶ 21. The *Williams* case concerned a proportionality challenge between section 2(a)(1) of the FOID Card Act and section 24-1.6(a)(1) and (a)(3)(C) of the aggravated unlawful use of a weapon statute, in which this Court found that the statutes were not identical because AUUW contained an

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additional location element. *Williams*, 2015 IL 117470, ¶ 14.

But unlike *Williams*, neither statute here contains an additional element precluding a finding of identical elements. Rather, both section (a)(1) of predatory criminal sexual assault of a child and section (c)(1) of aggravated criminal sexual abuse require the State to prove that the accused is over 17 and the victim is under 13. 720 ILCS 5/11-1.40(a)(1), 1.60(c)(1). Predatory criminal sexual assault requires the State to prove an act of contact between the sex organ or anus of one person with the body part of another for the purpose of sexual gratification or arousal. 720 ILCS 5/11-1.40(a)(1). Aggravated criminal sexual abuse requires the State to prove an act of "sexual conduct," which means "knowing touching or fondling by the victim or the accused . . . of the sex organs, anus, or breast of the victim or the accused . . . for the purpose of sexual gratification or arousal of the victim or the accused." 720 ILCS 5/11-0.1, 1.60 (c)(1). When viewed objectively, as the test requires, these elements are identical. *Williams*, 2015 IL 117470, ¶ 19.

The appellate court finally tried to distinguish this case from *People v. Deckard*, 2020 IL App (4th) 170781-U, ¶ 75, which found that section (a)(1) of the predatory criminal sexual assault statute and section (c)(1) of the aggravated criminal sexual abuse statute have identical elements. *Johanson*, 2023 IL App (2d) 210690, ¶ 24. According to the appellate court, *Deckard* was wrongly decided because the *Deckard* court appeared to conclude that the elements were identical through a subjective comparison of the facts, not an objective comparison of the elements. *Id.*, ¶¶ 24–25, *citing Deckard*, 2020 IL App (4th) 170781-U, ¶ 75.

But while it is true that the *Deckard* court found "[t]he two offenses have

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identical elements when applied to the facts alleged[,]" the offenses still contain identical elements when compared objectively. *Deckard*, 2020 IL App (4th) 170781-U, ¶ 75; (*see above* at 15). As the appellate court in this case explained, "Under the identical-elements test, *all that matters* is whether, when comparing the elements of the offenses as the legislature enacted them, the two statutes are revealed to contain the same elements but provide for disparate sentences." *Johanson*, 2023 IL App (2d) 210690, ¶ 27 (emphasis added). The only argument the appellate court advanced that the statutory elements at issue are different is that the statutory definition of "sexual conduct" occurs in three ways. *Id.*, ¶ 19. But this Court's precedents have established that the presence of categories in a statutory definition does not mean offenses' elements are not identical. *See Hauschild*, 226 Ill.2d at 85; *Lewis*, 175 Ill.2d at 418; *Woolley*, 178 Ill.2d at 204–06. Essentially, the appellate court's decision seeks to require offenses be equally specific to satisfy the identical elements test—which this Court has never required in a proportionate-penalties challenge alleging identical elements. *Clemons*, 2012 IL 107821, ¶ 23.

For the reasons above, this Court therefore should find that section (a)(1) of the predatory criminal sexual assault of a child statute and section (c)(1) of the aggravated criminal sexual abuse statute have identical elements.

Next, predatory criminal sexual assault is punished more harshly than aggravated criminal sexual abuse, which the appellate court also acknowledged. *Johanson*, 2023 IL App (2d) 210690, ¶ 12 ("Clearly, the sentences imposed for these two offenses are disparate[.]"). Predatory criminal sexual assault of a child is a Class X felony carrying a sentencing range of six to 60 years in prison. 720

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ILCS 5/11-1.40(b)(1). Aggravated criminal sexual abuse is a Class 2 felony with a sentencing range of three to seven years. 720 ILCS 5/11-1.60(g); 730 ILCS 5/5-4.5-35(a). Where offenses have identical elements, "common sense and sound logic would seemingly dictate that their penalties be identical." *Christy*, 139 Ill.2d at 181. Because these identical offenses do not yield identical penalties, the greater penalty for predatory criminal sexual assault of a child cannot stand. *Sharpe*, 216 Ill.2d at 504.

Therefore, this Court should reverse the appellate court's decision in Johanson's case and find that section (a)(1) of the predatory criminal sexual assault of a child statute and section (c)(1) of the aggravated criminal sexual abuse statute are unconstitutionally disproportionate. The proper remedy for a violation of the Proportionate Penalties Clause is remand for a new sentencing hearing. *Hauschild*, 226 Ill.2d at 88–89. This Court therefore should vacate Johanson's conviction and sentence for predatory criminal sexual assault of a child, enter a conviction for aggravated criminal sexual abuse, and remand for a new sentencing hearing on the Class 2 offense.

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CONCLUSION

For the foregoing reasons, Korem Johanson, defendant-appellant, respectfully requests that this Court vacate his conviction and sentence for the offense of predatory criminal sexual assault of a child, enter a conviction for aggravated criminal sexual abuse, and remand for a new sentencing hearing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and 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, is 18 pages.

/s/Anthony J. Santella
ANTHONY J. SANTELLA
Assistant Appellate Defender

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PEOPLE OF THE STATE OF ILLINOIS
Plaintiff/Petitioner

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Plaintiff/Petitioner

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STATES	01-3	TWO ORDERS OF PROTECTION AND ONE VICTIME IMPACT STATEMENT	SUP E 23-SUP E 49 (Volu...
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SUBMITTED - 23308899 - Norma Huerta - 6/27/2023 12:20 PM

FILED
McHenry County, Illinois
NOV - 5 2021
KATHERINE M. KEEFE
Clerk of the Circuit Court

IN THE CIRCUIT COURT OF McHenry COUNTY, ILLINOIS
22nd JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS
Case No 19CF578
Vs.
Date of Sentence 11-5-2021
Date of Birth 1-6-1982 (Defendant)
Korem Johanson
Defendant

JUDGMENT – SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

WHEREAS the above-named defendant has been adjudged guilty of the offenses enumerated below; IT IS THEREFORE ORDERED that the defendant be and hereby is sentenced to confinement in the Illinois Department of Corrections for the term of years and months specified for each offense.

COUNT	OFFENSE	DATE OF OFFENSE	STATUTORY CITATION	CLASS	SENTENCE	MSR
III	Pred Crim. Sex. Assault of a Child	7/1/19-7/22/19	720 ILCS 5/11-1.40(a)(1)	X	16 Yrs. ___ Mos.	not less than 3 Yrs. to a maximum of natural life

To run (concurrent with) (consecutively to) count(s)___and served at 50%, 75% (85%) 100% pursuant to 730 ILCS 5/3-6-3

______ ______ ______ ______ ______ ____Yrs. ____Mos. ____Yrs.
To run (concurrent with) (consecutively to) count(s)___and served at 50%, 75%, 85%, 100% pursuant to 730 ILCS 5/3-6-3

______ ______ ______ ______ ______ ____Yrs. ____Mos. ____Yrs.
To run (concurrent with) (consecutively to) count(s)___and served at 50%, 75%, 85%, 100% pursuant to 730 ILCS 5/3-6-3

This Court finds that the defendant is:
_______Convicted of a class_______offense but sentenced as a class X offender pursuant to 730 ILCS 5/5-4.5-95(b) on count(s)_.

The Court further finds that the defendant is entitled to receive credit for time actually served in custody (of 835 days as of the date of this order) from (specify dates) 7/22/2019 – 11/5/2021. The defendant is also entitled to receive credit for the additional time served in custody from the date of this order until defendant is received at the Illinois Department of Corrections.

✓ The defendant remained in continuous custody from the date of this order.

____The defendant did not remain in continuous custody from the date of this order (less_days from a release date of to a surrender date of__________).

_______The Court further finds that the conduct leading to conviction for the offenses enumerated in counts_resulted in great bodily harm to the victim. (730 ILCS 5/3-6-3(a)(2)(iii)).

_______The Court further finds that the defendant meets the eligibility requirements for possible placement in the Impact Incarceration Program. (730ILCS 5/5-4-1(a)).

_______The Court further finds that offense was committed as a result of the use of, abuse of, or addiction to alcohol or a controlled substance and recommends the defendant for placement in a substance abuse program. (730 ILCS 5/5-4-1(a)).

_______The defendant successfully completed a full-time (60-day or longer) Pre-Trial Program____Educational/Vocational____Substance Abuse____Behavior Modification____Life Skills____Re-Entry Planning – provided by the county jail while held in pre-trial detention prior to this commitment and is eligible and shall be awarded additional sentence credit in accordance with 730 ILCS 5/3-6-3(a)(4) for___total number of days of program participation, if not previously awarded.

_______The defendant passed the high school level test for General Education and Development (GED) on___while held in pre-trial detention prior to this commitment and is eligible to receive Pre-Trial GED Program Credit in accordance with 730 ILCS 5/3-6-3(a)(4.1). THEREFORE IT IS ORDERED that the defendant shall be awarded 60 days of additional sentence credit, if not previously awarded.

_______IT IS FURTHER ORDERED the sentence(s) imposed on count(s)_be (concurrent with) (consecutive to) the sentence imposed in case number__________in the Circuit Court of________County.

✓ IT IS FURTHER ORDERED that judgment taken on outstanding fines and assessments. Defendant admonished re potential sexually violent persons petition

The Clerk of the Court shall deliver a certified copy of this order to the sheriff. The Sheriff shall take the defendant into custody and deliver defendant to the Department of Corrections which shall confine said defendant until expiration of this sentence or until otherwise released by operation of law.

This order is (✓ effective immediately) (____stayed until__________).

DATE: 11/5/2021 ENTER:______________________

(PLEASE PRINT JUDGE'S NAME HERE) ______________________

Approved by Conference of Chief Judges 6/20/14 (rev. 10/23/2015)

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IN THE CIRCUIT COURT OF McHenry COUNTY, ILLINOIS
22nd JUDICIAL CIRCUIT

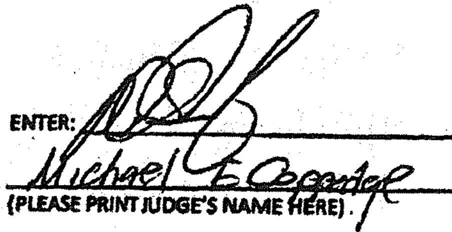
Defendant Korero Johanson

Case Number 19CF578

JUDGMENT – SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

IT IS FURTHER ORDERED that defendant not eligible for impact incarceration program.
Defendant admonished of appellate rights.
Defendants admonished as to SVP commitment.

DATE: 11/5/2021

ENTER: 

Michael E Coppedge
(PLEASE PRINT JUDGE'S NAME HERE)

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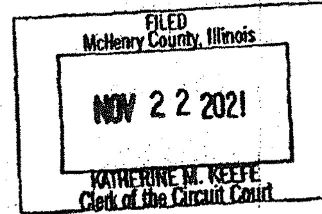
304

IN THE CIRCUIT COURT OF THE 22ND JUDICIAL CIRCUIT
McHENRY COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS	)	19CF578
	)	
vs.	)	
	)	
Johanson, Korem M	)	



ORDER

THIS MATTER COMING BEFORE THE COURT for status, the People being present, Defendant (~~not~~) present, with(~~out~~) counsel, and the Court having jurisdiction and being fully advised in the premises, it is hereby ordered that:
in custody

___ This case is set for _______________ hearing on _______________ at 9:00 a.m./ 1:30 p.m., on motion of the Defendant/People/Court/by agreement of the parties.

★★★

___ This case is set for jury/bench trial on _______________ at 10:00 a.m./1:30 p.m. on motion of the Defendant/People/Court/by agreement of the parties.

★★★

___ This case is continued for status/negotiated plea on _______________ at 9:00 a.m./ 1:30 p.m. on motion of the Defendant/People/Court/by agreement of the parties.

It is further ordered that:

Defendant's combined motion to reduce sentence pursuant to 730 ILCS 5/5-4.5-50 (d) and motion to reconsider the sentence and challenge to sentencing hearing/proportionate penalties clause is denied.

~~Defendant must appear; bond continued.~~
Defendant's motion for appointment of appellate counsel is granted. Defendant filing notice of appeal (pro se).

11-22-21

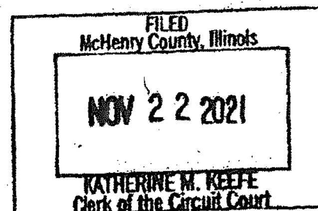
Date | Judge: [signature]

CR-Sht Ord

SUBMITTED - 23308899 - Norma Huerta - 6/27/2023 12:20 PM

IN THE CIRCUIT COURT OF THE 22nd JUDICIAL CIRCUIT
MCHENRY COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS)
)
)
VS.) 19 CF 578
)
)
KOREM JOHANSON)



NOTICE OF APPEAL

An appeal is taken from the order or judgment described below.

1. Court to which appeal is taken:
   Second District Court of Appeals, Elgin, Illinois.

2. Name of the appellant and address to which notices shall be sent:
   Korem Johanson, Inmate McHenry County Jail, 2200 North Seminary Avenue, Woodstock, IL 60098 or c/o Illinois Department of Corrections.

3. Name and address of appellant's attorney on appeal: Pending Trial Court Appointment, State Appellate Defender, 2010 Larkin Avenue, Elgin, IL 60123.

4. Date of judgment or order: 11/22, 2021.

5. Offense of which convicted: Count III of the Indictment, Predatory Criminal Sexual Assault of a Child, a Class X felony.

6. Sentence: 16 years Illinois Department of Corrections, $1,839 in fines, court costs and fees.

7. If appeal is not from a conviction, nature of order appealed from: not applicable.

8. This appeal is not from the circuit court holding unconstitutional a statute of the United States or of this state.

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Respectfully Submitted,

By: *Korem Johanson*

CERTIFICATE OF SERVICE BY EMAIL

I, Korem Johanson, a non-attorney, on oath state that I served Defendant's Notice of Appeal by hand delivery to Ms. Sharyl Eisenstein, Assistant McHenry County State's Attorney at the McHenry County Government Center, 2200 North Seminary Ave., Woodstock, IL 60098 or before *10 00 A* on *11/22*, 2021.

Respectfully Submitted,

By: *Korem Johanson*

Korem Johanson
Inmate – McHenry County Jail
2200 North Seminary Avenue
Woodstock, IL 60098

SUBMITTED - 23308899 - Norma Huerta - 6/27/2023 12:20 PM

2023 IL App (2d) 210690
No. 2-21-0690
Opinion filed January 23, 2023

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of McHenry County.
Plaintiff-Appellee,	)	
v.	)	No. 19-CF-578
KOREM M. JOHANSON,	)	Honorable Michael E. Coppedge,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court, with opinion.
Presiding Justice McLaren and Justice Birkett concurred in the judgment and opinion.

OPINION

¶ 1 Following a bench trial, defendant, Korem M. Johanson, was convicted of predatory criminal sexual assault of a child, a Class X felony (720 ILCS 5/11-1.40(a)(1), (b)(1) (West 2018)). Before sentencing, he moved the court to sentence him for aggravated criminal sexual abuse (*id.* § 11-1.60), a Class 2 felony (*id.* § 11-1.60(g)), instead of predatory criminal sexual assault of a child. Defendant argued that sentencing him as a Class X offender for predatory criminal sexual assault of a child violated the proportionate-penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11) because predatory criminal sexual assault of a child and aggravated criminal sexual abuse have identical elements but the punishment for predatory criminal sexual assault of a child is more severe. The trial court denied the motion and sentenced defendant to 16 years'

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imprisonment for the Class X felony of predatory criminal sexual assault of a child. Defendant timely appeals. We affirm.

¶ 2 I. BACKGROUND

¶ 3 The State charged defendant with five offenses related to the sexual abuse and assault of his two children. Defendant was found guilty of only one count, concerning his daughter, A.J. That count provided:

> "That between the dates of July 1, 2019 and July 22, 2019, *** defendant committed the offense of predatory criminal sexual assault, in that the said defendant, who was seventeen years of age or older, knowingly committed an act of contact with A.J. *** who was under thirteen years of age when the act was committed, in that defendant caused [his] sex organ (penis) to make contact with the hand of A.J. for the purpose of the defendant's sexual gratification or arousal."

¶ 4 After the trial court found defendant guilty, he moved the court to sentence him for aggravated criminal sexual abuse,[1] a Class 2 felony, instead of predatory criminal sexual assault of a child, a Class X felony. Defendant argued that "the proportionate penalties clause is violated

[1]Section 11-1.60 of the Criminal Code of 2012 (Code) (720 ILCS 5/11-1.60 (West 2018)) sets out several forms of aggravated criminal sexual abuse. In his motion to be sentenced for aggravated criminal sexual abuse, defendant cited section 11-1.60(b) of the Code (*id.* § 11-1.60(b)), which prohibits an act of "sexual conduct" with a victim who is under 18 years of age and is a member of the defendant's family. However, defendant's proportionate-penalties argument on appeal relies on section 11-1.60(c)(1)(i) of the Code (*id.* § 11-1.60(c)(1)(i)), which prohibits a person 17 years old or older from engaging in "sexual conduct" with a person under 13 years of age. Notably, the State takes no issue with this disparity.

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as the conduct [he] was found guilty of having committed forms the basis for the violation of two different offenses with identical elements yet vastly different sentences." The State replied, arguing only that all dispositions imposed by a court in a criminal case must be authorized by law.

¶ 5 Following a hearing, the trial court denied the motion, finding that predatory criminal sexual assault of a child and aggravated criminal sexual abuse "do not have identical elements." The court elaborated:

> "Predatory criminal sexual assault requires an act of contact, however slight. For example, an accused could rub his penis on the back of the victim, and if he did so for sexual gratification or arousal, he could be found guilty of predatory criminal sexual assault. The contact must, however, involve the sex organ or anus. Aggravated criminal sexual abuse requires an act of sexual conduct, not any contact. There must be a knowing touching or fondling.
>
> Regarding a child under 13, the touching or fondling does not have to involve the sex organ, anus or breast. For example, massaging a naked child under the age of 13 for sexual gratification can be aggravated criminal sexual abuse.
>
> The two offenses, while similar, are not identical and evidence the intent of the legislature to punish more severely contact that involves the sex organ or anus of the victim or the accused. As noted, this is an identical elements test. It is not driven by the consideration of the facts specific to a given case, and it is not sufficient that there is substantial similarity. There must be identical elements."

¶ 6 Subsequently, the court sentenced defendant to 16 years' imprisonment for predatory criminal sexual assault of a child. This timely appeal followed.

¶ 7 II. ANALYSIS

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¶ 8 Defendant argues that his 16-year sentence for predatory criminal sexual assault of a child violates the proportionate-penalties clause of the Illinois Constitution. We review *de novo* that issue. See *People v. Charleston*, 2018 IL App (1st) 161323, ¶ 33.

¶ 9 "The proportionate penalties clause of the Illinois Constitution provides that '[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.' " *People v. Brooks*, 2022 IL App (3d) 190761, ¶ 11 (quoting Ill. Const. 1970, art. I, § 11).

> "Criminal sentences may be found unconstitutionally disproportionate where: (1) the punishment is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community; (2) similar offenses are compared and the conduct that results in a less serious threat to the public health and safety is punished more severely; and (3) identical offenses are given different sentences." *Id.*

¶ 10 Defendant bases his argument on the third scenario—when identical offenses result in different sentences. He contends that predatory criminal sexual assault of a child, a Class X felony, and aggravated criminal sexual abuse, a Class 2 felony, have identical elements but different sentences. " '[A]n identical elements proportionality violation arises out of the relationship between two statutes—the challenged statute, and the comparison statute with which the challenged statute is out of proportion.' " *Id.* (quoting *People v. Blair*, 2013 IL 114122, ¶ 32). "If the two compared statutes exhibit identical elements, but result in different penalties, then one of these penalties has not been set in accordance with the seriousness of the offense and is unconstitutionally disproportionate." *Id.*

¶ 11 With these principles in mind, we turn to the two statutes defendant compares in this appeal. The statute he challenges is section 11-1.40(a)(1) of the Criminal Code of 2012 (Code)

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(720 ILCS 5/11-1.40(a)(1) (West 2018) (predatory-criminal-sexual-assault statute). The statute he uses for comparison is section 11-1.60(c)(1)(i) of the Code (*id.* § 11-1.60(c)(1)(i)) (aggravated criminal sexual abuse statute).

¶ 12 Defendants convicted of predatory criminal sexual assault of a child are sentenced, as Class X offenders, to prison sentences between 6 and 60 years. *Id.* § 11-1.40(b)(1). Defendants convicted of aggravated criminal sexual abuse, a Class 2 felony, face prison sentences between three and seven years. 730 ILCS 5/5-4.5-35(a) (West 2018). Clearly, the sentences imposed for these two offenses are disparate, with defendants convicted of predatory criminal sexual assault of a child facing more severe punishments. Accordingly, if the elements of these two offenses are identical, sentencing defendant for predatory criminal sexual assault of a child instead of aggravated criminal sexual abuse violated the proportionate-penalties clause.

¶ 13 To make our comparison, we must set forth the elements of each statute. The predatory-criminal-sexual-assault-of -a-child statute provides:

> "(a) A person commits predatory criminal sexual assault of a child if that person is 17 years of age or older, and commits an act of contact, however slight, between the sex organ or anus of one person and the part of the body of another for the purpose of sexual gratification or arousal of the victim or the accused *** and:
>
> (1) the victim is under 13 years of age[.]" 720 ILCS 5/11-1.40(a)(1) (West 2018).

"Contact," as used in the predatory-criminal-sexual-assault-of-a-child statute, means any touching. *People v. Kitch*, 2019 IL App (3d) 170522, ¶ 51.

¶ 14 The aggravated-criminal-sexual-abuse statute provides:

> "(c) A person commits aggravated criminal sexual abuse if:

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(1) that person is 17 years of age or over and: (i) commits an act of sexual conduct with a victim who is under 13 years of age[.]" 720 ILCS contain.60(c)(1)(i) (West 2018).

"Sexual conduct," as used in the aggravated-criminal-sexual-abuse statute, is:

"[A]ny 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." (Emphasis added.) *Id.* § 11-0.1.

¶ 15 Deciding whether predatory criminal sexual assault of a child and aggravated criminal sexual abuse share the same elements mandates that we construe the definition of "sexual conduct." In doing so, we are guided by the well-settled rules of statutory construction. *Dawkins v. Fitness International, LLC*, 2022 IL 127561, ¶ 26. "Our primary and overriding concern is to ascertain and give effect to the intent of the legislature." *Id.* ¶ 27. "Legislative intent is best determined from the language of the statute itself, which if unambiguous should be enforced as written." *Id.* "In giving effect to the statutory intent, the court should consider, in addition to the statutory language, the reason for the law, the problems to be remedied, and the objects and purposes sought." *Id.* "It is also true that statutes must be construed to avoid absurd results." *Id.* "When a proffered reading of a statute leads to absurd results or results that the legislature could not have intended, courts are not bound to that construction, and the reading leading to absurdity should be rejected." *Id.*

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¶ 16 The only word in section 11-0.1. that needs interpretation to resolve this appeal is "or." "Or" is a disjunctive conjunction indicating an alternative between two or more options. Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/or (last visited Jan. 3, 2023) [https://perma.cc/WU6D-VXBF]. " 'Generally, use of the disjunctive *** requires separate treatment of those alternatives, hence a clause *following* a disjunctive is considered inapplicable to the subject matter of the *preceding* clause.' " (Emphases in original.) *In re E.B.*, 231 Ill. 2d 459, 468 (2008) (quoting *Tietema v. State*, 926 P.2d 952, 954 (Wyo. 1996)).

¶ 17 "Or" is used here with preceding serial commas. "The serial comma [is the comma that] separates items, including the last from the next to last, in a list of more than two." (Internal quotation marks omitted.) *Hatcher v. Hatcher*, 2020 IL App (3d) 180096, ¶ 18. These commas, like the statutory terms, must " 'be considered and given weight unless from inspection of the whole act it is apparent [they] must be disregarded in order to arrive at the intention of the legislature.' " (Emphasis omitted.) *In re D.F.*, 208 Ill. 2d 223, 234 (2003) (quoting *Illinois Bell Telephone Co. v. Ames*, 364 Ill. 362, 368 (1936)).

¶ 18 In defining "sexual conduct," the legislature used "or" with a preceding serial comma three times. First, the legislature used the combination to separate items in a list—specifically, "sex organs, anus, or breast," *i.e.*, three different body parts. The knowing touching of any of these for sexual gratification or arousal constitutes "sexual conduct." Second, "or" and a serial comma separate two clauses: (1) the clause providing that "sexual conduct" constitutes the knowing touching of the "sex organs, anus, or breast" for purposes of sexual gratification or arousal from (2) the clause indicating that "sexual conduct" also occurs when, for sexual gratification or arousal, there is a knowing touching of "any part of the body of a child under 13 years of age." If we were to conclude that "sex organs, anus, or breast" in the first clause modified "any part of the body of

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a child under 13" in the second clause, we would be ignoring "or" and the serial comma separating the clauses. Moreover, we would render the legislature's inclusion of "any part of the body" meaningless and frustrate the legislature's intent to punish those who touch *any part* of a child's body for sexual gratification or arousal. Under that reading, knowingly touching the "sex organs, anus, or breast" of anyone, regardless of age, would constitute "sexual conduct" as well as the knowing touching of any part of the body of a child under 13. This would conflate the two clauses, with clause one effectively subsuming clause two, and override the legislature's intent to criminalize touching any part of the body of a victim under 13. We simply cannot construe the statute this way. *In re Julie M.*, 2021 IL 125768, ¶ 27 ("No part of a statute should be rendered meaningless or superfluous."). The third and final use of "or" and a serial comma is to separate the first and second clauses from the clause indicating the last circumstance where "sexual conduct" occurs. Specifically, in addition to the circumstances indicated in the first two clauses, "sexual conduct" occurs when, for sexual gratification or arousal, there is "any transfer or transmission of semen by the accused upon any part of the clothed or unclothed body of the victim." 720 ILCS 5/11-0.1 (West 2018). Thus, put more simply, "sexual conduct" occurs when, for the purpose of sexual gratification or arousal of the defendant or the victim, there is (1) knowing touching or fondling of the victim's or the defendant's sex organs, anus, or breast, *or* (2) knowing touching or fondling of any part of the body of a child under age 13, *or* (3) "any transfer or

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transmission of semen by the accused upon any part of the clothed or unclothed body of the victim[.]"[2] *Id.*

¶ 19 Aiding our conclusion that "sexual conduct" occurs in these three distinct ways is that "sexual conduct" applies to some offenses that have nothing to do with the age of the victim or the defendant. See, *e.g.*, *id.* § 11-1.50(a)(1) (criminal sexual abuse occurs when the defendant "commits an act of sexual conduct by the use of force or threat of force"); *id.* § 11-9.2(a)(1) (custodial sexual misconduct committed when the defendant "is an employee of a penal system and engages in sexual conduct or sexual penetration with a person who is in the custody of that penal system"); *id.* § 11-9.5(b)(1) (sexual misconduct with a disabled person committed when the defendant "is an employee and knowingly engages in sexual conduct or sexual penetration with a person with a disability who is under the care and custody of the Department of Human Services at a State-operated facility"). With these offenses, in contrast to predatory criminal sexual assault of a child, "sexual conduct" is committed when, for the purpose of sexual gratification or arousal, there is a knowing (1) touching of the defendant's or the adult victim's sex organs, anus, or breast or (2) transfer of semen by the defendant upon any part of the adult victim's body. Thus, these offenses involve two of the ways outlined above in which "sexual conduct" occurs. The offense of which defendant was convicted, predatory criminal sexual assault of a child, concerns "contact, however slight, between the sex organ or anus of one person and the part of the body of another,"

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[2]We do not construe whether "either directly or through clothing" applies to both the first and second clauses describing "sexual conduct." Construing the application of that term is not relevant to this appeal and would, thus, constitute *dicta*. See *People v. Kovacs*, 135 Ill. App. 3d 448, 450-51 (1985) (refusing to rely on *dicta* because, at best, it provided only superficial support to the defendant's argument).

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where the victim is under 13 years of age. *Id.* § 11-1.40(a)(1). While the aggravated-criminal-sexual-abuse statute likewise provides that the victim is under 13, "sexual conduct" is much broader than the conduct prohibited in the predatory-criminal-sexual-assault statute. For instance, when the victim is under 13, "sexual conduct" need not involve the sex organs, anus, or breast but, rather, includes the touching (for sexual gratification or arousal) of *any* part of the victim's body. The fact that "sexual conduct" occurs in three distinct ways necessarily means that predatory criminal sexual assault of a child and aggravated criminal sexual abuse do not have identical elements.

¶ 20 Defendant suggests that, because the conduct at issue here "constitute[d] both predatory criminal sexual assault of a child and aggravated criminal sexual abuse," a proportionate-penalties violation arose. We disagree. As the court in *Brooks* observed, a person convicted of striking a police officer with his hand (aggravated battery) could also have been convicted of simple battery. *Brooks*, 2022 IL App (3d) 190761, ¶ 20. However, a defendant who strikes his friend with his hand (simple battery) cannot automatically be convicted of aggravated battery in the absence of an aggravating factor. *Id.* Likewise, the touching of a defendant's penis by a child under 13 for the purpose of the defendant's sexual gratification or arousal—as happened here—constitutes both predatory criminal sexual assault of a child and the lesser included offense of aggravated criminal sexual abuse. However, not all conduct that constitutes aggravated criminal sexual abuse also constitutes predatory criminal sexual assault of a child. For example, a defendant who massages the back of a naked six-year-old for purposes of sexual gratification can be convicted of aggravated criminal sexual abuse, but, without an allegation that the touching concerned a sex organ or anus, the defendant cannot also be convicted of predatory criminal sexual assault of a child.

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¶ 21 Supporting our position is *People v. Williams*, 2015 IL 117470. There, our supreme court assessed whether (1) aggravated unlawful use of a weapon, a Class 4 felony (720 ILCS 5/24-1.6(a)(1), (a)(2), (a)(3)(C) (West 2012))[3], and (2) a violation of section 2(a)(1) of the Firearm Owner's Identification Card Act (FOID Card Act), a Class A misdemeanor (430 ILCS 65/2(a)(1) (West 2012)), shared the same elements but different sentences, in violation of the proportionate-penalties clause. *Williams*, 2015 IL 117470, ¶¶ 12-14. The court determined that there was no proportionate-penalties clause violation, because aggravated unlawful use of a weapon required proof that the defendant possessed a firearm outside of his home, while section 2(a)(1) of the FOID Card Act did not have a location requirement. *Id.* ¶ 14. In reaching that conclusion, the court observed that an individual could violate the two statutes simultaneously under certain circumstances but that "this [was] not always true." *Id.* ¶ 18. For example, "a person [could] violate the FOID Card Act by possessing a firearm in his home without also having in his possession a FOID card, whereas such conduct would not violate the [aggravated-unlawful-use-of-a-weapon] statute." *Id.*

¶ 22 The same is true of predatory criminal sexual assault of a child and aggravated criminal sexual abuse. Like the location requirement in the aggravated-unlawful-use-of-a-weapon statute in *Williams*, the predatory-criminal-sexual-assault-of-a-child statute requires more than the aggravated-criminal-sexual-abuse statute. Predatory criminal sexual assault of a child requires proof of a knowing touching of a sex organ or anus for sexual gratification or arousal when the victim is under 13, whereas aggravated criminal sexual abuse does not require knowing touching

---

[3]This version of the aggravated-unlawful-use-of-a-weapon statute was found unconstitutional in *People v. Aguilar*, 2013 IL 112116, ¶¶ 21-22, and amended by Public Act 98-63 (eff. Jul 9, 2013) (amending 720 ILCS 5/24-1.6).

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of such specific areas when the victim is under 13. Rather, touching *any part* of the body of a victim under 13 for sexual gratification or arousal constitutes aggravated criminal sexual abuse.

¶ 23 This difference makes clear that the legislature created the offenses of predatory criminal sexual assault of a child and aggravated criminal sexual abuse for similar, albeit different, reasons. Presumably because of an increase in sexual assaults against children where the sex organs or anus are involved, the legislature found a need to punish more severely defendants who commit predatory criminal sexual assault of a child than defendants who touch more innocuous parts of a child's body for sexual gratification or arousal. Nothing about this was improper. *People v. Coty*, 2020 IL 123972, ¶ 24 (noting that the legislature may enact more severe penalties for certain crimes to halt the increase of certain crimes).

¶ 24 Defendant argues that, as applied to him, the predatory-criminal-sexual-assault-of a-child statute and the aggravated-criminal-sexual-abuse statute violate the proportionate-penalties clause. Although cited by neither party, there is support for defendant's position. In *People v. Deckard*, 2020 IL App (4th) 170781-U, ¶ 72, the defendant argued that his two convictions of predatory criminal sexual assault of a child violated the proportionate-penalties clause because those offenses, as charged, had the same elements as aggravated criminal sexual abuse. The appellate court agreed, observing that the counts charging the defendant with predatory criminal sexual assault of a child alleged that the defendant " 'patted the sex organ of [his girlfriend's six- or seven-year-old granddaughter] with his hand for the purpose of sexual gratification or arousal of the defendant.' " *Id.* ¶¶ 2, 38, 75. The court determined that "this conduct, as alleged, also [met] the elements of aggravated criminal sexual abuse." *Id.* ¶ 75. That is, predatory criminal sexual assault of a child, as charged, required—as would a charge of aggravated criminal sexual abuse based on

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the same allegations—that the touching of the granddaughter's sex organ was for the defendant's sexual gratification or arousal. See *id.*

¶ 25 We believe that *Deckard* was wrongly decided. How and where the granddaughter was touched was irrelevant in deciding whether the proportionate-penalties clause was violated under the identical-elements test. Instead, comparing the elements of both statutes, irrespective of how the defendant committed predatory criminal sexual assault of a child, was all that mattered.

¶ 26 *Williams* is again instructive. There, the defendant argued that the aggravated-unlawful use-of-a-weapon statute violated the proportionate-penalties clause as applied to him, because (1) his being armed with a firearm on a public street while lacking a valid FOID card violated both the aggravated-unlawful-use-of-a-weapon statute and the FOID Card Act and (2) the statutes prescribed disparate penalties. *Williams*, 2015 IL 117470, ¶¶ 3, 19. Our supreme court disagreed, noting that "a proportionate penalty analysis under the identical elements test is not a subjective determination." *Id.* ¶ 19. Rather, "[i]t is an objective and logic-based test" that "compares the elements of two offenses to determine if the offenses are the same." (Internal quotation marks omitted.) *Id.* "This objective test does not consider the offenses as applied to an individual defendant." *Id.*

¶ 27 Here, admittedly, what the State alleged in the count of which defendant was found guilty satisfied the elements of both predatory criminal sexual assault of a child and aggravated criminal sexual abuse. However, as in *Williams* and unlike in *Deckard*, it is irrelevant what was alleged in that count. Under the identical-elements test, all that matters is whether, when comparing the elements of the offenses as the legislature enacted them, the two statutes are revealed to contain the same elements but provide for disparate sentences. The elements of predatory criminal sexual

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assault of a child and aggravated criminal sexual abuse are not the same. Thus, the disparate sentences for the two offenses are proper.

¶ 28 In reaching our conclusion, we find misplaced defendant's reliance on *People v. Hernandez*, 2016 IL 118672, and *People v. Ligon*, 2016 IL 118023. Citing these cases, defendant argues that "courts must necessarily consider the facts alleged in a case." Although both cases discussed the specific weapons with which the defendants were armed, our supreme court did not do so in determining whether the charges of armed robbery with a dangerous weapon (*Hernandez*) and aggravated vehicular hijacking while armed with a dangerous weapon other than a firearm (*Ligon*) violated the proportionate-penalties clause in that these offenses had the same elements as armed violence with a Category III weapon but different sentences. See *Hernandez*, 2016 IL 118672, ¶ 16; *Ligon*, 2016 IL 118023, ¶ 25. Rather, our supreme court objectively compared the elements of the applicable statutes to assess whether a proportionate-penalties violation occurred under the identical-elements test. See *Hernandez*, 2016 IL 118672, ¶ 16 ("[T]he elements of armed robbery, which require, *inter alia*, proof that [the] defendant was 'armed with a dangerous weapon' *** [citation] are not identical to the elements of armed violence, which require, *inter alia*, proof that [the] defendant committed a qualifying felony while armed with a Category III weapon *** [citation]." (Emphasis omitted.)); *Ligon*, 2016 IL 118023, ¶ 25 ("[T]he elements of [aggravated vehicular hijacking while armed with a dangerous weapon other than a firearm], which require, *inter alia*, proof that [the] defendant was 'armed with a dangerous weapon, other than a firearm' *** [citation] are not identical to the elements of armed violence, which require, *inter alia*, proof that [the] defendant committed a qualifying felony while armed with a category III weapon *** [citations]." (Emphasis omitted.)).

¶ 29 III. CONCLUSION

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¶ 30 For the reasons stated, we affirm the judgment of the circuit court of Kane County.

¶ 31 Affirmed.

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People v. Johanson, 2023 IL App (2d) 210690

Decision Under Review:	Appeal from the Circuit Court of McHenry County, No. 19-CF-578; the Hon. Michael E. Coppedge, Judge, presiding.
Attorneys for Appellant:	James E. Chadd, Thomas A. Lilien, and Vicki P. Kouros, of State Appellate Defender's Office, of Elgin, for appellant.
Attorneys for Appellee:	Patrick D. Kenneally, State's Attorney, of Woodstock (Patrick Delfino, Edward R. Psenicka, Victoria E. Jozef, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.

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No. 129425

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 2-21-0690.
	)	
Plaintiff-Appellee,	)	There on appeal from the Circuit Court of the Twenty-Second
-vs-	)	Judicial Circuit, McHenry County, Illinois, No. 19 CF 578.
	)	
KOREM M. JOHANSON,	)	Honorable Michael E. Coppedge,
Defendant-Appellant.	)	Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, Attorney General's Office, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, eserve.criminalappeals@ilag.gov;

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Mr. Korem Johanson, Register No. Y49126, 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 June 27, 2023, 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 and one copy is being mailed to the in an envelope deposited in a U.S. mail box in Elgin, 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.

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