2018 IL App (2d) 160185-U
No. 2-16-0185
Order filed October 29, 2018

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 14-CF-258
JUAN CALDERON,	)	Honorable James C. Hallock,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Birkett and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The State's rebuttal closing argument was properly responsive to defendant's argument; (2) defendant was properly convicted of aggravated criminal sexual assault rather than criminal sexual assault: the bodily harm that he inflicted was sufficiently linked to his acts of penetration, and his multiple acts of penetration supported multiple convictions of aggravated criminal sexual assault even though each charge was based on the same act of bodily harm.

¶ 2 Defendant, Juan Calderon, appeals from his convictions of two counts of aggravated criminal sexual assault (bodily harm) (720 ILCS 5/11-1.30(a)(2) (West 2014)) and domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2014)). He raises three claims of error on appeal: (1) the prosecutor's rebuttal argument was improperly inflammatory and denied him a fair trial; (2) the

State failed to prove a nexus between the sexual assaults and the victim's injuries, such that his convictions should be reduced to criminal sexual assault; and (3) the State argued only one form of bodily injury and thus under one-act, one-crime principles, only one sexual assault could be aggravated. We disagree on all points and thus affirm the convictions.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged by indictment with two counts of aggravated criminal sexual assault (bodily harm), one of which was charged as "finger in the vagina of M.C." and the other as "finger in the rectum of M.C.," three counts of criminal sexual assault (720 ILCS 5/11-1.20(a)(1) (West 2014)), of which two were the same as the aggravated criminal sexual assaults, but without the allegations of bodily harm, and the third was an "act of fellatio"; one count of aggravated domestic battery (strangulation) (720 ILCS 5/12-3.3(a-5) (West 2014)); three counts of domestic battery (one charged as a felony, two as misdemeanors); and one count of unlawful restraint (720 ILCS 5/10-3(a) (West 2014)).

¶ 5 Defendant had a jury trial. The prosecutor told the jury that the State's evidence would show that M.C. met with defendant in her truck to discuss an end to their brief marriage, that an argument ensued, that defendant became violent during the argument, and that, during the course of those events, defendant sexually assaulted M.C.

¶ 6 Defense counsel started his opening argument as follows:

> "If you tell a big enough lie, you tell it often enough, people will believe it. That's what the evidence is going to show here.
>
> * * *

> What you're going to find out when you listen to [M.C.] testify and these officers testify is that her story has evolved over time, and that's how we know that this is a big lie."

The State interrupted to object that this was argumentative; the court sustained the objection.

¶ 7 The State's first witness was South Elgin police officer Victor Wiacek, who was on duty the evening of February 15, 2014, and was dispatched to a Marathon station on the east side of South Elgin. Wiacek arrived at the station about a minute before 8 p.m. He saw a Hispanic man—defendant—who was standing just outside the entrance to the station store and smoking. Inside the store, several people were clustered around a woman lying on the floor who was crying while someone held an icepack to her face. Someone pointed to defendant and said that he had hurt the woman. Wiacek went out to defendant and placed him in the squad car while he investigated. As Wiacek checked defendant for weapons, he noted that defendant's fly was all the way down.

¶ 8 Wiacek returned to the store to talk to the victim. He observed that her clothing was in disarray, that she had bruises across her face and on her arm, and that she had "blood coming from her mouth." Looking more closely at the woman's left elbow, he realized that a bump he had already noticed was a bite mark with puncture wounds. He photographed the victim's injuries.

¶ 9 M.C., who testified through an interpreter, was the State's second witness. She said that she had met defendant in June or July of 2013 and married him that September. The marriage had been in trouble from the start, and M.C. had decided to end it. She wanted to meet defendant to discuss a divorce and, because defendant had made threats against her, wanted the meeting to be in a public place. Defendant and M.C. agreed that she would pick him up in her truck at a

Hanover Park 7-Eleven. When defendant got in, he asked to go to a liquor store in Elgin to cash a check. M.C. took him, but he purchased alcohol and then he insisted she let him drive. As defendant drove, the two started to argue. Defendant started drinking and insisted that M.C. also drink. She was afraid of him, and she complied.

¶ 10 Defendant drove the truck to a park where he stopped briefly. The two continued to argue, and defendant made new threats against M.C. and her children. Defendant grabbed M.C. by her hair and demanded oral sex. M.C. again complied, performing oral sex on him as he drove away from the park. As this was going on, he told her "that [she] was an illegal whore, and that that was what [you] illegals deserved." After about 10 minutes of driving, defendant stopped the truck at what M.C. later learned was the gas station, arriving at what she estimated was about 5 p.m.

¶ 11 M.C. and defendant remained in the truck in the station parking lot for an hour to an hour and a half. During that time, defendant continued to verbally abuse her: "He wouldn't stop saying that [she] was a whore, that [she] was illegal." Eventually, she noticed that the truck key was no longer in the ignition, and, thinking that defendant might have thrown the key out the window, she got out to look for it. When she did not find it, she returned to her seat on the passenger side of the truck.

¶ 12 After M.C. got back in, the argument took a more violent turn when defendant backhanded M.C. across the mouth. She tried to calm him, but he became angrier and repeatedly punched her in the face. As she tried to push him away with her left arm, he bit her elbow. She struggled; he grabbed her around the neck and started to choke her. When she reached for the door; he grabbed her by the back of her pants, pulling them down nearly to her thighs. As she tried to get out, he forced several of his fingers into her rectum. He turned his hand and forced at

least one of his fingers into her vagina. As he did this, he said again, "[She] was an illegal whore and that's what *** illegals deserved." She freed herself somehow—she thought that she made defendant let go by hitting him in the stomach or groin. Once clear of the truck, she ran toward a "white person"; he walked her into the station store.

¶ 13 Defense counsel asked M.C. whether she was a citizen and whether she was familiar with the "U visa" program. She said that she was not a citizen and that she had been told that a U visa might allow her to become a legal resident. M.C. admitted that she was unsure exactly when and where the events to which she had testified had occurred. For instance, she was confident that defendant had hit her in the chest, but was unable to remember when it happened or where they had been at the time.

¶ 14 On redirect, M.C. said that she had felt uncomfortable telling the male police officers about the sexual aspects of defendant's actions and had had difficulty talking about them. Defendant's actions had humiliated her.

¶ 15 Thomas Burke, who had encountered M.C. in the station parking lot, followed her as a witness. He testified that, as he had pulled into one of the parking spaces in front of the station store, he encountered a woman standing in the parking lot, "crying and seem[ing] very upset." She came up to him and asked for help. He noticed that her face was bruised and that she "looked a little bit unstable," so he persuaded her to go inside. As he spoke to her further, she pointed out defendant standing a few steps outside the door. At M.C.'s urging, Burke demanded that defendant hand over the keys to M.C.'s truck. Defendant complied. When Burke came back inside with the keys, he discovered that M.C. had fainted.

¶ 16 Jessica Barber, who worked in a business in the building with the station store, testified that she walked over to the station store because she heard some sort of commotion. M.C. was

already inside, and Barber saw that she was "terrified" and "hysterical," had been bruised to the point of bleeding, and had a severe bite mark on her arm. The way she was swaying gave Barber the impression that she was intoxicated. Barber held her to steady her, but she fell, causing Barber to fall as well.

¶ 17 Brian Polkinghorn, a detective with the South Elgin police, interviewed defendant very early in the morning of February 16, 2014. After signing a *Miranda* waiver, defendant told Polkinghorn that he and M.C. had bought beer and whiskey. They had started to argue while she was driving, and she hit him. He admitted that he had hit her back in self-defense, but he said that, although they might have kissed one another, they had not had any other sexual contact that day. Polkinghorn asked him about the bite mark on M.C.'s elbow; defendant said that he thought that M.C. had bitten herself to get him into trouble. He continued to offer that explanation when Polkinghorn noted to him that it is physically impossible to bite one's own elbow.

¶ 18 As Polkinghorn and defendant exited the interview room, they encountered Wiacek, who asked defendant why his fly had been down when he was at the gas station. Defendant, after initially not responding, said that M.C. had touched his penis and he had touched M.C.'s vagina. Polkinghorn observed that defendant's demeanor changed dramatically when Wiacek asked him about his fly—he became obviously nervous and started to shake. As Polkinghorn walked defendant to the holding cell, defendant admitted that he had received oral sex from M.C.

¶ 19 The State rested at the conclusion of Polkinghorn's testimony.

¶ 20 Defendant recalled Wiacek and Polkinghorn. Both said that M.C. had been extremely upset when interviewed in the presence of male officers. Polkinghorn agreed that he had interviewed M.C. at the police station a few days after the incident and had questioned her about

why she got out of the truck two or three times at the gas station. He agreed that his question was based on what he had seen on security video from the gas station. Defendant's final witness, Lisandro Ramirez, an officer with the Elgin police, testified that M.C. was "trembling and shaking" when interviewed at the hospital.

¶ 21 Defendant attempted to introduce an explanation of U visas—a printout from a Department of Homeland Security website. The court declined to admit it, ruling that it was hearsay and not a reliable statement of the relevant immigration law. Defendant then rested, and the State presented no rebuttal evidence.

¶ 22 The State's closing argument was unremarkable. The prosecutor used most of his time to explain the State's theory of how the evidence satisfied all elements of the charged offenses.

¶ 23 In closing, defense counsel returned to the "big lie" theme of his opening statement:

> "You tell a big enough lie, tell it often enough, people are going to believe you. It's what I told you in opening statements yesterday.
>
> And [M.C.] told her story, and it was a big story, and she told it often. And she learned from that story that she could profit. Not monetarily, but in other ways. And she evolved her story so she could get the most out of this. Her story changes over time."

¶ 24 Defense counsel continued, discussing the inconsistencies in M.C.'s reports and arguing against what he said would be the State's explanations:

> "Now, the State can come back, they do get a chance, and they're going to try to explain it. ***
>
> * * *
>
> The State can say all they want about how she was confused. *** There were police officers there, there were doctors there, there were nurses there. If this happened,

if a crime was committed, she should have been telling the truth. But she didn't. And she didn't say anything about oral sex.

* * *

So her second—her third opportunity to tell somebody what really happened, she didn't take advantage of that. She didn't, because it didn't happen.

Now, two days later, after she had talked to a social worker, after she had heard about this visa, the potential for legal status in the country—

[THE STATE]: Objection, Judge.

THE COURT: It's argument. Overruled.

[DEFENSE COUNSEL]: All of a sudden oral sex, 'He forced me to perform oral sex.'

* * *

Only at the question of the officer did she bring up this oral sex, and then it came up, and then it became it was forced upon her, and then yesterday all of a sudden two times, now it's two times. The lie evolves because she has so much at stake.

But her own stories betrayed her, and they showed to you, they showed to everybody that she's not telling the truth.

* * *

The strangulation didn't happen. The strangulation came about later when she realized what she has to gain by continuing with this story."

¶ 25 Defense counsel reemphasized the theory that all of M.C.'s claims of sexual assault were the result of her desire for a visa, but attempted to tie her motivations to American greatness:

"Now, one of the things the State may ask and you may ask, why would [M.C.] do this? And that gets us to the point we were talking about before. She told her story and she learned she could profit from this story. And not money, but potential citizenship status. She testified she's an illegal alien. And that goes to her credibility.

Our country is a great country. We have principles that other countries don't. *** We have certain rights that are guaranteed to us by the Constitution, and people fight for that Constitution. People die for that Constitution, and people want to be citizens. People want to have legal status. We can't put a price on it. It's not tangible. It's not she did it for a hundred dollars, it's not she did it to get back at [defendant]. She found out about this visa shortly after leaving the hospital.

[THE STATE]: Objection, Judge. There's no evidence to that.

THE COURT: Sustained.

[DEFENSE COUNSEL]: She talked to some counselors shortly after leaving the hospital, as you heard her say today, and that's when she told you she found out about this visa.

The State can argue why would she put herself through this? Why would she put herself through this rape kit, this examination? The potential to be an American citizen, to have legal status in our country, it's a very powerful thing.

She married him after meeting him in June, 2013, she married him in September. You heard the officer testify that he's an American citizen. It might have been her goal all along.

[THE STATE]: Objection, Judge. Not a reasonable inference based on the evidence.

THE COURT: Sustained.

[DEFENSE COUNSEL]: She married a U.S. citizen after knowing him for three months. After that she accuses him of a sexual act, sexual assault, and finds out about a visa which could be the road to legal status.

With that motive, with those inconsistencies *** it calls into question her whole story. What can you believe? ***

*** You have to look at everything.

Her story changed over time because she wasn't telling the truth. If you tell the truth, you don't have to remember what you said."

¶ 26 The final portion of defense counsel's closing argument was directed to the elements of the offenses. However, counsel did comment on what he expected the State to say in rebuttal, and again linked the argument to patriotic values:

"[The prosecutor] gets another chance to argue, and he's going to tell me I'm full of crap, and that's fine. That's the way our system is. That's the way we do it in this country.

A lot of us take it for granted that we're citizens of the United States. But this is why we should be proud to be Americans, because he is presumed innocent until proven guilty beyond a reasonable doubt. *** Beyond a reasonable doubt. And the State chose to rely on a proven liar."

¶ 27 In rebuttal, the prosecutor immediately picked up on defense counsel's comment, "[H]e's going to tell me I'm full of crap":

"I will not tell the Defense Attorney that he's full of crap. I will tell him that his argument is full of crap, though.

Apparently[,] we have gone through the looking glass in this courtroom today, because what the Defense just argued to you is that their idea of the founding theories of this country is that someone who might be here illegally should not be believed. Their theory—

[DEFENSE COUNSEL]: Judge, I would object to that argument. That was not my argument.

[THE STATE]: That is what his theory was.

THE COURT: Overruled.

[THE STATE]: His theory makes sense if we, as a society, want to tell people who are here illegally, 'Don't report crimes to the police, because you go into court, nobody is going to believe you.'

Is that the public policy that we want to set in this country? That's the policy that the Defense wants to set.

[DEFENSE COUNSEL]: Judge, we object to that.

THE COURT: Overruled.

[DEFENSE COUNSEL]: That's not the policy we're promoting.

THE COURT: Overruled.

[THE STATE]: And when you think about that, that argument that was just made here within the last ten or fifteen minutes about illegal immigrants in this country, what does that remind you of? It reminds you of [M.C.'s] testimony yesterday about every vile thing that this Defendant said to her in this trial. 'You're a whore. This is what illegal immigrant whores do.'

> And he might as well have said, 'Don't worry about reporting it because you're an illegal immigrant whore. Nobody is going to believe you and my Defense Attorney is going to stand up there and argue don't believe her because she's illegal.
>
> ***
>
> Yesterday the Defense Attorney stood up here, today he stood up here in his closing argument and he called it the big lie, [M.C.'s] big lie.
>
> Well, a funny thing happened on the way to the Defendant's defense that [M.C.] just made all of this up. That's People's Exhibit Number 1, People's Exhibit Number 2, and People's Exhibit Number 3 [(photographs of M.C.'s face with bruises)] (indicating). Does that look like a woman who was lying about being beaten?"

¶ 28 The jurors sent two questions to the court during their deliberation. One, they asked with what defendant would have to be charged to make M.C. potentially eligible for a "U visa." Two, they asked whether the "bodily harm" necessary for a conviction of aggravated criminal sexual assault must be harm caused by the penetration or whether they could consider harm that defendant caused before the penetration. Ultimately, the jury found defendant guilty of aggravated criminal sexual assault (finger in vagina and finger in anus) and of domestic battery. It found him not guilty of criminal sexual assault (penis in mouth) and not guilty of aggravated domestic battery.

¶ 29 Defendant moved for a new trial, asserting, among other things, that the court erred in "allowing the state to argue incorrectly the reason and purpose of introducing [M.C's] status as an illegal alien." He asserted that the State had incorrectly claimed that defense counsel had argued that M.C. "was incredible because she was illegal." The court denied defendant's motion and sentenced him to two eight-year terms of imprisonment for aggravated criminal sexual

assault. After the court denied defendant's motion to reconsider the sentences, defendant timely appealed.

¶ 30 II. ANALYSIS

¶ 31 On appeal, defendant argues that the prosecutor's closing argument, in which he "called the defense theory 'full of crap,' and equated defense counsel's argument to calling M.C. an 'illegal immigrant whore,' " was improper because it was a "blatant disparagement of counsel's argument itself, rather than a discussion of the facts." He contends that it was "so inflammatory as to require a new trial." He also argues that, because M.C. was aware of the U visa program,[1] which might help her obtain legal status based on her cooperation with the prosecution, "it was not unreasonable for defense counsel to suggest that M.C. might have had some motive to testify falsely or embellish her story."

¶ 32 Arguing in the alternative, defendant asks us to reduce his aggravated criminal sexual assault convictions to criminal sexual assault. He asserts that the injuries he inflicted on M.C. were insufficiently contemporaneous with the sexual assaults. Arguing in the further alternative, he contends that one-act, one-crime principles require that no more than one of the criminal sexual assault convictions be for aggravated criminal sexual assault. He thus asks us to reduce one of his aggravated criminal sexual assault convictions to criminal sexual assault.

¶ 33 The State first responds that the prosecutor's rebuttal was entirely fair. It suggests that, if defense counsel meant to argue only that M.C.'s hope of obtaining a U visa made her biased, he

[1] "U visas" are available to some aliens who have "been helpful, [are] being helpful, or [are] likely to be helpful to *** local law enforcement official[s] ***, or local authorities investigating or prosecuting [certain] criminal activity." 8 U.S.C. § 1101(a)(15)(U)(i)(III) (2012).

failed badly—counsel succeeded in arguing only that illegal aliens are inherently incredible. It further argues that nothing was wrong with the prosecutor's basing an argument on what "society *** want[s] to tell people who are here illegally," inasmuch as that argument "flowed directly" from the need to respond to counsel's implication that illegal aliens can never be wholly credible. In response to defendant's two alternative arguments, the State urges us to reject both on the basis that the law is not what defendant says it is and does not support him.

¶ 34 We agree with the State on all three points. One, the rebuttal arguments were proper reply and thus not error. Two, the State provided sufficient evidence that the injuries defendant inflicted on M.C. were contemporaneous with the sexual assaults. Three, the State adequately apportioned the offenses among M.C.'s various injuries, so that no violation of the one-act, one-crime rule occurred. See *People v. Crespo*, 203 Ill. 2d 335, 340-44 (2001). We address each point in order.

¶ 35 Substantively, whether argument is improper "depends, in each case, on the nature and extent of the statements and whether they are probative of [the] defendant's guilt." *People v. Blue*, 189 Ill. 2d 99, 132 (2000).

> "Courts allow prosecutors great latitude in making closing arguments. [Citation.] In closing, the State may comment on the evidence and all inferences reasonably yielded by the evidence. [Citation.] However, argument that serves no purpose but to inflame the jury constitutes error. [Citations.] Closing arguments must be viewed in their entirety and the allegedly erroneous argument must be viewed contextually." *Blue*, 189 Ill. 2d at 127-28.

Illinois authority is unclear as to the standard of review that applies to the propriety of a prosecutor's closing remarks—abuse of discretion or *de novo*. See, *e.g.*, *People v. Burman*, 2013

IL App (2d) 110807, ¶ 26 (discussing the uncertainty). We will not resolve the issue here; we conclude that the remarks were proper under either standard. More precisely, we apply the less deferential *de novo* standard and nevertheless find that no error occurred.

¶ 36 Defendant asserts that the rebuttal was improper in four ways. One, the argument was "a blatant disparagement of counsel's argument itself, rather than a discussion of the facts." Two, the prosecutor's discussion of what "we, as a society, want to tell people who are here illegally" was irrelevant and thus distracted the jury from fair consideration of the facts. Three, the suggestion that defense counsel's closing argument was similar to defendant's calling M.C. an "illegal immigrant whore" was "a transparent attempt to inflame the passions of the jurors." Four, "and perhaps most egregiously," the rebuttal "mischaracterized what the defense actually said": counsel was merely trying to tell the jury that illegal immigrants are a group particularly susceptible to pressure from the State.

¶ 37 Before addressing the specific statements of which defendant complains, we point out that a central premise of defendant's argument is incorrect. Defendant asserts that the prosecutor acted improperly in his "blatant disparagement of counsel's argument itself," and insists that such argument violates the rule that arguments should be about the facts of the case and reasonable inferences therefrom. *E.g.*, *People v. Sandifer*, 2016 IL App (1st) 133397, ¶ 39. He equates attacks on defense counsel's arguments with the attacks on defense counsel personally such as are condemned in cases such as *People v. Beringer*, 151 Ill. App. 3d 558, 564 (1987). This argument, taken at face value, absurdly suggests that the State cannot point out the flaws in defense counsel's arguments. Of course a responsive argument can disparage the argument to which it responds. To discuss the proper inferences from the evidence, a party needs also to be able to discuss improper inferences, and where, as here, one party has made appeals to emotion,

the other party must be able to point that out. *Beringer* and like cases tell us that calling defense counsel a liar is out of bounds, not that the prosecutor is barred from saying that an argument is deceptive, illogical, or irrelevant.

¶ 38 With that recognition, we can dispose of defendant's first assertion, that the prosecutor acted improperly by saying that defense counsel's arguments were "full of crap." Although the prosecutor echoed defense counsel's slightly vulgar language, he otherwise was simply stating his intent to abide by the rule that we just stated. That is, he announced his intent to attack defense counsel's argument but not defense counsel personally.

¶ 39 Second, we hold that the prosecutor's comments about what "we, as a society, want to tell people who are here illegally," although policy-based, was nevertheless invited by defense counsel's specific comments. "The prosecutor may *** respond to comments made by defense counsel that clearly invite a response," and an otherwise prohibited response may be permissible if the defendant opened that *particular* door. *People v. French*, 2017 IL App (1st) 141815, ¶ 48. Here, defense counsel did much more than suggest that illegal immigrants are vulnerable to State pressure. He effectively suggested that anyone who did not think that M.C. would lie to get a chance of United States citizenship was undervaluing that citizenship—that giving little weight to M.C.'s immigration issues as motivation to lie would make a juror the kind of person who "take[s] it for granted that we're citizens of the United States." That recurring theme in defense counsel's argument was not precisely a policy argument, but it was a similar kind of appeal to outside considerations. That argument clearly invited the prosecutor's response. Put another way, defense counsel implied that it was patriotic to discount M.C.'s testimony. It was thus fair for the prosecutor to suggest that that kind of treatment of illegal aliens produces a bad society, thus implying that such treatment is not patriotic at all.

¶ 40 Third, we agree with the State that it was permissible for the prosecutor to equate defense counsel's attack on M.C.'s credibility to the verbal abuse M.C. described as coming from defendant. The prosecutor's comparison was justified. Defense counsel argued that M.C. was willing to marry to regularize her illegal status—by implication, to have sex for a chance to regularize her illegal status—and to perjure herself as well. Put in cruder terms, he implied that she was an illegal immigrant whore. Both defense counsel's and the prosecutor's arguments were potentially inflammatory, but the prosecutor's argument was also completely relevant. The parallels between the two treatments of M.C. made clear why defendant would think that he could get away with his attacks. Defendant *expected* M.C. to be treated as unworthy of belief, and defense counsel's remarks urged the jury to validate that expectation.

¶ 41 Fourth, we do not agree with defendant's assertion that the prosecutor significantly misrepresented defense counsel's argument. Defendant asserts that defense counsel was simply pointing out M.C.'s vulnerability to pressure, but that the prosecutor misrepresented that proper argument as an appeal to juror bias against illegal immigrants. Given the content of defense counsel's arguments, to claim this takes a bit of gall. Defense counsel started his opening statement by saying, "If you tell a big enough lie, you tell it often enough, people will believe it." He started his closing argument with essentially the same words. This statement typically appears as a reference to Nazi propaganda techniques.[2] See, *e.g.*, Brian Hayes, How Adams has turned mastery of the 'Big Lie' technique into art form for SF, April 8 2015, Independent.ie, https://www.independent.ie/irish-news/politics/how-adams-has-turned-mastery-of-the-big-lie-technique-into-art-form-for-sf-31125902.html (visited September 19, 2018). That is, defense

---

[2] The most common form of this is, "If you tell a lie big enough and keep repeating it, people will eventually come to believe it."

counsel, intentionally or not, for anyone familiar with the reference, accused the prosecutor of Nazi tactics. The remaining appeals to emotion in the defense closing argument were more open, albeit a shade less incendiary. It was defense counsel, not the prosecutor, who implied that to give no weight to the U visa as a motive for M.C. to lie amounted to taking for granted the value of United States citizenship. To be sure, one can cherry-pick from defense counsel's words the sketch of a straightforward argument about the pressures facing M.C. However, that clearly relevant argument was all but buried under the appeals to patriotism. Thus, the rebuttal fairly identified and responded to the essential characteristics of the defense argument. We therefore deem that there was no impropriety in the prosecutor's characterization of defense counsel's argument. Throughout his rebuttal, the prosecutor merely gave a fair response to defense counsel's emotional closing.

¶ 42 Defendant argues in the alternative that "because the State failed to prove beyond a reasonable doubt that [he] caused bodily harm to M. C. during the alleged penetrations and [because] the [alleged] penetrations were not contemporaneous with the bodily harm that occurred," we must reduce his aggravated criminal sexual assault convictions to criminal sexual assault. Specifically, he argues that the State made clear "that the bruising to M.C.'s face was the 'bodily harm' that elevated the [criminal sexual assault] charges to aggravated criminal sexual assault." However, "those injuries were temporally removed from the alleged acts of penetration," which "occurred as [M.C.] was leaving the truck." We do not agree. Defendant's argument relies on an implication that his violence effectively lost its power to aggravate the offense as the encounter went on, even though M.C. continued to be in defendant's presence and away from any trusted source of aid. That view does not withstand serious consideration.

¶ 43 The aggravated criminal sexual assault provision under which defendant was charged provides that a person commits aggravated criminal sexual assault if "*during the commission of the offense*" the person "causes bodily harm to the victim" (emphasis added) (720 ILCS 5/11-1.30(a)(2) (West 2014)). We have held that, to satisfy this requirement, the State must prove "that the bodily harm was contemporaneous to the criminal sexual assault." *People v. Potts*, 224 Ill. App. 3d 938, 949 (1992). Defendant, relying primarily on *People v. Thomas*, 234 Ill. App. 3d 819 (1992), and *People v. Colley*, 188 Ill. App. 3d 817 (1989), contends that the harm and the acts of penetration in this case were insufficiently contemporaneous. Those cases are not as defendant represents them to be, and they do not support defendant's position.

¶ 44 Defendant, quoting *Thomas*, 234 Ill. App. 3d at 825, argues that "[i]njuries inflicted directly before or after a sexual assault can support a conviction of aggravated criminal sexual assault, but they *must be* 'part of an unbroken series of events *** both very near in time and closely linked to the forced sexual acts.' " (Emphasis added.) In fact, the *Thomas* court said that the injuries to the victim in that specific case "were part of an unbroken series of events and were both very near in time and closely linked to the forced sexual acts," and thus were "*sufficient* to support the charges and convictions of aggravated criminal sexual assault based upon the infliction of bodily harm during the commission of a criminal sexual assault." (Emphasis added.) *Thomas*, 234 Ill. App. 3d at 825. Quoting *Colley*, 188 Ill. App. 3d at 820, defendant asserts that "the term 'during' has been defined as 'sufficiently close in time to the sexual acts that they can be said to have been committed during the course of the sexual assault.' " In fact, the *Colley* court stated that, under the particular facts of the case, the court would "not draw a bright line between the ending of the sexual acts and the bodily harm occurring afterward, as that would defeat the statutory purpose of protecting victims from sex offenders." *Colley*, 188 Ill.

App. 3d at 820. The *Colley* court therefore found that "the [victim's] stab wounds occurred sufficiently close in time to the sexual acts that they can be said to have been committed during the course of the sexual assault." *Colley*, 188 Ill. App. 3d at 820.

¶ 45 The State argues that both *Thomas* and *Colley* support the conclusion that defendant's convictions of aggravated criminal sexual assault were proper. We agree. *Colley* involved sexual assaults followed by an armed robbery. *Colley*, 188 Ill. App. 3d at 818-19. *Thomas* involved a series of assaults interrupted by the defendant's burning the victim with a heated fork. *Thomas*, 234 Ill. App. 3d at 825. Both involved what the *Thomas* court called "an unbroken series of events [with injuries] both very near in time and closely linked to the forced sexual acts." *Thomas*, 234 Ill. App. 3d at 825. However, as both cases show, "very near in time" need not mean just a few minutes. One reasonable characterization is that both cases, like this one, involved extended encounters. However, *Thomas* and *Colley*, unlike this case, both concerned assaults in which the assailant inflicted the harm after committing the act of penetration. That made both of those cases closer calls than this one. When the harm comes first, it predictably will place the victim in fear of the assailant and limit the realistic ways the victim has to escape the later act of penetration. Here, the evidence shows that defendant punched and bit M.C. before he sexually penetrated her. He then took advantage of her physical vulnerability to sexually penetrate her. This is not quite the most obvious kind of link between a harm and an act of penetration—it is not exactly a case in which an assailant used force to subdue a victim—but nevertheless, the link between the harms and the sexual assaults is clear and direct. We thus decline to reduce the aggravated criminal sexual assault convictions to simple criminal sexual assault.

¶ 46 Defendant last argues that, under one-act, one-crime principles, the single injury that the State put forward as aggravating—bruising to M.C.'s face—can aggravate only a single criminal sexual assault conviction. We note that defendant's analysis necessarily implies that a defendant who incapacitated a victim with a single blow could repeatedly sexually assault that victim until he or she recovered and yet be guilty of only one act of *aggravated* sexual assault. Defendant's analysis fails to persuade us.

¶ 47 Under one-act, one-crime principles, an "act" is "any overt or outward manifestation that will support a separate offense." *Crespo*, 203 Ill. 2d at 341. Although multiple closely connected acts, such as separate blows, can support multiple convictions, the State must charge the defendant according to such a theory and present it and argue it to the jury accordingly. *Crespo*, 203 Ill. 2d at 342. However, a defendant can be guilty of two or more offenses even when a common act is a part of those offenses, provided that separate acts support both or all convictions. See *People v. Coats*, 2018 IL 121926, ¶¶ 15-16 (reviewing cases).

¶ 48 Defendant argues that, under *People v. Bishop*, 218 Ill. 2d 232, 248-49 (2006), and *People v. Cook*, 2011 IL App (4th) 090875, ¶¶ 34-36, "multiple counts of an aggravated offense cannot be based on the same aggravating circumstance." That is, he claims that, if an assailant inflicts one instance of bodily harm on a victim and then commits two or more acts of sexual penetration on the victim, only one of those acts of penetration can be aggravated by the instance of bodily harm, even if that instance of harm has a clear nexus to all the acts of penetration.

¶ 49 Neither *Bishop* nor *Cook* supports defendant's claim. In *Bishop*, the harm identified in two aggravated sex-crime counts was the victim's pregnancy. *Bishop*, 218 Ill. 2d at 248. The supreme court, noting that only one of the assaults could have been the cause of one pregnancy and that "[t]here was no evidence at the trial that [the victim] became pregnant more than once

during this time period," accepted the State's concession that the pregnancy could be the aggravating factor in only one conviction. *Bishop*, 218 Ill. 2d at 248-49. *Bishop* is inapposite. In *Bishop*, no logical way existed to establish a nexus between one pregnancy and more than one assault; one assault caused the harm and the other did not. Here, though, the beating aided two separate assaults. No reason exists for those disparate situations to receive the same analysis. *Cook* is even less relevant, as the State in that case identified only a single act, an instance of driving while intoxicated. *Cook*, 2011 IL App (4th) 090875, ¶ 36. That single act supported a conviction of an aggravated offense—it resulted in one person's death—but it was *only* one act and thus could support only a single conviction. *Cook*, 2011 IL App (4th) 090875, ¶ 36. Here, by contrast, the State proved two distinct acts of penetration. We thus decline to apply one-act, one-crime principles to reduce either of the aggravated criminal sexual assault convictions to simple criminal sexual assault.

¶ 50 III. CONCLUSION

¶ 51 For the reasons stated, we affirm defendant's convictions. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 52 Affirmed.