FOURTH DIVISION
Rule 23 Order filed on June 23, 2016
Modified upon denial of rehearing July 28, 2016

No. 1-14-0423



IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 12 CR 17361 |
| | ) | |
| JAMES GATES, | ) | Honorable |
| | ) | Charles P. Burns, |
| Defendant-Appellant. | ) | Judge Presiding. |

JUSTICE HOWSE delivered the judgment of the court.
Justices Ellis and Cobbs concurred in the judgment.

**O R D E R**

¶ 1 *Held*: Judgment entered on defendant's conviction for attempted aggravated kidnapping affirmed over his claim that the evidence was insufficient to prove that he intended to secretly confine the victim.

¶ 2 Following a bench trial, defendant James Gates was found guilty of attempted aggravated kidnapping and aggravated battery, then sentenced to seven and one-half years' imprisonment.

On appeal, defendant contends that the evidence was insufficient to prove that he intended to secretly confine the victim, and, therefore, we should reduce his conviction for attempted aggravated kidnapping to aggravated battery. He also contends that the fines and fees order should be corrected.

¶ 3 At trial, Kelly Davis testified that on August 25, 2012, he, his two children, M.D. and D.D., and their mother, Amanda Green, had taken the Metra train from Zion, Illinois, into Chicago. At 9 p.m. that evening, his two-year-old daughter, M.D., was playing on the Picasso statue in the Daley Center Plaza at 50 West Washington Street when defendant approached the family. Defendant said that M.D. was "Goldilocks," his daughter, and that he was going to take her home. Davis insisted that M.D. was not his daughter, but defendant continued to say that she was his daughter and that he was going to take her home. Defendant approached M.D. and grabbed her right arm. M.D. "yelped," and Green tried to pull M.D. away from him while Davis stepped in between defendant and M.D.

¶ 4 Davis further testified that defendant punched him in the nose, then stepped onto the Picasso statue, pointed at M.D., and continued insisting that she was his daughter and that he was going to take her home. When defendant started to walk away from the statue, Davis told Green to call police. Davis followed defendant for several blocks until police arrived, then signaled the officers, and got into their vehicle. They stopped defendant about two blocks away from Daley Center Plaza. Davis then viewed a surveillance video from Daley Center Plaza and identified his family and defendant on the video.

¶ 5 On cross-examination, Davis stated that he saw defendant approaching his family, so he stayed close to his children, but he did not think defendant would grab M.D. He further stated that as soon as defendant grabbed M.D., he "interjected" himself between her and defendant.

¶ 6 Green testified to the same series of events related by Davis leading to the family's arrival at Daley Center Plaza on August 25, 2012. She further testified that she saw defendant approaching the family and that M.D. started to cry when defendant grabbed her arm. Green testified that she was able to pull M.D. away from defendant, but defendant kept insisting that she was his daughter, "Goldilocks," and that he was going to take her home with him. Green watched as defendant punched Davis, who never touched defendant, in the nose, and then yelled that she was going to call police. Defendant continued to insist that M.D. was his daughter and that he was going to take her home, so Green called police. She testified that she stayed with the children while Davis followed defendant out of the plaza.

¶ 7 Chicago police officer Daniel Town testified that he was on patrol at 10 p.m. on August 25, 2012, when he received a radio call about an attempted kidnapping at the Daley Center, with a brief description of the perpetrator. He saw defendant at 100 North LaSalle Street, about one and one-half blocks away from the Daley Center, and was on the scene when Davis identified defendant as the person who attempted to kidnap his child. On cross-examination, Officer Town stated that when he asked defendant for his address, defendant gave him the address of a homeless shelter.

¶ 8 Defendant testified that he takes medication for schizophrenia, which sometimes helps him feel more clear-headed. He further testified that on August 25, 2012, he had been homeless for two or three years, and about 9:30 p.m. that night, he was on his way to sleep on the benches

at the Daley Center Plaza. There, he saw Davis and his family and attempted to make conversation with them by saying that M.D. was his daughter, "Goldilocks." He testified that he was only joking, and did not actually think she was his daughter, but was trying to make the family laugh because he wanted to ask them for something else. Before he had the chance to do so, however, Green told him to leave, and he walked away.

¶ 9 He further testified that he never grabbed M.D. or was anywhere near her. After Green told him to leave, he noticed Davis following him as he left the plaza, but he never punched him. He testified that he saw police, but that they never stopped or talked to him, and just arrested him. On cross-examination he stated that he did not get a chance to tell the family he was joking about M.D. being his daughter, and that the police always arrest him when he is looking for something to eat. In rebuttal, the State introduced certified copies of defendant's 2001 conviction for a felony narcotics offense, and 2002 conviction for robbery, for the limited purpose of impeachment.

¶ 10 In finding defendant guilty of attempted aggravated kidnapping, the trial court found Davis to be "a very, very credible witness." The court further found that it did not believe that Davis or Green embellished anything, and that it did not believe defendant's testimony that he was just trying to make a joke or start up a conversation with the family. The court stated that it had no doubt that if Davis and Green did not stop defendant, he would have continued, and, therefore, the only question was whether defendant's actions constituted a "substantial step" toward the commission of a kidnapping, which depended on whether or not the "secret confinement" element was satisfied.

¶ 11 On that element, the trial court stated that the mere fact that someone was still in a public place does not necessarily dismiss the element of secret confinement. The court found that defendant intended to secretly confine M.D. and that it was irrelevant whether he lived on a bench, on lower Wacker Drive, or in the Ritz Carlton. The court found defendant's testimony to be self-serving denials, and that the State had proved him guilty of attempted aggravated kidnapping beyond a reasonable doubt. At the subsequent sentencing hearing, after considering the appropriate factors in mitigation and aggravation, the court sentenced defendant to seven and one-half years' imprisonment.

¶ 12 In this appeal from that judgment, defendant contests the sufficiency of the evidence to prove him guilty of attempted aggravated kidnapping beyond a reasonable doubt. He contends that he did not intend to secretly confine M.D., and that, in any case, secret confinement would have been impossible because he was living on a bench in Daley Center Plaza at the time of the offense, and the attempt took place in the middle of a crowded, public plaza.

¶ 13 Where defendant challenges the sufficiency of the evidence to sustain his conviction, the reviewing court must consider whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004). This standard recognizes the responsibility of the trier of fact to determine the credibility of the witnesses and the weight to be given their testimony, to resolve any conflicts and inconsistencies in the evidence, and to draw reasonable inferences therefrom. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). A reviewing court must allow all reasonable inferences from the record in favor of the prosecution, and will not overturn the decision of the trier of fact unless the evidence is so

unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011); *People v. Smith*, 185 Ill. 2d 532, 542 (1999).

¶ 14 In his reply brief, defendant briefly contends that we should review his claim *de novo* because he is not challenging the credibility of the witnesses, but only the sufficiency of the evidence. Defendant relies on *In re Ryan B.*, 212 Ill. 2d 226, 231 (2004), and *People v. Montoya*, 373 Ill. App. 3d 78, 81 (2007), in asserting that where the facts are not in dispute, his guilt is a question of law to be reviewed *de novo*. We find defendant's reliance on these cases misplaced. Unlike the cases cited by defendant, the crux of defendant's challenge to his attempt conviction is his dispute with the court's finding that he possessed the intent required to support an attempted aggravated kidnapping conviction. Because defendant asks this court to review the trial court's findings of fact regarding his intent to secretly confine M.D., and his ability to do so, we find that the facts are in dispute, and the standard of review is not *de novo* (*People v. Jones*, 376 Ill. App. 3d 372, 382 (2007)), but rather, the reasonable doubt standard stated above.

¶ 15 To sustain defendant's conviction for attempted aggravated kidnapping, the State was required to prove that he, with the intent to commit aggravated kidnapping, took a substantial step toward (720 ILCS 5/8-4(a) (West 2010)) secretly confining M.D. against her will or by force or threat of force carried her from one place to another with intent to secretly confine her against her will (720 ILCS 5/10-1(a)(1), (2) (West 2012)), while M.D. was under the age of 13 years (720 ILCS 5/10-2(a)(2) (West 2012)). Defendant does not contest the sufficiency of the evidence to prove M.D.'s age, but contends that the State failed to prove that he intended to secretly confine M.D., or that it was possible for him to do so.

¶ 16 "Confinement" encompasses the act of imprisoning or restraining an individual, and the secret confinement element of kidnapping may be shown by evidence of secrecy of the confinement or secrecy of the location of the confinement. *People v. Gonzalez*, 239 Ill. 2d 471, 479 (2011). In this context, "secret" has been defined as "concealed, hidden, or not made public" (*People v. Pasch*, 152 Ill. 2d 133, 187 (1992)), or "kept from the knowledge or notice of persons liable to be affected by the act" (*People v. Mulcahey*, 72 Ill. 2d 282, 285 (1978), quoting Black's Law Dictionary 1519 (4th ed. 1951)). "[T]he secret confinement contemplated by the statute may be shown by proof of the secrecy of both the confinement and the place of confinement, or of either." *Mulcahey*, 72 Ill. 2d at 285. Even if defendant did not intend his confinement of M.D. to be secret, a reasonable trier of fact could infer that defendant intended the place of confinement to be secret.

¶ 17 Here, when viewed in a light most favorable to the prosecution, the record shows that Davis and Green were on the Daley Center Plaza with their two children, D.D. and two-year-old M.D. when defendant approached the family while shouting that M.D. was his daughter, "Goldilocks," and that he was taking her home with him. Defendant then grabbed M.D.'s arm while continuing to insist that M.D. was his daughter and that he was taking her home. Green was able to pull M.D. away from defendant while Davis stood between defendant and M.D. Defendant then punched Davis in the face, pointed at M.D., and continued to shout that she was his daughter and that he was going to take her home. This evidence and the reasonable inferences therefrom were sufficient to allow a reasonable trier of fact to find that defendant intended to secretly confine M.D., and took a substantial step toward commission of that offense. 720 ILCS 5/8-4(a) (West 2010); 720 ILCS 5/10-1(a)(1), (2) (West 2012); 720 ILCS 5/10-2(a)(2) (West

2012); *People v. Williams*, 295 Ill. App. 3d 663, 666 (1998). Although defendant testified that he was just joking with the family, that he did not actually believe M.D. was his daughter, and that he did not grab M.D., the trial court was not required to accept defendant's testimony (*Williams*, 295 Ill. App. 3d at 666; *People v. Pitchford*, 39 Ill. App. 3d 182, 186-87 (1976)) and could infer his intent from the circumstantial evidence (*Williams*, 295 Ill. App. 3d at 665). Intent may be inferred from defendant's conduct and other facts presented at trial. *Id*. Here, defendant's intent to secretly confine the child could be reasonably inferred from the testimony at trial that he repeatedly shouted that M.D. was his daughter and that he was going to take her home with him. *Id.* at 665-66.

¶ 18 Defendant contends that the State failed to prove that he intended to secretly confine M.D. because he publicized his intent to take M.D. home with him, so his intent was not a secret. In support of this contention, defendant relies on *Pasch*, where our supreme court reversed the defendant's conviction for aggravated kidnapping based on a finding that the confinement was not secret. *Pasch*, 152 Ill. 2d at 188. In *Pasch*, the court determined that the defendant never made an attempt to keep the victim's presence secret, and many people, including police, were aware that the defendant was holding the victim hostage in the apartment. *Id*. at 187-88. Defendant contends that the circumstances here are similar to *Pasch* because he loudly told everyone his intent to take M.D. home with him, which precluded any finding of secret confinement. Defendant contends that there is even less evidence of secret confinement in this case than in *Pasch* because M.D. was never actually removed from the public area. We disagree.

¶ 19 In *Pasch*, both the fact of the confinement and the place of the confinement were known. *Id.* at 187-88. The record in that case revealed that the defendant struggled with the victim's

sister on the porch of an apartment the victim and her sister shared, the victim's sister escaped, and the defendant ran inside. *Id.* at 155. Very shortly after the defendant entered the victim's apartment (the place of confinement), her sister told a neighbor that the victim was in the apartment with the defendant. *Id.* at 187. In this case, defendant grabbed M.D.'s arm and announced his intention to take her to his home. Defendant was a stranger to M.D. and her family, and they did not know defendant's identity or the location of his home. When defendant grabbed M.D. announcing his intention to take her home, he tried to remove the victim from Daley Center Plaza and confine her in a place known only to defendant. See *id.* at 187 (the secret confinement element of kidnapping may be shown by proof of the secrecy of the place of confinement). This is true despite evidence of defendant's homelessness. Defendant argues that the evidence is not sufficient to prove defendant possessed the requisite intent to confine the minor in a secret place because defendant testified at trial he intended to sleep on the benches at the Daley Center Plaza (where, allegedly, the victim's confinement cannot be secret). However, the trial court was not required to accept defendant's testimony. *Williams*, 295 Ill. App. 3d at 666. The place defendant called home was known only to him and was a secret as far as the victim, her family, or anyone else was concerned. *Cf. Id.* at 187-88 (the victim's sister and "many people were quite aware that [the victim] was restrained inside the apartment").

¶ 20 Moreover, we observe that *Pasch* involved a conviction for aggravated kidnapping, whereas this case involves a conviction for attempted aggravated kidnapping where the State was not required to prove that defendant secretly confined M.D., but that he intended to do so and took a substantial step toward the commission of the offense. 720 ILCS 5/8-4(a) (West 2010); *Williams*, 295 Ill. App. 3d at 666. Given the testimony of Green and Davis, which was found

credible by the trial court, defendant's grabbing of M.D. and defendant's repeated statements that he was taking her home were sufficient to support the court's determination that defendant intended to secretly confine M.D. and took a substantial step toward that end. *Id*. As discussed above defendant is challenging his conviction for attempted aggravated kidnapping. There is, therefore, no requirement that the elements of aggravated kidnapping be actually satisfied. 720 ILCS 5/8-4(a) (West 2010); *People v. Marsh*, 118 Ill. App. 2d 298, 305 (1969). The trial court determined that when defendant grabbed M.D.'s arm after repeatedly shouting that she was his daughter and that he was going to take her home, he took a substantial step toward the commission of an aggravated kidnapping, and we find no basis for disturbing that determination on review. *Williams*, 295 Ill. App. 3d at 666.

¶ 21 Defendant next contends that there was no possibility for him to effectuate his plan in secrecy because there was no secret place for him to confine M.D. He maintains that because the incident occurred in a public area, any secret place of confinement would have to be reached in a public way, thus "rebutting any inference that [he] intended any 'secret confinement.' " In support of this proposition, defendant relies on *Dahlberg v. People*, 225 Ill. 485, 492 (1907), where the supreme court reversed the defendant's conviction for attempt to commit mayhem because it was impossible for the defendant to blind the victim with powdered red pepper.

¶ 22 Insofar as defendant's argument asserts that it was "impossible" for him to commit the offense under the circumstances, we observe that such an argument is barred by statute in attempt convictions. 720 ILCS 5/8-4(b) (West 2010). Moreover, in this case, defendant's conviction is premised on the secretive location of the confinement, *i.e.*, the location of his "home" where he intended to take M.D., rather than the secretiveness of the confinement itself.

*Gonzalez*, 239 Ill. 2d at 479. It is, therefore, irrelevant that defendant would not have been able to abscond from the Daley Center Plaza with M.D. without being observed because he was charged with attempt, which is satisfied by intent, and a substantial step toward the commission of the offense, which a reasonable trier of fact could find in this case. *Williams*, 295 Ill. App. 3d at 666; *Marsh*, 118 Ill. App. 2d at 305. Additionally, it was not "inherently impossible" for defendant to take the victim to some other undisclosed location. The trial court did not have to accept defendant's testimony that his "home" that night was the Daley Center Plaza, and the fact defendant walked away from the plaza is evidence from which a reasonable trier of fact could reasonably infer that defendant was capable of taking the victim to another, unknown, location. We, therefore, find no basis for reversing the trial court's judgment, and need not consider defendant's argument that his conviction should be reduced to aggravated battery.

¶ 23 Defendant next contends that we should make several corrections to his fines and fees order. He first contends that he should be permitted to use his presentence custody credit to offset the $2 Public Defender records automation fee and the $2 State's Attorney records automation fee because, despite being labeled as fees, they are actually fines. The Public Defender records automation fee requires defendant to pay a $2 assessment "to discharge the expenses of the Cook County Public Defender's office for establishing and maintaining automated record keeping systems." 55 ILCS 5/3-4012 (West 2012). Similarly, under the State's Attorney records automation fee, defendant is required to pay a $2 assessment "to discharge the expenses of the State's Attorney's office for establishing and maintaining automated record keeping systems." 55 ILCS 5/4-2002.1(c) (West 2012).

¶ 24 As the State points out, the Fourth District appellate court recently determined that the State's Attorney records automation assessment was compensatory in nature, and, therefore, a fee. *People v. Rogers*, 2014 IL App (4th) 121088, ¶ 30. Citing *People v. Warren*, 2014 IL App (4th) 120721, ¶ 108, the court in *Rogers* stated that the "assessment is a fee because it is intended to reimburse the State's Attorney for their expenses related to automated record-keeping systems." *Rogers*, 2014 IL App (4th) 121088, ¶ 30. Defendant acknowledges the decision in *Rogers*, but urges us to apply the supreme court's holding in *People v. Graves*, 235 Ill. 2d 244, 250 (2009), where the supreme court stated that a fee is intended to compensate the State for the costs of prosecuting the defendant, while fines are punitive in nature. He maintains that these assessments do not reimburse the State for costs incurred in defendant's specific prosecution, but are collected to finance future purchases of automated record-keeping systems.

¶ 25 We believe that the Fourth District properly interpreted the supreme court's holding in *Graves* in deciding *Warren* and *Rogers*. The statutory language of 55 ILCS 5/4-2002.1(c) shows that the assessment is intended to compensate the State for the costs of prosecuting defendant by offsetting the State's costs in establishing and maintaining automated record keeping systems (55 ILCS 5/4-2002.1(c) (West 2012)), and, as such, is a fee, which may not be offset by presentence custody credit (*People v. Jones*, 397 Ill. App. 3d 651, 664 (2009)). It therefore follows that the $2 Public Defender records automation fee is a fee in that it is intended to compensate the office of the public defender for costs incurred in defending defendant, and may not be offset by defendant's presentence custody credit.

¶ 26 Finally, defendant contends that he should be permitted to use his presentence custody credit to offset the $10 probation and court services operations fee, because it is actually a fine.

Section 27.3a(1.1) of the Clerks of Courts Act provides, in relevant part, that the clerk of "any county that imposes a fee pursuant to subsection 1 of this Section shall also charge and collect an additional $10 operations fee for probation and court services department operations." 705 ILCS 105/27.3a(1.1) (West 2012). The fee "shall be paid by the defendant in any felony, traffic, misdemeanor, local ordinance, or conservation case upon a judgment of guilty or grant of supervision." 705 ILCS 105/27.3a(1.1) (West 2012). The Fourth District in *Rogers* also discussed this assessment. Under the facts of this case, the assessment is a fee. *Rogers*, 2014 IL App (4th) 121088, ¶¶ 37-38. For the reasons discussed above, we agree with the court in *Rogers* and find that defendant is not permitted to use his presentence custody credit to offset the $10 probation and court services operations fee.

¶ 27 We, therefore, affirm the judgment of the circuit court of Cook County.

¶ 28 Affirmed.