2017 IL App (1st) 141202-U

FOURTH DIVISION
February 16, 2017

No. 1-14-1202

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 13808
	)	
MICHAEL JOHNSON,	)	Honorable
	)	Joseph G. Kazmierski, Jr.,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE ELLIS delivered the judgment of the court.
Justices McBride and Burke concurred in the judgment.

O R D E R

¶ 1 *Held*: Convictions for aggravated sexual assault affirmed despite credibility questions surrounding complainant. Extended-term sentence for aggravated battery vacated where it was not most serious offense of which defendant was convicted, and conviction did not arise from unrelated course of conduct.

¶ 2 A jury found defendant Michael Johnson guilty of two counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(2) (West 2008)) and one count of aggravated battery. 720 ILCS 5/12-4(a) (West 2008). The trial court sentenced him to consecutive, extended-term sentences of 40 years' imprisonment on each count of aggravated criminal sexual assault and 10

years' imprisonment for aggravated battery, for a total of 90 years' imprisonment. On appeal, defendant contends that (1) the State failed to prove beyond a reasonable doubt that he committed aggravated criminal sexual assault where the victim's testimony was not credible, and (2) the trial court erred in sentencing him to 10 years' imprisonment for aggravated battery because he was not eligible to be sentenced to an extended term for the offense. We affirm defendant's convictions but vacate his extended-term sentence for aggravated battery and modify his mittimus to reflect a sentence of five years' imprisonment for that offense.

¶ 3 The State charged defendant with, and proceeded to trial against him on, three counts. Count 1 alleged that defendant committed attempted first-degree murder of T.W. Counts 2 and 14 alleged that defendant committed aggravated criminal sexual assault in that he sexually penetrated T.W.'s vagina with his penis (Count 2), and penetrated her anus with his penis (Count 14). At trial, the jury was instructed as to aggravated battery as a lesser-included offense of attempted murder.

¶ 4 At trial, T.W. testified that, in August 2008, she worked as a prostitute and was addicted to cocaine. She acknowledged being arrested several times for prostitution and giving the police various aliases. She further acknowledged that, in 2003, she was convicted of prostitution and received 18 months' probation. She later violated her probation and received a sentence of one year imprisonment. In 2009, T.W. was again convicted of prostitution and received a sentence of two years' probation. She later violated her probation and received a sentence of three years' imprisonment. T.W. stated that she had not been arrested since her release from prison on the second prostitution conviction and had been "clean" for two years prior to defendant's trial.

¶ 5 In early August 2008, T.W. saw defendant, whom she knew as Eddie, at a gas station located at the intersection of East 111th Street and South State Street in Chicago. She agreed to

have sex with him in exchange for $20. They walked to defendant's home where they had consensual vaginal sex.

¶ 6 On August 16, 2008, T.W. had used crack cocaine and was panhandling outside the same gas station when she saw defendant again. She agreed to have oral and vaginal sex with him in exchange for money, and they walked to defendant's residence and went into a second-floor bedroom. Both T.W. and defendant took off their clothes, and they began to have consensual oral sex. Defendant then put a condom on, and they began to have consensual vaginal sex, but defendant could not ejaculate. He asked T.W. if they could have anal sex, but T.W. refused.

¶ 7 T.W. began to put her clothes back on, and defendant became "angry" and sat down on the bed next to her. T.W. testified that defendant grabbed her neck and began strangling her. T.W. passed out and when she regained consciousness, defendant was on top of her penetrating her anus and hitting her in the back of her head and face with his hands. T.W. said that she passed out again.

¶ 8 T.W. said that, the next time she regained consciousness, defendant was holding her in a cradle position on what she believed was the porch outside the second-floor bedroom. She again lost consciousness. When she came to, she was naked at ground level, outside the stairs leading to the second floor. She testified that defendant came down to ground level and began dragging her by her ankles into an alley. T.W. described her back as "burning" on the concrete and she began screaming, which caused defendant to drop her and run away.

¶ 9 The next thing she remembered was hearing an ambulance, which transported her to the hospital. T.W. could not recall many details about her stay at the hospital or her initial conversations with the police, explaining at trial that she was "heavily sedated" during the time

and recovering from her injuries. After spending several days at the hospital, she was discharged because she did not have insurance.

¶ 10 On September 5, 2008, T.W. was living at a family member's house when detectives visited her. She took them to the house where defendant had taken her on August 16, 2008, and told them that defendant had a "deformed hand" that "looked like a claw." T.W. testified that she did not remain in contact with the police because she was homeless and still involved in prostitution.

¶ 11 On June 7, 2010, T.W. encountered a police officer, who asked her to come to the police station to discuss the person who had attacked her. The next day, T.W. went to the police station, viewed a lineup and identified defendant as the man who attacked her. About a month later, T.W. gave a handwritten statement to an assistant State's Attorney and a detective. She acknowledged that, in the statement, she did not mention that defendant punched or kicked her or forcibly penetrated her anally or vaginally. She explained these omissions were because she was also being arrested at that same time and struggling with her addiction, so she "wanted to get [the statement] over with." She did tell the assistant State's Attorney and detective that defendant had asked her for anal sex, became angry and eventually began to hit her and choke her, causing her to go in and out of consciousness.

¶ 12 Laura Turner testified that, in the morning of August 17, 2008, she was in her backyard when she observed T.W., who was naked, coming out of an alley. T.W. walked toward Turner's house and Turner approached her, telling her to come inside her yard. Turner described T.W.'s condition as "terrible," as her back and face were bloody. Turner stated that a man who had also seen T.W. near the street called 911. Turner went into her house and brought T.W. a sheet so she could cover her body.

¶ 13 Chicago police officer Dawn Albrecht testified that, in the morning of August 17, 2008, she responded to a call on the 100 block of West 111th Street. When she arrived, she observed T.W., who was naked, and Turner holding a white sheet over T.W.'s body. Albrecht said that T.W. had debris in her hair, was missing "half the flesh of her back," and was in "really bad shape." T.W. faded in and out of consciousness and "could barely speak," so Albrecht's top priority was to get T.W. medical attention. Albrecht did ask T.W. if she had been assaulted, to which T.W. nodded her head affirmatively, but she was otherwise unresponsive. An ambulance arrived, and Albrecht followed it to Metro South Hospital.

¶ 14 At the hospital, T.W. told Albrecht that she had been taken to an unknown bedroom, vaginally penetrated, then "kicked" several times and eventually dragged out of the bedroom, down some stairs and "just left." T.W. whispered to Albrecht that defendant, whom she referred to as Eddie, was the person who attacked her and sexually assaulted her vaginally. Albrecht said that T.W. described defendant by pantomiming a claw with her hand and told Albrecht that he was missing fingers, but she could not remember on which hand. Albrecht asked T.W. where the attack occurred, but T.W. could not give an exact address. Albrecht acknowledged that, during the interview, T.W. never told her that defendant had paid her for sex, choked her, turned violent after a disagreement about anal sex, or even mentioned anal sex.

¶ 15 James Buckner, a paramedic, testified that he responded to a call on the 100 block of West 111th Street. When he arrived, he observed T.W., who looked as if she had been "severely beaten" because of bruising and abrasions all over her body, a "very swollen" face, and a ligature mark on her neck. Buckner attempted to obtain information from T.W. about her injuries, but she was "very upset," "scared," and "crying." Because her face was "so swollen," Bucker could not

understand what she was saying. T.W. eventually told Buckner that she had been beaten, "raped" and left in an alley. Buckner took T.W. to Metro South Hospital.

¶ 16 Susan Jakob, a nurse, testified that, on August 17, 2008, T.W. was brought to the emergency room of Metro South Hospital in critical condition. T.W.'s eyes were swollen, her face was bleeding and swollen, and she had a ligature mark around her neck. T.W. also had a large abrasion on her back where pieces of her skin had peeled off. Jakob tried to find out what happened to T.W., but she was "withdrawn" and only would respond to questions after prompting. Eventually, Jakob asked T.W. if she had been sexually assaulted, and T.W. told her she had been.

¶ 17 Jakob performed a sexual assault kit on T.W., which included obtaining swabs of T.W.'s vagina and anus. There were no visible injuries to T.W.'s vagina or anus, but Jakob explained that it was "not unusual" for a person to not have external injuries but still to have been sexually assaulted. Jakob agreed that, if a sexual assault victim was unconscious and could not fight back, trauma to the "genital area" would not be expected. Blood tests were also performed on T.W., which revealed she tested positive for cocaine. T.W. was eventually transported to Advocate Christ Medical Center because she needed "a higher level of care."

¶ 18 Dr. James Doherty, a trauma surgeon at Advocate Christ Medical Center, treated T.W. and testified to her injuries. She had a mixture of first-degree and second-degree burns on her back, a collapsed lung, a grade-three lacerated liver, which was the second most severe type of laceration, and required a breathing tube. She had bruising, swelling, and a ligature mark on her neck, all of which, according to Doherty, was consistent with being strangled. Above T.W.'s neck, she had suffered soft tissue swelling to the right side of her face, a small fracture to her

sinus bone, and had blood in her brain. Doherty believed that her injuries together were life threatening.

¶ 19 C.F. testified to another sexual assault allegedly involving defendant. C.F. said that, beginning around the year 2000, she worked as a prostitute. On several occasions, she had been arrested for prostitution and had been convicted of prostitution in 2008 and 2011. For the most recent conviction, she was sentenced to a special prostitution probation program, which she completely satisfactorily, although she acknowledged being convicted of trespassing while on probation.

¶ 20 C.F. said that, early in the morning of either March or April 2010, she was working as a prostitute inside a store called Big Sam's near West 119th Street and South Harvard Avenue in Chicago. She saw defendant pacing in front of the store. She left the store and asked defendant if he was looking for a prostitute. C.F. agreed to have sex with defendant in exchange for $20.

¶ 21 C.F. testified that they walked to a nearby gangway where C.F. asked defendant for the money. Defendant began patting his body, looking for money. C.F. thought that defendant was trying "to play games" with her, so she started to back away from him. Defendant then grabbed her hood and coat, causing her to "choke[ ]," and "flipped" her. Defendant began strangling C.F. until she passed out. When she regained consciousness, she realized her clothes had been unbuttoned and her pants had been taken off. She did not see defendant and did not know where he went, so she picked up her clothes and other belongings and ran to a friend's house. She testified that she knew defendant ejaculated in her vagina because her genital area was wet.

¶ 22 At trial, C.F. could not recall anything unusual about defendant's hands, stating they felt like "regular hands," but said that the gangway was dark and she did not pay attention to his hands.

¶ 23 C.F. did not see a doctor and did not call the police after the assault. She said she did not come forward because of her "lifestyle" and because she wanted someone to take revenge against defendant.

¶ 24 C.F. testified that, on May 22, 2010, she was walking toward Big Sam's when she saw defendant coming out of the store. She called her boyfriend and brother and told them that she saw defendant. They arrived, stopped defendant and called the police, who arrested defendant.

¶ 25 The parties stipulated that defendant's DNA profile, as obtained from a buccal swab he submitted, matched the DNA profile of semen found in both the rectal and vaginal swabs taken from T.W.'s sexual assault kit.

¶ 26 Chicago police detective Jennifer Ghoston testified for the defense. She stated that, on August 17, 2008, she went to Metro South Hospital to interview T.W. Ghoston talked to T.W. "a little" and obtained a description of defendant. Three days later, at Advocate Christ Medical Center, Ghoston had a more extensive conversation with T.W. She told Ghoston that, after she entered a residence with defendant, she changed her mind about having sex. Ghoston stated her police report did not include T.W. telling her that a dispute arose over anal sex and did not mention anal sex at all.

¶ 27 On August 24, 2008, Ghoston tried to contact T.W. at her sister's house in Indiana. Ghoston learned that T.W. was not there and was staying in the same neighborhood where she previously lived. Two weeks later, Ghoston and T.W. went to a house which T.W. identified "as the location where she was raped." T.W. did not tell Ghoston anything about anal sex. Two weeks later, Ghoston tried to contact T.W., but could not locate her. Shortly thereafter, Ghoston stated she changed the status of the investigation in the computer system to suspended.

¶ 28 On January 5, 2010, Ghoston saw T.W. near the intersection of East 110th Street and South State Street. T.W. told Ghoston that she was still living in the same neighborhood, which was only a couple blocks from where her encounter with defendant had occurred.

¶ 29 In late May 2010, Ghoston drove around the same neighborhood looking for T.W., but Ghoston could not find her. Ghoston agreed that, at this time, the investigation was still suspended, but stated a "better term" was "in progress" because suspended merely indicated that defendant had not been positively identified.

¶ 30 By early June 2010, Ghoston had issued an investigative alert for T.W. because Ghoston could not find her. A week later, T.W. was located and brought to the police station where she identified defendant as her attacker. Although Ghoston acknowledged difficulties in locating T.W. at various points in the investigation, she stated that it is "very difficult" to locate a homeless person.

¶ 31 On July 13, 2010, Ghoston had another conversation with T.W., during which T.W. told Ghoston that the incident with defendant occurred after they had argued about anal sex. T.W. further told Ghoston that defendant sexually assaulted her, choked her and threw her down stairs.

¶ 32 Defendant testified and acknowledged paying T.W. for sex the week prior to the night in question. He also provided a similar narrative of events as T.W. from the time he encountered her on the night in question to when they arrived at the residence. But he also stated that, as part of their arrangement, T.W. agreed to have anal sex with him.

¶ 33 Defendant testified that, at his house, he paid T.W., and they had unprotected oral, vaginal, and anal sex. After they finished, defendant left the room to grab a towel and when he returned, he saw T.W. holding his pants with one hand inside the pocket. Defendant thought she was trying to rob him, so he "stormed" across the room, grabbed her arm and told her to leave.

T.W. became combative and hit defendant in the face, which made him angry. Defendant admitted that he punched T.W. in the face. Defendant said that, as T.W. continued to fight him, he opened the door to the second-floor bedroom, pulled T.W. outside, came back inside and shut the door.

¶ 34 Defendant said that, as he began to put his clothes back on, he heard T.W. screaming and banging the door. Defendant opened the door, and T.W. tried to force her way back inside by hitting him. Defendant eventually pushed her outside, hit her in the face, and kicked her once or twice in the midsection. T.W. continued screaming, so defendant dragged her down the stairs and told her to leave. Because T.W. continued fighting him and tried to go back up the stairs, he hit her four or five more times, including once in the head and twice in the chest. When it became clear that T.W. would not leave, defendant grabbed her foot and dragged her to an alley where he left her. At trial, defendant denied raping or choking T.W., and denied attacking C.F.

¶ 35 In rebuttal, T.W. testified that she never tried to rob defendant and never attacked him.

¶ 36 The jury found defendant guilty of both counts of aggravated criminal sexual assault and one count of aggravated battery. Defendant unsuccessfully moved for a new trial.

¶ 37 At sentencing, Chicago police detective Patrick Durkin testified that the DNA obtained from defendant's buccal swab matched the DNA recovered from the bodies of four women who had been murdered between November 2008 and May 2010 within 10 blocks of defendant's apartment. Durkin said that each woman had been found in an abandoned building either nude or partially nude, and that each woman's cause of death was strangulation. Defendant had been charged with their murders.

¶ 38 During argument, the State noted that the sentencing range for aggravated criminal sexual assault was between 6 and 30 years' imprisonment "unless it is extended" and 2 to 5 years'

imprisonment for aggravated battery "unless it's extended." The State then argued that defendant was eligible for an extended-term sentence because his conduct caused or threatened serious harm because an extended sentence was necessary to deter others from committing the same crime. The State recalled the severity of the injuries defendant inflicted upon T.W. and observed that there was evidence linking him to the murders of four women who had been attacked in the same manner as T.W. The State concluded that, despite defendant having no criminal background, his actions and danger to society, particularly to women, required the maximum sentence allowable.

¶ 39 Defense counsel argued that defendant had suffered a traumatic childhood where he was beaten and raped and, at times, lived in a vehicle. His mother did not allow him to attend high school and generally forbade him and his siblings from leaving their residence. Counsel asserted that defendant grew up "surrounded by violence, drug abuse, and a mother who was depressive and subject to violent episodes." Counsel added that defendant's father had not been involved in his life since he was five years old. Counsel concluded that defendant's behavior developed as a result of an abusive childhood.

¶ 40 The trial court subsequently sentenced defendant to an extended-term sentence of 40 years' imprisonment on each count of aggravated criminal sexual assault and an extended-term sentence of 10 years' imprisonment on aggravated battery, all to be served consecutively, for a total of 90 years' imprisonment. In imposing the sentences, the court found defendant's conduct caused serious harm and they were necessary to deter others from committing the "same crime." Defendant filed an unsuccessful motion to reconsider, arguing the court "erred when it extended the [aggravated criminal sexual assault] sentences to 40 years" but did not include an argument related to his extended-term sentence for aggravated battery. This appeal followed.

¶ 41 Defendant first contends that the State failed to prove beyond a reasonable he committed either aggravated criminal sexual assault. Specifically, he argues the convictions depended on the uncorroborated allegations of T.W. whose credibility had been impugned by her varying accounts of the incident and her cocaine addiction. Defendant does not challenge the evidence supporting his aggravated battery conviction.

¶ 42 When a defendant challenges his convictions based upon the sufficiency of the evidence presented against him, we must ask whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could find all the elements of the crimes proven beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48; *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). All reasonable inferences must be allowed in favor of the State. *People v. Lloyd*, 2013 IL 113510, ¶ 42. While we must carefully examine the evidence before us, we must give proper deference to the trier of fact who observed the witnesses testify (*Brown*, 2013 IL 114196, ¶ 48), because it was in the "superior position to assess the credibility of witnesses, resolve inconsistencies, determine the weight to assign the testimony, and draw reasonable inferences therefrom." *People v. Vaughn*, 2011 IL App (1st) 092834, ¶ 24. "Testimony may be found insufficient under the *Jackson* standard, but only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt." *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004).

¶ 43 To prove defendant committed aggravated criminal sexual assault, the State must establish that he committed criminal sexual assault and, as part of the same course of conduct, caused bodily harm. 720 ILCS 5/12-14(a)(2) (West 2008). In turn, to prove defendant committed criminal sexual assault, the State must have established that he committed an act of sexual penetration by the use of force or threat of force. 720 ILCS 5/12-13(a)(1) (West 2008). " 'Sexual

penetration' means any contact, however slight, between the sex organ or anus of one person by an object, the sex organ, mouth or anus of another person *** including but not limited to *** anal penetration." 720 ILCS 5/12-12(f) (West 2008).

¶ 44 Defendant does not contest that he caused great bodily harm to T.W. Instead, he argues the evidence failed to establish that he forcibly penetrated T.W. either anally or vaginally.

¶ 45 We disagree. T.W. testified that defendant knocked her out. As she faded in and out of consciousness, she felt defendant penetrating her vagina and anus with his penis. Defendant's DNA was found on the rectal and vaginal swabs taken from T.W. shortly after the incident. As T.W. testified that defendant penetrated her while she was unconscious, her testimony supports the notion defendant forcibly penetrated her both anally and vaginally.

¶ 46 Moreover, C.F. testified to a similar encounter with defendant where he had strangled her and sexually assaulted her, thereby corroborating T.W.'s account and establishing defendant's propensity to commit a sex crime. See *People v. Donoho*, 204 Ill. 2d 159, 175-76 (2003); *Alexander*, 2014 IL App (1st) 112207, ¶ 48. In light of this evidence, and when viewing it in the light most favorable to the State with reasonable inferences in the State's favor, we conclude a rational trier of fact could have found that defendant forcibly penetrated T.W. both anally and vaginally to support his convictions for aggravated criminal sexual assault.

¶ 47 Defendant points to numerous inconsistencies in T.W.'s testimony that, according to defendant, render it unworthy of belief. He notes that T.W.'s initial statements concerning the events in question "varied" from her later statements and trial testimony. For example, in contrast to her trial testimony, when T.W. spoke to Officer Albrecht at the hospital, she did not tell her that defendant anally penetrated her or the altercation with defendant occurred because she refused to have anal sex. Defendant also points to Detective Ghoston's report from three

days after the incident, in which there were no allegations of anal penetration or that defendant became violent when T.W. refused to have anal sex.

¶ 48 While we recognize that T.W.'s testimony was not without contradiction, contradictions and inconsistencies in the evidence should be resolved by the trier of fact. See *Brown*, 2013 IL 114196, ¶ 48; *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). We will not simply reweigh the evidence in defendant's case and substitute our judgment for that of the jury. See *People v. Tenney*, 205 Ill. 2d 411, 428 (2002). Here, defendant's trial counsel capably brought to light the inconsistencies in T.W.'s story, but the jury elected to credit her testimony over defendant's. Simply reviewing the transcript of the trial, we cannot say that the jury's conclusion was unreasonable. Nor do we find it particularly unusual that T.W.'s statements following such a traumatic experience might not line up perfectly with her statements at a much later date. See *People v. Hogan*, 388 Ill. App. 3d 885, 896 (2009) (jury could have rationally found that assault victim's statements at hospital, though in some measure contradictory with other evidence, was due to fact that victim "was very emotional, traumatized, and suffering from painful injuries while she was at the hospital.").

¶ 49 Moreover, the severity of T.W.'s injuries corroborated her version of events. T.W.'s life-threatening injuries, including a collapsed lung and lacerated liver, supported the notion that defendant beat her unconscious. While defendant admitted to hitting T.W., he did not testify that he knocked her out; his testimony downplayed the severity of the injuries that T.W. sustained. And defendant denied choking T.W., which was contradicted by the fact that T.W. had injuries on her neck that were consistent with having been strangled. Contrary to defendant's claim that "no reliable evidence" corroborated T.W.'s allegations, the physical evidence tended to support T.W.'s testimony over defendant's testimony.

¶ 50 Defendant additionally assails T.W.'s credibility based on her addiction to cocaine, quoting *People v. Herman*, 407 Ill. App. 3d 688, 705 (2011), in which this court stated "testimony of a narcotics addict is subject to suspicion due to the fact that habitual users of narcotics become notorious liars." (Internal quotation marks omitted.) While her drug addiction in August 2008 and positive test for cocaine at the hospital following the attack do bear on her credibility (see *People v. Bazemore*, 25 Ill. 2d 74, 77 (1962)), determinations of witness credibility are reserved for the trier of fact. Indeed, as the court in *Herman* stated, "the trier of fact was responsible for weighing this fact in its consideration of the evidence." *Herman*, 407 Ill. App. 3d at 705. Here, the jury was well aware of her drug addiction during the time in question but elected not to discredit T.W. We see no reason to second-guess the jury on this credibility question. See *Hogan*, 388 Ill. App. 3d at 895-98 (finding sufficient evidence to support conviction even though victim was addicted to drugs, where jury heard evidence regarding victim's addiction and prior convictions but credited her anyway).

¶ 51 Defendant also notes that "law enforcement did not actively seek out [defendant] in spite of T.W.'s allegations." We fail to see why the police's delay in investigating should discredit T.W. Even assuming that the police did not fully pursue the investigation because they disbelieved T.W.'s story, the jury could take that fact into account when assessing T.W.'s credibility.

¶ 52 Finally, defendant suggests that his version of events was more believable than T.W.'s because he "was forthright," as he readily admitted to paying T.W. for sex and beating her, whereas T.W. initially omitted key facts about the alleged events in question, such as being a prostitute, having a dispute with defendant over anal sex, and the fact that defendant anally penetrated her. Again, the jury was fully capable of assessing defendant's forthrightness as

opposed to T.W.'s. The jury heard both sides of the story, and in finding defendant guilty, believed T.W.'s version over defendant's. We decline to revisit that determination.

¶ 53 Despite defendant's many arguments as to why T.W.'s testimony cannot be considered credible evidence against him, we find that a rational trier of fact could have accepted T.W.'s testimony beyond a reasonable doubt, especially in light of the medical testimony corroborating T.W.'s story and C.F.'s testimony as to a similar encounter with defendant. See *Cunningham*, 212 Ill. 2d at 280. Accordingly, we affirm defendant's convictions for aggravated criminal sexual assault.

¶ 54 Defendant next contends that the trial court improperly imposed an extended-term sentence on his conviction for aggravated battery because it was not the most serious class of offense of which he was convicted.

¶ 55 Initially, defendant acknowledges in his reply brief that he failed to preserve this claim of error for review, but argues that the error amounts to second-prong plain error. See *People v. Ramsey*, 239 Ill. 2d 342, 412 (2010) (defendant may invoke plain error for first time in reply brief). Under the second prong of the plain-error doctrine, we may review an unpreserved claim of sentencing error if the error is clear or obvious and "the error was so egregious as to deny the defendant a fair sentencing hearing." *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). The first step in a plain-error analysis is to determine whether an error actually occurred. *People v. Taylor*, 2011 IL 110067, ¶ 30.

¶ 56 Extended term sentences are authorized by section 5-8-2(a) of the Unified Code of Corrections (Code) (730 ILCS 5/5-8-2(a) (West 2008)) if certain aggravating factors are present. Our supreme court has held that this section of the Code limits the imposition of extended-term sentences to only the offenses within the most serious class. *People v. Jordan*, 103 Ill. 2d 192,

205-06 (1984). An exception to this rule, however, applies where the extended-term sentence is imposed "on separately charged, differing class offenses that arise from unrelated courses of conduct." *People v. Coleman*, 166 Ill. 2d 247, 257 (1995) (interpreting section 5-8-2(a) of the Code). The test for determining whether offenses arise from unrelated courses of conduct is whether there was a substantial change in the nature of the defendant's criminal objective. *People v. Bell*, 196 Ill. 2d 343, 354-55 (2001). If a substantial change existed, the trial court may impose an extended-term sentence on a less serious class of offense. *Id.*

¶ 57 The parties do not dispute that, because defendant's aggravated battery was a Class 3 offense (720 ILCS 5/12-4(e) (West 2008)), whereas his aggravated criminal sexual assaults were Class X offenses (720 ILCS 5/12-14(d)(1) (West 2008)), his sentence for aggravated battery, as the less serious class of offense, could only be extended if there was a substantial change in the nature of his criminal objective.

¶ 58 During sentencing, the trial court never made an explicit finding as to whether there was a substantial change in the nature of defendant's criminal objective between the criminal sexual assaults and the aggravated battery. At trial, the evidence showed that, after T.W. refused to have anal sex with defendant, he began to strangle her, which caused her to drift in and out of consciousness. During this time, defendant sexually assaulted her and inflicted various injuries on her face and body. There was no meaningful change in defendant's purpose between the conduct supporting his aggravated battery conviction and his aggravated criminal sexual assault convictions.

¶ 59 In light of this evidence, we cannot conclude there was a substantial change in the nature of defendant's criminal objective that would justify the imposition of an extended-term sentence for aggravated battery. The extended-term sentence for the offense was therefore improper. We

further find that the improper sentence amounts to second-prong plain error. See *People v. Palen*, 2016 IL App (4th) 140228, ¶¶ 77-78 (imposition of improper extended-term sentence amounted to second-prong plain error).

¶ 60 A reviewing court may modify an improper sentence without remand to the trial court. *Robinson*, 2015 IL App (1st) 130837, ¶ 113; see also Ill. S. Ct. R. 615(b)(4). When not extended, aggravated battery, as a Class 3 felony, has a maximum sentence of 5 years' imprisonment. 720 ILCS 5/12-4(a) (West 2008); 730 ILCS 5/5-8-1(a)(6) (West 2008). Accordingly, pursuant to Illinois Supreme Court Rule 615(b)(4), we vacate defendant's extended-term sentence for aggravated battery and modify his mittimus to reflect that his sentence for the offense be reduced to 5 years' imprisonment to run consecutively with his two 40-year sentences for aggravated criminal sexual assault. See, *e.g.*, *People v. Thompson*, 209 Ill. 2d 19, 29 (2004) (reducing improper extended-term sentence on less-serious offense to maximum, nonextended term).

¶ 61 For the foregoing reasons, we affirm defendant's convictions but vacate his extended-term sentence for aggravated battery and reduce his sentence for aggravated battery to five years' imprisonment.

¶ 62 Affirmed in part and vacated in part.