FIFTH DIVISION
August 26, 2016

No. 1-14-0906

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. 13 CR 9830
	)	
DOUGLAS LYEN,	)	Honorable
	)	Angela Munari Petrone,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Lampkin and Burke concurred in the judgment.

O R D E R

¶ 1 *Held:* We affirm the judgment of the circuit court where the evidence was sufficient to convict defendant of aggravated kidnapping, and his conviction for aggravated battery should not be vacated under the one-act, one-crime doctrine because it was not based on the same physical act as the aggravated kidnapping conviction.

¶ 2 Following a bench trial, defendant Douglas Lyen was found guilty of aggravated kidnapping and aggravated battery and sentenced to respective terms of eight and four years' imprisonment, to be served concurrently. On appeal, defendant contests the sufficiency of the evidence supporting his aggravated kidnapping conviction, asserting that the State failed to prove beyond a reasonable doubt that he intended to secretly confine the victim. Alternatively, defendant maintains that pursuant to the one-act, one-crime doctrine, his conviction for aggravated battery should be vacated as it was based on the same act as the aggravated kidnapping conviction. We affirm.

¶ 3 As is pertinent to this appeal, defendant was charged with aggravated kidnapping and aggravated battery, stemming from an incident that occurred on the sidewalk in front of a residence located on South Maplewood Avenue in Chicago on April 26, 2013. The aggravating kidnapping charge alleged that defendant knowingly carried F.A., a child under 13 years of age, by force or threat of imminent force, from one place to another, with the intent to secretly confine him against his will. 720 ILCS 5/10-2(a)(2) (West 2012).

¶ 4 The aggravated battery charge alleged that defendant, in committing a battery, knowingly made physical contact of an insulting or provoking nature with F.A. In particular, defendant grabbed F.A. about the body, while they were on a public way, *i.e.*, the sidewalk of South Maplewood Avenue in Chicago. 720 ILCS 5/12-3.05(c) (West 2012).

¶ 5 At trial, Maria Herrera testified that she lived on South Maplewood Avenue on April 26, 2013. She had three children, including F.A. who was four years old at the time. At about 3:30 p.m., she was outside with her children and the other children from the neighborhood. Herrera

went inside her house to get some juice for the children. While inside, she heard the children yelling for her. She ran outside and saw defendant, who she had seen numerous times in the neighborhood, grabbing F.A.'s shirt near his left elbow. At the time defendant grabbed F.A., he was on a tricycle in front of the house. Defendant dragged F.A. about five or six feet away while F.A. was holding onto his tricycle. Herrera stated, "what the f*** are you doing with my son?" Defendant removed his hand from F.A.'s shoulder and continued walking. F.A. remained on his tricycle. Herrera brought all of the children inside of her house and called the police, who arrived shortly thereafter. Herrera provided the police with information regarding the incident and described defendant as a white male wearing black jeans and a checkered sweater. The police found defendant and returned him to the scene a few minutes later. They removed defendant from the police vehicle and made him look in the direction of Herrera, who was inside of her house looking out of the window. Herrera positively identified defendant as the individual who grabbed her son.

¶ 6 Officer Tracy testified that he and his partner responded to the scene and then searched for a suspect matching the description provided by Herrera. Tracy noticed defendant, who matched Herrera's description, detained him, and brought him to the address of the occurrence for a showup identification. While transporting defendant, he said "oh, sh*t," in a quiet voice when the police turned onto Herrera's block. Herrera positively identified defendant as the offender and Tracy arrested him.

¶ 7 The State rested and defendant made a motion for judgment of acquittal, arguing that the State had failed to prove that he had the intent to secretly confine F.A. against his will. The court

denied the motion, finding that defendant's intent to secretly confine F.A. against his will could be inferred from the circumstances. Particularly, the court pointed out that the moment Herrera went inside of her house, defendant emerged, allegedly grabbed F.A.'s arm and pulled him while F.A. was holding onto the tricycle.

¶ 8 Defendant testified that he was pushing a shopping cart filled with scrap in an alley near South Maplewood Avenue on his way to a junkyard on April 26, 2013. The police pulled up, placed him in handcuffs, and put him in the back of their vehicle. The police drove around the block to the address in question and made him step out. They then returned him to their vehicle and drove him to the police station. Defendant had previously seen Herrera in the neighborhood and knew the block on which she lived. However, he stated that he never saw or grabbed any of the children that day as he was walking down 63rd Street towards the garage where he lived, which was across the alley from Herrera's residence. Defendant stated that he pled guilty to burglary in 2012.

¶ 9 During closing argument, defense counsel argued that the State failed to prove beyond a reasonable doubt that defendant had the intent to secretly confine F.A. against his will. In particular, defense counsel argued that it could be reasonably inferred from the evidence that defendant was attempting to remove F.A. from the tricycle in order to take the cycle and sell it for scrap.

¶ 10 Following closing argument, the trial court found defendant guilty of aggravated kidnapping and aggravated battery. In so finding, the court stated that Herrera credibly testified that defendant grabbed and dragged F.A. down the street against his will. If defendant wanted the

tricycle for scrap, the court indicated he could have knocked the child off of it. Moreover, the court heard no evidence to support defendant's testimony that he was "scrapping." According to the court, it was reasonable to infer from the circumstances that defendant had the intent to secretly confine F.A against his will, and that defendant's guilty state of mind was shown when the police vehicle turned onto Herrera's block and defendant said "oh sh*t."

¶ 11 On appeal, defendant contends that his conviction for aggravated kidnapping should be reversed. He specifically maintains that the State failed to prove beyond a reasonable doubt that he intended to secretly confine F.A.

¶ 12 When a defendant challenges the sufficiency of the evidence to sustain a conviction, the standard of review is whether, after viewing the evidence in the light most favorable to the State, 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, 278-79 (2004). It is the responsibility of the trier of fact to resolve any inconsistencies and conflicts in the evidence, and to draw reasonable inferences therefrom. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). A criminal conviction will be reversed only if the evidence is so unsatisfactory as to raise a reasonable doubt of guilt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011).

¶ 13 As charged in this case, a person commits the offense of aggravated kidnapping when he knowingly by force or threat of imminent force carries another from one place to another with intent to secretly confine that other person against his will, and the victim is a child under the age of 13 years. 720 ILCS 5/10-1(a)(2); 10-2(a)(2) (West 2012). Defendant does not dispute that the victim was under the age of 13, maintaining only that the State failed to prove beyond a

reasonable doubt that he intended to secretly confine F.A. against his will. Intent may be proven through circumstantial evidence (*People v. Begay*, 377 Ill. App. 3d 417, 421 (2007)), and may be inferred from the defendant's conduct surrounding the act, and from the act itself (*People v. Phillips*, 392 Ill. App. 3d 243, 259 (2009)). Moreover, "a kidnapping conviction is not precluded by the brevity of the asportation or the limited distance of the movement." *People v. Ware*, 323 Ill. App. 3d 47, 54 (2001).

¶ 14 Viewing the evidence in the light most favorable to the State, as we must, we find it sufficient to prove beyond a reasonable doubt that defendant intended to secretly confine F.A. against his will. The evidence showed that when Herrera went into her home to get juice for the children playing outside, defendant emerged and grabbed F.A. while F.A. was on his tricycle. After hearing screams from the children, Herrera returned outside and noticed defendant grabbing F.A.'s shirt. Defendant dragged F.A. for several feet while F.A. held onto his tricycle. When Herrera asked defendant what he was doing with her son, he removed his hand from F.A.'s shoulder and continued walking. Herrera called the police, who detained defendant shortly after the incident. As the police transported defendant, he said "oh, sh*t," when they turned onto the subject block. Herrera positively identified defendant as the offender who grabbed and dragged her son. We thus agree with the trial court's conclusion that defendant's intent to secretly confine F.A. against his will can be inferred from the circumstances.

¶ 15 Our conclusion is consistent with *People v. Banks*, 344 Ill. App. 3d 590 (2003). In *Banks*, the defendant was convicted of aggravated kidnapping on evidence showing that he approached the victim in an alley and offered him money to clean out a nearby garage. As they walked down

the alley together, the defendant grabbed the victim's arm and started dragging him toward a gangway. After dragging the victim 10 feet, a friend of the victim confronted the defendant, and the defendant ran out of the alley. *Id*. at 592. We affirmed the kidnapping conviction, finding that the defendant intended to secretly confine the victim where he first enticed the victim to go down an alley, and then forced the victim by grabbing his arm and dragging him toward a gangway. *Id*. at 594. Similarly, in this case, evidence of defendant's intent to secretly confine F.A. can be inferred from his emergence onto the scene after Herrera went inside, his act of dragging F.A. down the sidewalk, and his release of F.A. only after Herrera screamed and came after him.

¶ 16 Nevertheless, defendant contests the trial court's findings that the evidence showed his intent to secretly confine F.A. against his will. Defendant specifically maintains that no evidence was presented regarding what he was doing before Herrera left the children alone, he may have been trying to remove F.A. from the bike in order to scrap it, and the remark he made as he was being returned to the scene by police sheds no light on why he believed he was being detained.

¶ 17 In contesting the trial court's findings of fact, defendant is essentially requesting this court to retry him. It is not the prerogative of this court to do so. *People v. Castillo*, 372 Ill. App. 3d 11, 20 (2007). As stated above, we will only reverse a criminal conviction if the evidence is so unsatisfactory as to raise a reasonable doubt of guilt. *Beauchamp*, 241 Ill. 2d 1, 8 (2011). We do not find this to be such a case, particularly where defendant's testimony at trial contradicts his argument on appeal that he was trying to steal the tricycle. Defendant testified that he finished work and walked down 63rd Street toward the garage he was staying in and did not pass F.A.'s house. He claimed that he never noticed the children playing outside, and never testified that he

was merely harassing the children or trying to take the tricycle for scrap. In fact, defendant denied that the entire encounter occurred.

¶ 18 In the alternative, defendant contends that his conviction for aggravated battery should be vacated as it was based on the same physical act as the aggravated kidnapping conviction.

¶ 19 Defendant concedes that he waived this issue because he did not properly preserve it below. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (stating that to preserve an issue for review, the defendant must both object at trial and raise the issue in a written motion for a new trial). Nevertheless, defendant maintains that we should review this issue for plain error. The plain error doctrine allows a reviewing court to consider unpreserved error when (1) an error occurs and the evidence is so closely balanced that the error alone threatens to tip the scales of justice against the defendant, regardless of the seriousness of the error; or (2) an error occurs and it is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 187 (2009). Defendant asserts that the second prong of the plain error analysis applies to this case as it is well established that "forfeited one-act, one-crime arguments are properly reviewed under the second prong of the plain-error rule because they implicate the integrity of the judicial process." *People v. Nunez*, 236 Ill. 2d 488, 493 (2010). However, application of the plain error doctrine first requires a determination as to whether any error occurred. *People v. Piatkowksi*, 225 Ill. 2d 551, 565 (2007).

¶ 20 Under the one-act, one-crime doctrine, multiple convictions may not be based on the same physical act. *People v. Miller*, 238 Ill. 2d 161, 165 (2010); *People v. King*, 66 Ill. 2d 551,

566 (1977). The one-act, one-crime rule presents a legal question subject to *de novo* review. *People v. Almond*, 2015 IL 113817, ¶ 47.

¶ 21 Defendant was charged with aggravated kidnapping in that he knowingly carried four-year-old F.A. by force or threat of imminent force, from one place to another, with the intent to secretly confine him against his will. 720 ILCS 5/10-2(a)(2) (West 2012). The aggravated battery charge alleged that defendant knowingly grabbed F.A. about the body while on a public sidewalk. 720 ILCS 5/12-3.05(c) (West 2012). These are different, separate acts which were charged and committed. The act of grabbing F.A. on the sidewalk supported aggravated battery on a public way, and the act of carrying/dragging him five or six feet down the sidewalk while he was still holding onto his tricycle with the intent to secretly confine him supported the aggravated kidnapping charge. The fact that the trial court made its findings for both counts in a somewhat conflated manner does not change the fact that two separate and distinct acts supported defendant's two convictions. This case is thus distinguishable from *People v. McFadden*, 2014 IL App (1st) 102939, *appeal allowed*, No. 117424 (May 28, 2014), relied on by defendant, where the defendant in that case was improperly convicted of multiple weapon offenses based on a single act of possessing a firearm. *Id*., ¶ 29. Here, we find that no error resulted from the imposition of two convictions based on two separate acts. Having concluded that there was no error, there can be no plain error.

¶ 22 In his reply brief, defendant contends for the first time that if this court finds that the aggravated battery was based on defendant's separate act of grabbing the victim, which we have found, then we should reverse that conviction for lack of sufficient evidence. Defendant

maintains that the State did not present any evidence regarding the initial grabbing of the victim where Herrera testified that defendant was already holding onto the victim when she came outside.

¶ 23 Generally, "[p]oints not raised in the defendant's initial brief are forfeited and cannot be raised in the reply brief." *People v. Jacobs*, 405 Ill. App. 3d 210, 218 (2010). Defendant acknowledges that he did not raise a reasonable doubt argument with respect to his aggravated battery conviction in his opening brief, but attempts to circumvent waiver by maintaining that his sufficiency argument is an appropriate response to the State's brief. See, *e.g.*, *People v. Whitfield*, 228 Ill. 2d 502, 514-15 (2007) (stating that Supreme Court Rule 341(j) permitted a defendant to raise a double jeopardy claim for the first time in his reply brief where it was raised in response to arguments advanced by the State).

¶ 24 We do not believe that defendant's sufficiency of the evidence argument regarding his aggravated battery conviction is an appropriate response to the State's brief, particularly where the State was merely responding to defendant's argument in his opening brief that his convictions for aggravated kidnapping and aggravated battery were based on the same physical act. Having not raised this sufficiency issue until filing his reply brief, defendant has denied the State an opportunity to respond and forfeited the issue. Therefore, we will not address defendant's contention that there was insufficient evidence to prove him guilty of aggravated battery beyond a reasonable doubt.

¶ 25 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 26 Affirmed.