2017 IL App (1st) 151031-U

Nos. 1-15-1031 & 1-15-1641 (Consolidated)

Order filed December 15, 2017

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 13838
	)	
EDWIN HERNANDEZ,	)	Honorable
	)	Diane Gordon Cannon,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not abuse its discretion by admitting a video recording of the unsuccessful attempt to interview the victim about the assault because the victim's profound intellectual disability was an element of the charged offense. (2) The State's closing argument did not deprive defendant of a fair trial. (3) Aggravated criminal sexual assault is not a lesser included offense of home invasion.

¶ 2 Following a jury trial, defendant Edwin Hernandez was convicted of home invasion and aggravated criminal sexual assault of S.V., a 13-year-old girl with a severe or profound

intellectual disability. Defendant was sentenced to 40 years' imprisonment for aggravated criminal sexual assault and 17 years' imprisonment for home invasion, to be served consecutively.

¶ 3 On appeal, defendant contends that he was denied a fair trial because the State used a video recording of an unsuccessful attempt to interview the victim solely to inflame the jurors' emotions and the prosecutor's remarks during closing argument attempted to gain sympathy with the jury and attacked defense counsel. Defendant also contends that aggravated criminal sexual assault is a lesser included offense of home invasion and therefore he should only be convicted of home invasion under the one-act, one-crime doctrine.

¶ 4 For the reasons that follow, we affirm the judgment of the trial court.

¶ 5 I. BACKGROUND

¶ 6 The State charged defendant Edwin Hernandez with home invasion and aggravated criminal sexual assault, alleging that on June 16, 2013, he entered S.V.'s bedroom through a window and sexually assaulted her, knowing that she was under the age of 18 and profoundly intellectually disabled.

¶ 7 Prior to trial, defendant moved the court to exclude a video recording of an interview the Chicago Children's Advocacy Center attempted to conduct with S.V.. Defendant argued that the recording was prejudicial because S.V. cannot speak and made no statement. The trial court denied the motion and admitted the video for the limited purpose of proving S.V.'s intellectual disability.

¶ 8 A jury trial was held in January 2015. The State's evidence showed that, at the time of the assault, S.V. was 13 years old and lived with her mother, father and younger sister in a

garden level apartment in Chicago. S.V. was born premature, which caused severe developmental delays in movement, speech and her ability to understand and communicate. She also suffered from microcephaly, a medical condition that causes abnormally smaller head and brain sizes. S.V. was also diagnosed with level 2 autism. At the time of the assault, she had the mental capacity of a two or three-year-old child. She could not communicate more than one word at a time to indicate that she wanted something.

¶ 9 On June 15, 2013, S.V. went to sleep in the top bunk bed in the room she shared with her younger sister, who was sleeping in their mother's bedroom. A family friend, Rosa R., went to sleep in another bed in S.V.'s room. Everyone went to sleep around midnight except for S.V.'s father, who came home after 1 a.m. on June 16.

¶ 10 Rosa R. testified that she awoke to the sounds of S.V. crying and saying "pee, pee" and a male voice saying that he loved S.V. Rosa could not make out the man's face, however, she could see that he was in S.V.'s bed. Rosa feared the man had a gun and therefore did not stop the attack. Rosa heard the bed "squeaking and banging," and approximately a half-hour later, the man climbed out of S.V.'s bed, opened the window, and climbed out.

¶ 11 After the man left, Rosa went to the bedroom of S.V.'s parents and told them what happened. All three went to S.V.'s bedroom. The mother observed that S.V. "looked like she was very scared. She was like somebody was choking her. She was scared. She was red, sweating." The father observed footprints beside the bedroom window and mud on the edge of S.V.'s bunk bed. The parents immediately called the police and took S.V. to the hospital for an evaluation and a sexual assault examination.

¶ 12 At the hospital, nurse Lisa Mathey conducted S.V.'s forensic sexual assault exam, a process that typically takes six to eight hours. During the examination, nurse Mathey took swabs from S.V.'s mouth, vagina, vaginal area, anus, and neck. The attending physician testified that S.V. did not respond to any of his questions and would simply repeat whatever the staff said to her.

¶ 13 After the sexual assault exam, detectives arranged for S.V. to be interviewed at the Children's Advocacy Center in Chicago. The next day, S.V. went to the center with her parents, who gave their consent for the interview. Detective Susan Ruck, her partner, and an Assistant State's Attorney observed the interview conducted by Lauren Glazer, who was trained to conduct forensic interviews of children. Detective Ruck testified that S.V. was unable to effectively communicate with Ms. Glazer. At trial, the court admitted into evidence the video recording of the interview and published it to the jury for the limited purpose of showing that S.V. was severely intellectually disabled.

¶ 14 During the investigation, three latent prints were discovered on the exterior window of S.V.'s bedroom window. Police matched one of the prints to defendant. Additionally, semen was discovered on the swab taken from S.V.'s vulva, and the DNA from that semen sample completely matched defendant. Defendant was arrested on June 22, 2013, and Detective Ruck interviewed him. Defendant waived his *Miranda* rights and said that he attended a festival on the evening of the offense and then went home. Defendant spent the night at the police station and was interviewed by Detective Jacinto Gonzalez the next day.

¶ 15 Detective Gonzalez testified that defendant said he first saw S.V. at the home of a neighbor who sold tamales out of her house. This neighbor would babysit S.V. a few days a

week after S.V. finished school and before her parents came home. Defendant said he did not know S.V.'s name but thought she was "10 or 11 years old" and had "some kid of mental problems." Defendant admitted to following S.V. a few months before the incident. Defendant said that he had gone near S.V.'s bedroom at least three times. The first time, he stood outside her window and watched her sleep. He checked the window and found that it was unlocked. The second time, he climbed over the fence, went inside her room, and stood beside her bed as she slept. The third time, he crawled into her bunk bed and began to kiss and lick her face. S.V. woke up and defendant kept telling her that he loved her.

¶ 16 Detective Gonzalez testified that defendant told him that "as [defendant was] kissing [S.V.'s] breasts, he's working his way down, he's telling her 'I love you, I love you,' and he begins to kiss and lick her vagina. The defendant stated that while he was doing this, the child, the victim, was saying, 'pee. I have to pee, pee, pee,' I don't know if she said, 'I have to pee'; but she was saying 'pee, pee.' " Defendant then inserted his finger inside S.V's vagina and attempted to insert his penis into her vagina but told Detective Gonzalez that "he could only get the head of his penis in because the child jerked and said, 'No, no.' and at that point he began to – the defendant stated that he began to grind and hump his penis on the victim, on the child's vagina over and over until he subsequently ejaculated on the child's vagina." Then defendant put on his pants and crawled out the window.

¶ 17 The trial court denied defendant's motion for a directed verdict, and the jury found him guilty of home invasion and aggravated criminal sexual assault. Defendant moved for a new trial, arguing that the video of S.V.'s interview was more prejudicial than probative because he could not cross-examine her and the video prejudiced the jury against him. The trial court denied the

motion, finding that the evidence of defendant's guilt was overwhelming. The trial court stated that the video was admitted "solely for the purpose of proving the victim in this case was severely profoundly mentally ill. No words from her mouth were related to the jury at any time."

¶ 18 On March 9, 2015, the trial court initially sentenced defendant to concurrent terms of 50 years for aggravated criminal sexual assault and 30 years for home invasion. Defendant filed an appeal, and the case was assigned case No. 1-15-1031. Then, on March 26, 2015, the trial court *sua sponte* changed defendant's sentence so that the 50 and 30 year prison terms would run consecutively rather than concurrently. The defense moved the court to reconsider, arguing that the court could not increase a sentence after it was imposed. The defense proposed altering the sentence to consecutive terms of 40 years for aggravated criminal sexual assault and 17 years for home invasion, which would reflect the same term of imprisonment as originally imposed because 50 years served at 85% was equal to 40 years served at 85% plus 17 years served at 50%, in accordance with the truth-in-sentencing statute. The State agreed to vacate the prior sentences and amend them as proposed by the defense. The trial court accepted the parties' agreement and ultimately imposed consecutive terms of 40 years for aggravated criminal sexual assault and 17 years for home invasion. Defendant timely appealed, and the case was assigned case No. 1-15-1641. This court then consolidated case Nos. 1-15-1031 and 1-15-1541.

¶ 19 II. ANALYSIS

¶ 20 Defendant contends that he was denied a fair trial because (1) the admission of the video recording of the unsuccessful attempt to interview S.V. was prejudicial and served no purpose other than to evoke the jury's sympathy for her; and (2) the prosecutor's comments during closing argument improperly appealed to the jurors' emotions and disparaged the defense's

theory of the case. Defendant also argues that this court should vacate his conviction for aggravated criminal sexual assault because it is a lesser included offense of home invasion.

¶ 21 A. Admissibility of the Video Recording

¶ 22 Defendant argues that he was denied a fair trial because the video of the unsuccessful attempt to interview S.V. after the assault had no evidentiary value, was cumulative, and was unduly prejudicial where defendant never contested her intellectual disability and the State had already established her intellectual disability through several witnesses. These witnesses included S.V.'s mother, S.V.'s babysitter, Rosa R., the doctor and nurse who conducted the assault examination of S.V. at the hospital, Detective Ruck, and S.V.'s pediatrician, who testified that S.V. would not be able to understand the nature of a sex act and that she exhibits echolalia—a phenomenon in which she responds to questioning by parroting what others say.

¶ 23 The video recording, which was about five minutes long, showed that S.V. could not respond to any of the interviewer's questions about general matters. S.V. merely smiled and repeated some of the interviewer's words in a childlike manner. For example, when the interviewer asked S.V. who lived with her at home, S.V. responded, "Home! Home!" The interviewer stopped the interview because S.V. could not complete it.

¶ 24 Defendant contends that the only relevant issues for the jury were whether he unlawfully entered S.V.'s home and sexually assaulted her. He asserts that the sole effect of the video was to inflame the jurors' passions. He argues that the trial court further prejudiced him by allowing the recording into the jury room during deliberations, which exposed the jury to the exhibit for an extended period of time and gave the State a distinct advantage over the defense by highlighting S.V.'s vulnerability.

¶ 25 The decision to admit a photograph or videotape into evidence and to publish it to the jury is within the sound discretion of the trial court and will not be overturned absent an abuse of discretion, which occurs only when the trial court's evaluation is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the court. *People v. Kidd*, 175 Ill. 2d 1, 37 (1996); *People v. Morgan*, 197 Ill. 2d 404, 455 (2001). Evidence is relevant if it has a tendency to make the existence of a fact more or less probable than it would be without the evidence. *People v. Gonzalez*, 142 Ill. 2d 481, 487-88 (1991). If evidence could aid the jury in understanding testimony, it may be admitted even if cumulative of that testimony. *People v. Chapman*, 194 Ill. 2d 186, 220 (2000). Relevant evidence is admissible unless its nature is so prejudicial and likely to inflame the jurors' passions that its probative value is outweighed. *People v. Terrell*, 185 Ill. 2d 467, 495 (1998). Relevant evidence will not be excluded simply because it may prejudice the defendant (*People v. Jurczak*, 147 Ill. App. 3d 206, 214 (1986)), and evidence with sufficiently probative value may be admitted despite its inflammatory nature (*People v. Degorski*, 2013 IL App (1st) 100580, ¶¶ 97, 100 (evidence of a graphic nature may be relevant to corroborate oral testimony)). The effect of prejudicial and inflammatory evidence depends on the circumstances of the case, and it is the trial court's function to weigh the potential prejudicial effect against the evidence's probative value. *People v. Williams*, 181 Ill. 2d 297, 314 (1998).

¶ 26 Tangible objects that have been admitted into evidence and are relevant to any material issue can go into the jury room during deliberations unless they are more prejudicial than probative. *People v. Burrell*, 228 Ill. App. 3d 133, 144 (1992). Because evidence present in the

jury room during deliberations gives the party producing it a distinct advantage, potentially prejudicial evidence must be closely scrutinized. *Id*.

¶ 27 Here, the State was required to present sufficient evidence to prove beyond a reasonable doubt that defendant committed aggravated criminal sexual assault by committing an act of sexual penetration with the victim, S.V., who was a person with a severe or profound intellectual disability. See 720 ILCS 5/11-1.30(c) (West 2014). When a defendant elects to plead not guilty to the charged offense, the State possesses the right to establish every element of the charged offense and every relevant fact, even if those facts are stipulated to by the defendant. *People v. Henderson*, 142 Ill. 2d 258, 319 (1990).

¶ 28 The recording at issue was taken only one day after the sexual assault and showed how S.V. looked and acted around the time of the attack. The recording helped corroborate the witnesses' testimony about S.V.'s profound intellectual disability, including her pediatrician's finding that she had the mental capacity of a three year old and was unable to understand or consent to sexual intercourse with defendant. There is no question that this evidence was relevant and helpful for the jurors to understand a key proposition of the charged offense. Furthermore, the content of the recording was not unduly prejudicial. The recording shows S.V. enter a small room and follow the interviewer's direction to sit in a chair across from the interviewer. S.V. appears well, calm and cooperative. The duration of the attempted interview is very brief and the recording simply documents how S.V. responded to the interviewer's general questions by repeating the interviewer's words. Finally, the trial court instructed the jurors that "neither sympathy nor prejudice should influence you."

¶ 29 The cases defendant cites to support his claim of undue prejudice are distinguishable from the instant case because the cited cases involved graphic or gruesome autopsy photographs that were of little use beyond their shock-value. See, e.g., *People v. Lefler*, 38 Ill. 2d 216, 221-22 (1967) (photographs that showed the condition of the body of the deceased infant after the autopsy was conducted were improperly admitted into evidence); *People v. Garlick*, 46 Ill. App. 3d 216, 224 (1977) (where the defendant admitted to firing a shotgun at his wife and presented an insanity defense, it was error to admit the gruesome photograph of the wife's head wound, which was not probative of any material issue in the case); *People v. Coleman*, 116 Ill. App. 3d 28, 36 (1983) (photograph of the decedent's decomposing, maggot-infested, partially autopsied body, where several of her teeth were missing and her brain was exposed and lying next to her head, had no probative value). See also *People v. Burrell*, 228 Ill. App. 3d 133, 144 (1992) (the prejudicial effect of sending the murdered police officers' bullet-marked and blood-stained uniforms to the jury room during deliberations outweighed the probative value to the issues of the defendant's intent to kill and cause great bodily harm).

¶ 30 Our review of the record establishes that the trial court did not err in admitting the recording of the unsuccessful attempt to interview S.V. and publishing it to the jury because its probative value outweighed any potential prejudice.

¶ 31 B. The State's Closing Argument

¶ 32 Next, defendant argues that he was denied a fair trial because the State's closing argument played to the jurors' emotions to evoke sympathy for S.V. based on her intellectual disability and vulnerability. Defendant also argues that the State's closing argument attacked defense counsel and repeatedly disparaged the defense's theory of the case.

¶ 33 "The regulation of the substance and style of closing argument lies within the trial court's discretion; the court's determination of the propriety of the remarks will not be disturbed absent a clear abuse of discretion." *People v. Caffey*, 205 Ill. 2d 52, 128 (2001). A prosecutor is allowed wide latitude during closing arguments. *People v. Nieves*, 193 Ill. 2d 513, 532–33 (2000). A prosecutor may comment on the evidence presented at trial, as well as any fair, reasonable inferences therefrom, even if such inferences reflect negatively on the defendant. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). Remarks made during closing arguments must be examined in the context of those made by both the defense and the prosecution, and must always be based upon the evidence presented or reasonable inferences drawn therefrom. *People v. Coleman*, 201 Ill. App. 3d 803, 807 (1990).

¶ 34 The court reviews *de novo* the legal issue of whether a prosecutor's misconduct, like improper statements at closing argument, was so egregious that it warrants a new trial. *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007). The reviewing court asks whether the comments made at closing argument "engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them." *Id*. at 123. "Misconduct in closing argument is substantial and warrants reversal and a new trial if the improper remarks constituted a material factor in a defendant's conviction." *Id.*

¶ 35 The parties accurately state that this court has remarked multiple times that a conflict exists concerning whether a reviewing court should apply an abuse of discretion analysis or *de novo* review to allegations challenging a prosecutor's remarks during closing argument. See, *e.g.*, *People v. Deramus*, 2014 IL App (1st) 130995, ¶ 35; *People v. Hayes*, 409 Ill. App. 3d 612, 624 (2011); *People v. Raymond*, 404 Ill. App. 3d 1028, 1059-60 (2010). However, a careful

review of supreme court precedent establishes that no such conflict exists. Specifically, supreme court decisions have applied the two standards of review separately to the appropriate issue addressed on appeal.

¶ 36 In *People v. Blue*, 189 Ill. 2d 99, 128-134 (2000), the court held that the trial court abused its discretion by permitting the jury to hear the prosecutor's arguments that the jury needed to tell the police it supported them and tell the victim's family that he did not die in vain and would receive justice. In *People v. Hudson*, 157 Ill. 2d 401, 441-46 (1993), the court found under the abuse of discretion standard that the prosecutor's closing argument remarks about the defendant's concocted insanity defense and his expert's lack of credibility did not exceed the scope of the latitude extended to a prosecutor. In contrast, in *Wheeler*, 226 Ill. 2d at 121-31, the supreme court reviewed *de novo* whether a new trial was warranted based on the prosecutor's repeated and intentional misconduct during closing argument, which involved vouching for police credibility, attacking defense counsel's tactics and integrity, disparaging former defense counsel, and persistently stating that the prosecution was representing the victims. Whereas a reviewing court applies an abuse of discretion analysis to determinations about the propriety of a prosecutor's remarks during argument (*Blue*, 189 Ill. 2d at 128; *Hudson*, 157 Ill. 2d at 441), a court reviews *de novo* the legal issue of whether a prosecutor's misconduct, like improper remarks during argument, was so egregious that it warrants a new trial (*Wheeler*, 226 Ill. 2d at 121). Our supreme court has not created any conflict about the appropriate standard of review to be applied to these two different issues.

¶ 37 "To preserve an issue for review, a party ordinarily must raise it at trial and in a written posttrial motion." *People v. Cregan*, 2014 IL 113600, ¶ 15. Defendant acknowledges that he

failed to raise his challenges to the State's closing argument both at trial and in a posttrial motion. However, defendant argues that this court should review as plain error his forfeited challenge to the State's emphasis of S.V.'s vulnerability because the error was serious regardless of the closeness of the evidence. Defendant also argues that his challenge to the State's disparaging remarks of the defense is not forfeited because defense counsel objected to those remarks at trial and those remarks deprived defendant of his constitutional right to a fair trial before an impartial jury. Defendant contends that his challenge to the disparaging remarks is a constitutional issue and is not forfeited. See *id.* ¶ 16 ("three types of claims are not subject to forfeiture for failing to file a posttrial motion: (1) constitutional issues that were properly raised at trial and may be raised later in a postconviction petition; (2) challenges to the sufficiency of the evidence; and (3) plain error").

¶ 38 The plain error doctrine allows errors not previously challenged to be considered on appeal if either: (1) the evidence is closely balanced and the jury's guilty verdict may have resulted from the error; or (2) the error was so fundamental and of such magnitude that the defendant was denied a fair trial and the error must be remedied to preserve the integrity of the judicial process. *People v. Hudson,* 228 Ill. 2d 181, 191 (2008); *People v. Herron,* 215 Ill. 2d 167, 177 (2005). "In plain error review, the burden of persuasion rests with the defendant." *People v. Thompson,* 238 Ill. 2d 598, 613 (2010). The first step of plain error analysis is deciding whether any error has occurred. *Id.; People v. Durr,* 215 Ill. 2d 283, 299 (2005).

¶ 39 To support his assertion that the State improperly played to the jurors' emotions by highlighting S.V.'s intellectual disability and vulnerability during closing argument, defendant argues the State asked the jury six times to recall the video recording of the unsuccessful attempt

to interview S.V., exploited the hospital nurse's testimony about the lengthy and intrusive assault exam of S.V. to turn the jurors' outrage against defendant, and then disingenuously told the jurors not to base their verdict on emotion and sympathy.

¶ 40 The six challenged references to the video consist of the prosecutor's argument that when defendant saw S.V. at the babysitter's home, defendant knew S.V. was developmentally disabled because, as clearly shown in the video, S.V.'s disability was immediately discernible. Defendant also cites the prosecutors' statements made during initial and rebuttal arguments that the detective's testimony about defendant's inculpatory statements was credible. Specifically, defendant told the detective that during the assault S.V. kept repeating the word "pee," and the jurors saw from the video that that was how S.V. spoke. Defendant's ability to offer that kind of detail showed that he was the offender because he was not present when the video of S.V.'s interview was recorded, and based on the evidence showing how S.V. spoke, her repetition of the word "pee" would be consistent with her trying to say that something was wrong, that something was touching her vagina. Defendant also cites the prosecutor's statement, made during a discussion of the elements of the offense of aggravated criminal sexual assault, that the jurors saw from the video and heard from C.V.'s physician that S.V. could not understand the nature of sexual intercourse and could not give consent. Finally, defendant cites the prosecutor's argument that the jurors must not base their verdict on emotion and the State did not show the video to tug at their heart strings to gain sympathy for S.V.

¶ 41 In addition, defendant complains that the State exploited the evidence about S.V.'s sexual assault exam at the hospital to further highlight her vulnerability to the jurors. According to the record, the prosecutor was explaining the State's burden to prove that S.V. was unable to

understand the nature of defendant's act of sexual penetration or give knowing consent to that act. The prosecutor referred to a photograph taken of S.V. at the hospital after the assault exam and argued that her smile in that photograph showed that she could not understand the nature of defendant's act or the consequences of it. The prosecutor stated that the exam took several hours and required S.V. to stand over a paper cloth in a room with other people present, "strip down her clothes," and "stand there naked" as people took nail scrapings, combed her pubic hair, and prodded her. The prosecutor stated,

> "They take swabs from her mouth, from her vagina, from her anus. This is all going on and look at her smiling. She's oblivious. She cannot give consent and she cannot understand the act."

The prosecutor summarized the evidence about S.V.'s profound intellectual disability, her age, defendant's match to the DNA recovered from the swab of S.V.'s vulva, defendant's fingerprint at the point where he entered S.V.'s bedroom, and the physical evidence and testimony of the babysitter that corroborated Detective Gonzalez's testimony about defendant's inculpatory statements after his arrest. Then the prosecutor stated:

> "And the defense in opening statements got up here and said, at one point in[,] it told you not to base your verdict and asked you not to base your verdict on emotion. And that's absolutely correct. Do not base your verdict on emotion. Do not base your verdict on sympathy. The defense may get up here and say that the only reason that you're being shown the video of [S.V.] or pictures of [S.V.] is to tug at your heart strings or to gain sympathy. That's not the case. You're going to get the instructions from the judge. You saw the law and you saw what we have to

> prove. We have to prove her mental disability. You have to see that for yourself. That's what we have to prove. That's our burden. We have to show you that. It's not for sympathy. We don't want your sympathy. [S.V.'s parents] don't want your sympathy and [S.V.] doesn't want sympathy. What they want is justice."

¶ 42 After reviewing the challenged arguments of the State in context, we reject defendant's assertion that the prosecutor improperly emphasized S.V.'s vulnerability to play to the jurors' sympathies and arouse their outrage against defendant. The remarks about S.V.'s profound intellectual disability were proper because her disability was an element of the crime charged. Moreover, the remarks about the video recording of S.V. and her hospital exam were based on properly admitted evidence. It has long been held that it is proper for a prosecutor to comment on the evidence and draw any reasonable inferences therefrom, even if they are unfavorable to the accursed. *People v. Gosier*, 145 Ill. 2d 127, 153 (1991). Because no error occurred, we hold defendant to his forfeiture of this issue.

¶ 43 Next, defendant argues that the prosecutor improperly disparaged the defense during rebuttal closing argument by suggesting that defense counsel attempted to mislead the jury. Defendant argues that the prosecutor's remarks showed extreme disdain for the defense's theory of the case and improperly shifted the jury's focus away from the evidence by attacking defense counsel.

¶ 44 According to the record, defense counsel argued that there were "a lot of holes" in the State's case because the muddy footprint at the window and dirt found in the bedroom were not photographed until five days after the incident. Moreover, Rosa testified that she initially thought S.V.'s father had entered the bedroom rather than some stranger. Rosa also testified that the

attacker put the full palm of his hand on a window to push it open to leave, but there was no evidence that the police looked for prints on the inside of the window. Defense counsel argued that there was no written statement or recording of any confession by defendant. Counsel stated that the DNA database used for statistical purposes was not limited to Central Americans but rather included the entire Hispanic population. Counsel stated that not everyone in the world had their DNA tested so it was not "impossible that someone shares a DNA." Counsel also argued that the police did not conduct a thorough analysis of the fingerprints found on the exterior of the window.

¶ 45 In rebuttal, the prosecutor refuted the defense allegations about holes in the State's case by arguing that the State had compelling DNA and fingerprint evidence and although defense counsel "did as good a job as they could do," they were "stuck with the evidence their client left." The prosecutor stated that if he analogized this trial to a basketball game, every witness the State called "slam dunked over" defendant and the State could have rested at halftime. The prosecutor summarized the evidence about the DNA match to defendant and the similarities between the fingerprint lifted from the window and defendant's fingerprint card. The prosecutor recounted how S.V.'s babysitter testified that she knew defendant and had sold him tamales while S.V. was in her home. Moreover, the photographs taken of the scene shortly after the crime showed the scuff marks defendant left on S.V.'s bed frame. Also, the police saw the muddy footprint at the scene during their investigation immediately after the assault even though the footprint was not photographed until five days later. The prosecutor continued:

> "Remember the Wizard of Oz. Remember that scene where Dorothy and Toto and everybody [are] there and the wizard is discovered behind the curtain and the

> wizard screams, 'Pay no attention to the man behind the curtain.' That's what they're doing. Pay no attention to all the evidence in this case. Look over there."

¶ 46 After reviewing the complained-of remarks in context, we conclude that defendant's characterization of the prosecutor's rebuttal argument is not accurate. The prosecutor did not attack or attribute any particular wrongdoing to defense counsel, and comments about the credibility of the defendant and his theory of defense are proper. See *People v. Kirchner*, 194 Ill. 2d 502, 549 (2000); *Hudson*, 157 Ill. 2d at 442-46; *People v. Ligon*, 365 Ill. App. 3d 109, 125 (2006). The record establishes that the prosecutor properly responded to the defense's assertions that the State's case was full of holes by accurately summarizing the overwhelming evidence of defendant's guilt and urging the jury to focus on that evidence instead of defense accusations about shoddy police work or immaterial evidence. We also reject defendant's alternative claim that trial counsel was ineffective for failing to preserve defendant's challenges to the State's closing argument. Defendant cannot establish that his trial counsel's representation was deficient where there was no error with the State's closing argument. *People v. White*, 2011 IL 109689, ¶133.

¶ 47 C. Lesser Included Offense

¶ 48 Defendant argues that, pursuant to the one-act, one-crime doctrine, his conviction for aggravated criminal sexual assault should be vacated because it was a lesser included offense of his home invasion conviction. According to defendant, it was impossible in this case to commit the charged offense of home invasion—*i.e.*, that he unlawfully entered S.V.'s home and committed aggravated criminal sexual assault against her—without the completion of the charged offense of aggravated criminal sexual assault—*i.e.*, that he committed an act of sexual

penetration of S.V.'s vagina with his penis, knowing that she was intellectually disabled and unable to understand the nature of the act. Defendant argues that he is being punished twice for the same act and asks this court to vacate his conviction for aggravated criminal sexual assault.

¶ 49 Although defendant failed to preserve this issue for review, a violation of the one-act, one-crime doctrine affects the integrity of the judicial process and satisfies the second prong of the plain-error analysis. *People v. Span*, 2011 IL App (1st) 083037, ¶ 81.

¶ 50 Under the one-act, one-crime doctrine, multiple convictions are improper if they are based on precisely the same physical act, but multiple convictions and concurrent sentences are allowed when more than one offense arises from a series of incidental or closely related acts and the offenses are not, by definition, lesser included offenses. *People v. King*, 66 Ill. 2d 551, 556 (1977). The one-act, one-crime doctrine requires the court to first determine whether the defendant's conduct involved multiple acts or a single act; if the conduct involved multiple acts, the court must determine whether any of the offenses are lesser-included offenses. *People v. Miller*, 238 Ill. 2d 161, 165 (2010).

¶ 51 Here, defendant does not argue that his conduct involved a single act. Thus, the only question we must answer is whether the offense of aggravated criminal sexual assault is a lesser included offense of home invasion. Whether one charge is a lesser included offense of another is a legal question, which we review *de novo*. *People v. Nunez*, 236 Ill. 2d 488, 493 (2010).

¶ 52 The abstract elements approach applies when, as here, the issue is whether a charged offense is a lesser included offense of another charged offense. *Miller*, 238 Ill. 2d at 174-75. Under this approach, the court compares the statutory elements of the two offenses and if "all of the elements of one offense are included within a second offense and the first offense contains no

element not included in the second offense, the first offense is deemed a lesser-included offense of the second." *Id*. at 166. The abstract elements approach is "the strictest approach in the sense that it is formulaic and rigid, and considers 'solely theoretical or practical impossibility.' In other words, it must be impossible to commit the greater offense without necessarily committing the lesser offense." *Id*. (quoting *People v. Novak*, 163 Ill. 2d 93, 106 (1994)).

¶ 53 A comparison of the statutory elements of both offenses demonstrates that it is possible to commit home invasion without necessarily committing aggravated criminal sexual assault. For example, a person could commit the statutory offense of home invasion by entering the dwelling of another and, *inter alia*, (1) using force while armed with a dangerous weapon, (2) intentionally injuring a person in the dwelling, (3) using force while armed with a firearm, (4) threatening to use force and personally discharging a firearm, (5) discharging a firearm that causes great bodily harm or death, or (6) committing one of several specified major sex offenses aside from aggravated criminal sexual assault. See 720 ILCS 5/19-6(a)(1 to 6) (West 2014). Even if we only consider section 19-6(a)(6) of the Criminal Code of 2012, the statutory subsection for home invasion alleged in the indictment, it is still possible to commit home invasion without committing aggravated criminal sexual assault. For example, a person could commit home invasion by entering the dwelling of another and committing predatory criminal sexual assault of a child (720 ILCS 5/11-1.40 (West 2014)) or criminal sexual abuse (720 ILCS 5/11-1.60 (West 2014)). Thus, under the abstract elements approach, aggravated criminal sexual assault in not a lesser included offense of home invasion. See *People v. Bouchee*, 2011 IL App (2d) 090542, ¶ 10 (applying the abstract elements approach and holding the criminal sexual assault is not a lesser included offense of home invasion); accord *People v. Fuller*, 2013 IL App (3d) 110391, ¶18.

¶ 54 Although defendant's indictment charged that he committed home invasion by entering S.V.'s home and then committing criminal sexual assault against her, *Miller* makes clear that we must apply the abstract elements approach rather than the charging instrument approach to the issue before us. We cannot agree with defendant's assertion that the legislature intended to include aggravated criminal sexual assault as a lesser included offense of home invasion because it would lead to unjust and absurd results. See *Bouchee*, 2011 IL App (2d) 090542, ¶ 18 (considering the statutory provisions that require sex offenses to be punished separately and consecutively, the court rejected the notion that the legislature intended that a person could commit the gravamen of a home invasion and receive punishment for the offense but receive no separate punishment for the even more serious sex offense that he commits inside).

¶ 55 For these reasons, we conclude that aggravated criminal sexual assault is not a lesser included offense of home invasion. Thus, defendant's convictions of both offenses must stand.

¶ 56 III. CONCLUSION

¶ 57 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 58 Affirmed.