2020 IL App (1st) 181732-U

FIFTH DIVISION
DECEMBER 4, 2020

No. 1-18-1732

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. 14 CR 04082
	)	
JENIE LEBRON,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Delort and Justice Hoffman concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's convictions and sentence for attempted murder, aggravated domestic battery, and aggravated battery of her minor children are affirmed, but convictions for two counts of aggravated battery and two counts of aggravated domestic battery vacated pursuant to the one-act, one-crime rule.

¶ 2 Defendant-appellant Jenie Lebron appeals her convictions for attempted murder, aggravated domestic battery, and aggravated battery of her minor children, A.F. and R.Y., for which she was sentenced to 14 years' imprisonment. On appeal, she argues that (1) the circuit court of Cook County erred in admitting A.F.'s out-of-court statement without making a specific

finding that the "time, content and circumstances" of the statement were reliable; (2) the trial court abused its discretion in finding A.F.'s out-of-court statement sufficiently reliable; (3) A.F. was not subject to cross-examination, thus precluding the use of her out-of-court statement at trial; (4) the defendant's sentence was excessive; and (5) four of the defendant's seven convictions violated the one-act, one-crime rule. For the reasons that follow, we affirm in part and vacate in part the defendant's conviction and sentences.

¶ 3 BACKGROUND

¶ 4 The defendant is the mother of several children, including R.Y. and A.F. She was arrested on February 3, 2014, after a police report was made concerning her abuse of R.Y. and A.F. The defendant was charged with one count of attempted murder for holding R.Y.'s head under water, two counts each of aggravated battery and aggravated domestic battery for stabbing R.Y., one count of aggravated domestic battery for holding R.Y.'s head under water, one count of aggravated battery for striking R.Y. with a bludgeon, and one count of aggravated battery for striking A.F. about the body.

¶ 5 Prior to trial, in July 2017, the court held a hearing pursuant to section 115-10 of the Code of Criminal Procedure (725 ILCS 5/115-10 (West 2014)), to determine the admissibility of out-of-court statements A.F. made to Marilyn Soto, a forensic interviewer. At the hearing, Ms. Soto testified that she worked as a forensic interviewer for the Chicago Children's Advocacy Center (the Center). Ms. Soto explained that as a forensic interviewer, she regularly interviews children who have suffered physical or sexual abuse. During the interview, she uses an open-ended questioning technique in an effort to avoid leading the child, and also considers developmental and cognitive delays that may affect the child's ability to respond to questions. Ms. Soto testified that while the child's parent or guardian must provide consent for the interview, the child is interviewed

separately from the parent or guardian.

¶ 6 Ms. Soto interviewed A.F., who was six years old, on January 28, 2014, after A.F.'s grandmother bought her into the Center and gave consent for the interview. (Ms. Soto interviewed R.Y., A.F.'s brother, the same day.) Prior to the interview, Ms. Soto's only knowledge about the allegations against the defendant came from the intake form she received, which stated that there was suspicion of physical abuse.

¶ 7 The recording of the interview played for the trial court revealed that Ms. Soto began the interview by asking A.F. background questions about her age, grade in school, and hobbies. Ms. Soto then asked A.F. about who she lived with, and A.F. responded that she lived with her grandparents and her dog. When Ms. Soto asked who A.F. lived with prior to her grandparents, A.F. said she was living with the defendant (her mother) and, without prompting, stated that the defendant had beat her, hit her, tried to drown her brother, and stabbed her brother. A.F. continued that the defendant told her friend to come over to say goodbye to her and her brother, after which the defendant's friend called the police. The defendant pulled A.F.'s hair and threw her into the wall. A.F. stated that when the police arrived, her brother heard the sirens, at which point the defendant "stopped," told the children to go to bed, and ripped A.F.'s underwear (which she referred to as "chones").

¶ 8 Following A.F.'s recounting of these events, Ms. Soto said she wanted to talk more about it, but first assured A.F. that it was okay to admit she did not know the answer in response to any question she was asked. Ms. Soto also emphasized the importance of telling the truth and tested A.F.'s ability to distinguish between a truth and a lie. A.F. indicated she understood.

¶ 9 Ms. Soto then asked A.F. what happened to her when she lived with the defendant. A.F. stated that the defendant hit her and her brother with a back scratcher, belt, and stick. In response

to Ms. Soto's follow up questions about her brother, A.F. offered his name and age (13). Ms. Soto asked when the defendant hit them, and A.F. said it happened when the defendant left the children alone to clean the house. A.F. then offered, unprompted, that her mom went to get her friend, Alfred, and told him to say goodbye to the children because they were going to die. Alfred then went to the alley where he called the police. In response to Ms. Soto's questions, A.F. gave a physical description of Alfred, but stated that she did not know his last name.

¶ 10 Ms. Soto then specifically asked what happened when A.F. was hit with a backscratcher, and A.F. stated that while the defendant was hitting her, her brother was running in the kitchen and the defendant tried to hit him with a belt. A.F. stated that she saw the defendant hit her brother with the belt.

¶ 11 Ms. Soto then changed the subject to the drowning incident A.F. had mentioned earlier when A.F. interrupted and asked Ms. Soto if she was going to tell A.F.'s grandmother what A.F. said. Ms. Soto responded that she would not talk to A.F.'s grandmother because her job only involved talking to children. A.F. indicated that she understood and proceeded to tell Ms. Soto that the defendant put water in the bathtub and plugged it before telling A.F. and R.Y. to get in. Alfred came and told the children to get out of the tub, but the defendant told Alfred to say goodbye to the children. A.F. repeated that Alfred then went to the alley to call the police. When R.Y. heard the sirens, A.F. said it made the defendant scared so she stopped and told the children to go to bed. A.F. said the defendant put her in the same underwear that was torn.

¶ 12 Ms. Soto asked if anything happened before Alfred came over, and A.F. said that was the only thing that happened, but then said her brother was hit with a belt and she was hit with a stick. A.F. stated that before Alfred came in, she was cleaning the "whole house." A.F. said that Alfred called the police when he came in, at which point her mother ripped her underwear.

¶ 13 Ms. Soto asked again about the time the defendant put water in the bathtub, and A.F. again stated that the defendant told them it was going to be the end of their lives before putting R.Y.'s head underwater. A.F. screamed and said "don't kill us because we still want to go to school and we haven't ever went to school yet." A.F. told the defendant to stop and the defendant pulled A.F. by her hair and threw her against the wall.

¶ 14 Following arguments by the parties, the court ruled that A.F.'s interview was admissible in conjunction with her testimony at trial, stating that the "main issue" was whether there had been "undue influence and coaching" of A.F. The court concluded that there was no evidence of coaching and further found Ms. Soto credible.

¶ 15 A bench trial began in January 2018. R.Y. testified at trial that he was 17 years old. The State drew his attention to the spring of 2013, when he was 13, and R.Y. testified that between March and May of 2013, he lived with his mother and sister, A.F., in Chicago. R.Y. testified that one day that spring, around Easter, the police came to his house. The defendant had been drinking that day. At some point during the day, the defendant left the house, and A.F. began crying because she was hungry and there was no soup. The defendant heard A.F.'s crying when she returned to the house, and started screaming at the children. She took A.F. to the bedroom and made A.F. kneel on the floor next to the bed while she hit her with a wooden backscratcher. R.Y. testified that the defendant raised her hand to the ceiling before bringing the backscratcher down on his sister's back, where it made a noise on her skin. A.F. was crying. The defendant then turned her anger on R.Y. When the three were in the kitchen, she broke a beer bottle on his head and hit him on his head with a pot and a broom that had a metal handle. She also threw a chair at R.Y.

¶ 16 R.Y. testified that his mother then took him and A.F. to the bathroom. The defendant wedged R.Y.'s head between the bottom of the medicine cabinet and the sink and began stabbing

his cheek with a knife. She put R.Y. in the bathtub and stabbed him three times in the left thigh with the same knife. R.Y. saw small areas where his skin was missing from the stabbing. The defendant then turned on the water to fill the tub, bent R.Y. over the tub, and attempted to drown him. A.F. was standing next to the defendant and begging her to stop. At some point, the defendant released R.Y.'s head, and when he looked up, he saw blue flashing lights outside the bathroom window. The defendant then left the bathroom, but before leaving she told R.Y. to clean up the kitchen.

¶ 17 R.Y. testified that Alfred appeared at the front door of the apartment that evening and the defendant told Alfred to say goodbye to the children because they were leaving this world.

¶ 18 On cross-examination, R.Y. testified that he did not tell anyone, including his school counselor, his friends, his neighbors, or the defendant's mother, about the abuse he suffered. R.Y. testified that he did not regularly see his father and stepmother between April and October 2013 and rarely spoke to his father on the phone. However, he testified that he liked being with his father and wanted to live with him.

¶ 19 On re-direct examination, R.Y. explained that the reason he did not tell anyone about the abuse immediately was because the defendant threatened to kill him if he told anyone. When R.Y. had previously told his father or his counselor about "issues" he had with the defendant, the defendant learned of these disclosures and "beat and hurt" R.Y. more. R.Y. testified that the first person he told about the Easter incident was his stepmother, after he had moved in with his father and stepmother and knew that he would not be seeing the defendant for a long time.

¶ 20 A.F., who was 10 years old at the time of trial, also testified. She testified that she had been living with her grandmother for five years, but prior to that she lived with her mother and R.Y. A.F. testified that she did not remember a night while she was living with the defendant and

R.Y. when the defendant was angry at her or R.Y. She further testified that she had no memory of talking to her grandmother, the police, or Ms. Soto about problems with the defendant. A.F. denied that the defendant hit her or R.Y., and further denied that the defendant held R.Y.'s head under water. A.F. testified that she missed the defendant and wanted her to come home.

¶ 21 On cross-examination, A.F. testified that she loved her brother and her brother wanted to live with his father. A.F. responded affirmatively to defense counsel's question as to whether R.Y. asked her to make up a story that the defendant had hurt her.

¶ 22 Following the conclusion of A.F.'s testimony, the State moved to publish the recording of A.F.'s interview with Ms. Soto. The defendant objected "based on hearsay," which the court overruled. The video was played.

¶ 23 Alfred Alvarez, the defendant's friend of 20 years, also testified for the State. Mr. Alvarez testified that he often visited the defendant at her home and knew R.Y. and A.F. In April 2013, Mr. Alvarez walked by the defendant's house, noticed the door to the house was open, and heard the defendant screaming. When he entered the house, he saw the defendant run out of the bathroom with a foot-long knife in her hand. He further observed that chairs were knocked over, broken glass was on the floor, and a light fixture was hanging from the ceiling by a wire. Mr. Alvarez testified that he heard water running in the bathroom and R.Y. ran to him from the front room crying. R.Y. had blood on his face and begged Mr. Alvarez to help him. Mr. Alvarez also saw A.F., whose hair was "messed up." The defendant told Mr. Alvarez that this was the last time he would see the children alive. Mr. Alvarez characterized the defendant as agitated and when he could not calm her, he ran outside to call 911. Mr. Alvarez ended the 911 call after they asked him "too many questions." He then rode his bike down the street until he spotted a police car. He gave the officers in the car the defendant's address, and he followed the officers to the defendant's

house. Mr. Alvarez observed the officers talk to the defendant through the second-story window, and then saw the officers leave the scene.

¶ 24 At the conclusion of the State's case, the defendant moved for a directed verdict, which was denied. The defendant rested without putting on any evidence. Following closing arguments, the court found the defendant guilty on all counts.

¶ 25 On May 11, 2018, the court denied the defendant's motion for a new trial and held a sentencing hearing. The court considered victim impact statements from R.Y. and R.Y.'s stepmother, as well as a "mitigation manual" submitted by the defendant. The defendant argued that she had a difficult childhood, suffering physical and verbal abuse from her mother, and attempted suicide at age 7. In adulthood, she was involved in several abusive relationships, including with R.Y.'s father, who beat and attempted to rape her. Since her imprisonment, she had participated in AA meetings, started her own AA meeting for women on her floor in jail, and attended many classes and programs.

¶ 26 In imposing sentence, the court began by rejecting the defendant's argument that certain counts merged under the one-act, one-crime rule. The court went on to acknowledge that the defendant had uncharacteristic rehabilitative potential, but because the crime was "completely horrendous," he sentenced the defendant to 14 years' imprisonment on counts 1, 2, and 3, 7 years' imprisonment on counts 4, 5, and 6, and 5 years' imprisonment on counts 7 and 8, all to run concurrently.

¶ 27 ANALYSIS

¶ 28 We note that we have jurisdiction to review this matter, as the defendant timely appealed. Ill. S. Ct. R. 603 (eff. Feb. 6, 2013); Ill. S. Ct. R. 606 (eff. July 1, 2017).

¶ 29 I. Section 115-10 Hearing

¶ 30 The defendant initially argues that the court erred in granting the State's motion to admit A.F.'s out of court statement to Ms. Soto pursuant to section 115-10 of the Code of Criminal Procedure. 725 ILCS 5/115-10 (West 2014). Section 115-10 of the Code codifies an exception to the general rule against hearsay testimony in prosecutions "for a physical or sexual act perpetrated upon or against a child under the age of 13." *Id.* Pursuant to this section, the victim's out of court statements regarding the crime are admissible if "the court finds in a hearing *** that the time, content, and circumstances of the statement provide sufficient safeguards of reliability" and the child testifies at the proceeding or is unavailable as a witness and there is independent corroboration of the allegations. *Id.*; see also *People v. Lee*, 2020 IL App (5th) 180570, ¶ 5.

¶ 31 The defendant maintains that the court erred in admitting A.F.'s statement without making an explicit finding that her statement to Ms. Soto was "sufficiently reliable as to the time, content and circumstances of the statement." In the first place, the defendant failed to raise this argument before the trial court and allow the court to correct any "error" in its ruling on admissibility. As such, the argument is forfeited. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (in order to preserve error for review, party must object at trial and file written posttrial motion).

¶ 32 But even if we found that the argument was not forfeited, it is meritless. The court admitted A.F.'s out of court statement after making a verbal finding that there had been no undue influence or coaching of A.F., which the court described as the "main issue." The court also noted that A.F.'s mannerisms on the video did not indicate that she was "feeding back information." Therefore, the court concluded that the State met its burden of proving that her statement was sufficiently reliable. Contrary to the defendant's contention, nothing in the Code required the court to make specific findings of reliability or intone "magic words" when issuing its decision. To the contrary, *People v. Johnson*, 2014 IL App (4th) 150004, ¶ 54, on which the defendant relies,

explicitly noted that the findings required by section 115-10 of the Code need not be in writing nor "contain the level of detail promoted by defendant." It is sufficient that the court held the requisite hearing and stated that it found the statement sufficiently reliable. See *People v. West*, 158 Ill. 2d 155, 163 (1994).

¶ 33 In a closely related argument, the defendant maintains that regardless of whether the trial court was sufficiently explicit in its findings, its decision to admit A.F.'s out of court testimony was error where the testimony did not meet timeliness and content standards. When evaluating whether the time, content and circumstances of a statement are sufficiently reliable, courts consider "(1) the spontaneity and consistent repetition of the statement; (2) the mental state of the child in giving the statement; (3) the use of terminology not expected in a child of comparable age; and (4) the lack of a motive to fabricate." *People v. Oats*, 2013 IL App (5th) 110556, ¶ 25. It is the State's burden to prove the statement is reliable and "not the result of adult prompting or manipulation." *People v. Zwart*, 151 Ill. 2d 37, 45 (1992). We review a court's decision to admit evidence pursuant to section 115-10, for an abuse of discretion. *People v. Garcia*, 2012 IL App (1st) 103590, ¶ 96. A court abuses its discretion where its decision is arbitrary, fanciful, or unreasonable. *Id.*

¶ 34 In this case, A.F.'s allegations against the defendant were spontaneous, in that they were offered as a response to the innocuous, non-leading question of who she lived with prior to her grandparents. The defendant characterizes this "blurting out" of a "laundry list" of allegations as evidence that A.F. was coached, but Ms. Soto testified that it is typical for children to disclose abuse in response to questions about family members. It was far from an abuse of discretion for the court to accept this explanation.

¶ 35 The defendant also argues that A.F.'s question regarding whether Ms. Soto would tell A.F.'s grandmother about A.F.'s answers suggests that she was coached. But it is equally plausible that A.F.'s question reflected her concern that she would get in trouble for telling Ms. Soto about the abuse. We likewise reject the defendant's speculation that R.Y. coached A.F. regarding A.F.'s testimony. The basis for the defendant's speculation is the fact that Ms. Soto interviewed both children on the same day. However, A.F. and R.Y. were not living together at the time of their interviews, and there is no evidence that A.F. and R.Y. were at the Center at the same time, much less that there was any opportunity for R.Y. to coach A.F. prior to their interviews with Ms. Soto.

¶ 36 The defendant's final contention is that A.F.'s statement was untimely because almost a year had elapsed between the time of the abuse and the interview with Ms. Soto. However, this time lapse, standing alone, does not render A.F.'s statement inadmissible. See *Zwart*, 151 Ill. 2d at 46 ("[D]elay in reporting abuse or initial denials of abuse will not automatically render a victim's statements inadmissible under section 115-10."). This is particularly true where the other elements of spontaneity and repetition were satisfied and there was no evidence of coaching. For these reasons, we conclude that the trial court did not abuse its discretion in finding A.F.'s statements to Ms. Soto sufficiently reliable pursuant to section 115-10 of the Code.

¶ 37 III. Admissibility of A.F.'s Video Interview at Trial

¶ 38 The defendant's final challenge to the admission of A.F.'s interview with Ms. Soto concerns A.F.'s availability as a witness. Pursuant to section 115-10 of the Code, before an out of court statement is admissible, the victim must testify at trial. 725 ILCS 5/115-10(b)(2)(A). Or, if the victim is unavailable, the out of court statement may only be admitted if there is corroborating evidence of the allegations. 725 ILCS 5/115-10(b)(2)(B). The determination of whether a child is

available for cross-examination is committed to the discretion of the trial court. *People v. Major-Flisk*, 398 Ill. App. 3d 491, 503 (2010).

¶ 39 The defendant argues A.F. was not available to testify at trial because she either did not remember or denied the allegations of abuse committed against her by the defendant. Specifically, during direct examination, A.F. testified that the defendant never hit her or R.Y. and did not attempt to drown R.Y. She further testified that she did not remember telling anyone, including Ms. Soto, anything to the contrary. According to the defendant, A.F.'s lack of memory rendered her unavailable for cross-examination and barred the admissibility of her interview with Ms. Soto under section 115-10. We disagree.

¶ 40 Both our supreme court and the United States Supreme Court have rejected the argument that a witness's memory loss renders them unavailable for cross-examination. See, *e.g.*, *People v. Flores*, 128 Ill. 2d 66, 88 (1989); *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). The United States Supreme Court in *Fensterer* explained: "The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion." *Fensterer*, 474 U.S. at 21-22. Rather, so long as a witness is placed on the stand, under oath, and responds willingly to questions, that witness is subject to cross-examination. *People v. Lewis*, 223 Ill. 2d 393, 404 (2006) (citing *United States v. Owens*, 484 U.S. 554, 562 (1988)).

¶ 41 Here, A.F. willingly answered, under oath, all questions that were put to her on cross-examination. Merely because her memory loss precluded the State from eliciting details about her prior allegations against the defendant, it does not follow that the defendant was then unable to cross-examine her. See *United States v. Owens*, 484 U.S. 554, 560 (1988) ("The weapons available to impugn the witness' statement where memory loss is asserted will of course not always achieve

success, but successful cross-examination is not the constitutional guarantee.") In other words, "a defendant's right to confront witnesses cannot be recast as the State's burden to confront witnesses." *People v. Riggs*, 2019 IL App (2d) 160991, ¶ 38.

¶ 42 The defendant's argument to the contrary rests on *People v. Learn*, 396 Ill. App. 3d 891 (2009). There, the child victim made allegations of sexual abuse against the defendant in a videotaped interview, but at trial, did not repeat these allegations and often began crying when questioned by the State. *Id.* at 895-97. The trial court found that she was available to testify, but on cross-examination, the defendant established only that he was the victim's uncle. *Id.* at 897. On appeal, this court found that the victim was not available for cross-examination because she did not accuse the defendant at trial and offered only general background testimony. *Id.*at 899-900. The court explained that the victim's failure to testify with specificity about the accusations she made against the defendant placed the defendant in the "untenable position" of trying to elicit damaging testimony about the allegations against him before refuting those allegations. *Id.* at 900.

¶ 43 To the extent that the facts in *Learn* are comparable to those here, we decline to follow it.[1] The weight of authority supports the proposition that a witness who testifies to a lack of memory about accusations against the defendant is available for cross-examination. See *e.g.*, *People v. Major-Flisk*, 398 Ill. App. 3d 491, 506 (2010); *People v. Bryant*, 391 Ill. App. 3d 1072, 1083 (2009); *People v. Sundling*, 2012 IL App (2d) 070455-B, ¶ 67. Accordingly, we find no error in the court's decision to admit A.F.'s out-of-court statements at trial.

[1] It is arguable that *Learn* is inapposite because the victim there did not claim a loss of memory, but "offered no testimony whatsoever concerning the offense." *People v. Kennebrew*, 2014 IL App (2d) 121169, ¶ 35 (distinguishing *Learn* from memory-loss cases).

¶ 44 IV. Excessive Sentence

¶ 45 The defendant next challenges the length of her sentence in light of her rehabilitative potential. However, we afford great deference to the trial court's sentencing decision, as the court is in the best position to weigh the relevant sentencing factors which include the defendant's demeanor, criminal history, and social environment, as well the nature and circumstances of the crime. *People v. Wyma*, 2020 IL App (1st) 170786, ¶ 93. A sentence that falls within statutory guidelines is presumptively proper and will not be disturbed absent an abuse of discretion. *People v. Bridges*, 2020 IL App (1st) 170129, ¶ 37. An abuse of discretion occurs where the sentence is "at variance with the purpose and spirit of the law or manifestly disproportionate to the nature of the offense." *People v. Himber*, 2020 IL App (1st) 162182, ¶ 59.

¶ 46 In this case, the most serious offense of which the defendant was convicted—attempted murder—is a Class X offense carrying a sentencing range of between 6 and 30 years' imprisonment. 720 ILCS 5/8-4(c)(1) (West 2014); 730 ILCS 5/5-4.5-25 (West 2014)). It is undisputed that the 14 year sentence the trial court imposed on this count falls in the middle of that range.[2] In imposing sentence, the trial court explicitly acknowledged the defendant's rehabilitative potential, but declined to sentence the defendant closer to the minimum of the statutory range considering the horrifying nature of the crime. The defendant attempted to drown her 13-year-old son in a bathtub while her 5-year-old daughter looked on, crying and pleading with her to stop.

[2] The defendant points out that on the lesser counts, such as aggravated battery, the trial court sentenced the defendant to the maximum term of imprisonment, but as all sentences run concurrently, her challenge to the sentences of less than 14 years is moot.

¶ 47 While the defendant contends that the trial court only paid "lip service" to her rehabilitative potential, nothing in the record bears out this contention. The most important sentencing factor is the seriousness of the offense. The presence of mitigating factors does not necessarily require a minimum sentence. *People v. Contursi*, 2019 IL App (1st) 162894, ¶ 25. Before the trial court, the defendant pointed out the same mitigating factors she advances on appeal; namely, that her childhood was difficult, she had a limited criminal history, and made efforts at self-improvement while in jail. We will not independently reweigh the factors and substitute our judgment for that of the trial court but will presume that the court considered all relevant mitigating factors prior to sentencing. See *People v. Johnson*, 2020 IL App (1st) 162332, ¶ 95. The sentence imposed by the court falls well within the statutory range and is far from disproportionate when compared to the heinous nature of this crime. We therefore conclude that the defendant's 14-year sentence was not an abuse of discretion.

¶ 48 V. One Act, One Crime Violation

¶ 49 Lastly, the defendant maintains that her convictions on counts 3, 4, 5, and 6 should be vacated under the "one-act, one-crime rule," prohibiting multiple convictions carved from the same physical act. *People v. Harvey*, 211 Ill. 2d 368, 389 (2004) (citing *People v. King*, 66 Ill. 2d 551, 566 (1977)). Where a defendant is convicted of more than one offense based on the same act, the convictions for the less serious offenses must be vacated. *People v. Lee*, 218 Ill. 2d 219, 226-27 (2004).

¶ 50 Here, the State concedes that counts 2-5 in the indictment arose out of the same physical act: the stabbing of R.Y. about the body. And counts 1 and 6 of the indictment arose out of the same act of holding R.Y.'s head under water. The State also concedes that it did not attempt to apportion the stab wounds between the offenses charged in counts 2-5, nor did the State attempt

to differentiate between the act of holding R.Y.'s head under water in count 1 versus count 6. Accordingly, pursuant to one-act, one-crime principles, the defendant's convictions and sentences on multiple counts arising out of the same conduct must be vacated.

¶ 51 Specifically, we vacate the defendant's convictions and sentence on counts 3 (aggravated battery predicated on permanent disfigurement), 4 (aggravated domestic battery predicated on great bodily harm), and 5 (aggravated domestic battery predicated on permanent disfigurement), as the parties agree that count 2 (aggravated battery predicated on great bodily harm) is the most serious count. Likewise, we vacate the defendant's conviction and sentence on count 6 (aggravated domestic battery predicated on bodily harm), as count 1 (attempted murder) is the more serious count. Pursuant to our authority under Illinois Supreme Court Rule 615(b)(4), we instruct the Clerk of the Circuit Court of Cook County to amend the mittimus to reflect that the defendant's conviction and sentence for counts 3, 4, 5, and 6 are vacated.

¶ 52 CONCLUSION

¶ 53 For the reasons stated, we vacate the defendant's convictions and sentences under counts 3, 4, 5 and 6 and affirm the judgment of the circuit court of Cook County in all other respects.

¶ 54 Affirmed in part and vacated in part, mittimus corrected.