2018 IL App (1st) 153630-U

SIXTH DIVISION
November 2, 2018

No. 1-15-3630

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the
	)	Circuit Court of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	13 CR 08757 (02)
	)	
ANTONIO PERRY,	)	
	)	
	)	Honorable Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The State proved defendant guilty beyond a reasonable doubt of aggravated kidnapping because the evidence showed that defendant secretly confined all three victims against their will while armed with a firearm; the trial court properly denied defendant's motion to quash arrest and suppress evidence where officers' warrantless entry and search of defendant's apartment was justified by exigent circumstances; defendant was not denied a fair trial where the court did not abuse its discretion in admitting other-crimes evidence, plain error was not applicable, and defendant's counsel was not ineffective; and defendant's 25-year sentence was not excessive; affirmed.

¶ 2 Defendant, Antonio Perry, was charged with, *inter alia*, aggravated kidnapping as a result of an unusual series of incidents that occurred on April 6, 2013, wherein defendant and his then-girlfriend/codefendant, Amber Cannella[1], believed that men who were hired to help them move out of their apartment had stolen money from them, and engaged in self-help to get the money back. Jerry Collins[2], another codefendant and defendant's cousin, also participated in the crimes. After simultaneous, severed jury trials with codefendant Cannella, defendant was convicted of three counts of aggravated kidnapping and unlawful use of a weapon by a felon (UUW-F), and sentenced to 25 years' imprisonment. Defendant appeals, arguing as follows: (1) the State failed to prove beyond a reasonable doubt that defendant secretly confined any of the victims, or asported one of the victims with intent to secretly confine while armed for the purposes of the offense of aggravated kidnapping; (2) the trial court erred in denying defendant's motion to quash and suppress because none of the exceptions to the warrant requirement applied; (3) the trial court's refusal to redact a prejudicial portion of defendant's statement to police violated defendant's right to a fair trial; and (4) defendant's 25-year sentence was excessive.

¶ 3 For the reasons that follow, we affirm defendant's convictions.

¶ 4 BACKGROUND

¶ 5 On April 6, 2013, defendant and Cannella were moving out of their apartment located at 6120 South Eberhart in Chicago. They hired Ray Scott to help them move and he brought his two nephews, Pierre Scott and Steven Scott, to assist. After Ray, Pierre, and Steven (collectively, the Scotts) moved a few items out of the apartment, some money allegedly went missing. Defendant, Cannella, and Collins attempted to get the money back in a variety of ways, such as threatening the Scotts with a gun and strip-searching them. On May 3, 2013, defendant

[1] Cannella is not a party to this appeal but has her own appeal (No. 1-16-0125) pending in this court. Most of the facts and portions of the analysis are the same for both appeals.

[2] Collins is not a party to this appeal but has his own appeal (No. 1-18-0526) pending in this court.

was charged by information with, *inter alia*, four counts of aggravated kidnapping, three counts of attempt armed robbery, three counts of aggravated unlawful restraint, and one count of UUW-F.

¶ 6 Pretrial Motions

¶ 7 At the outset of this case, defendant and Cannella were represented by the same private counsel, Patrick McClurkin. On October 28, 2013, defendant and Cannella filed a motion to quash arrest, search, and seizure without a warrant or probable cause, arguing that the 911 call that prompted the officers to arrive at the Eberhart apartment was based on false and deceptive information. The motion stated that the evidence suggested that Ray's wife, Samantha Scott, had made the 911 call at issue, and that she informed the emergency operator that Ray called her and stated that he was being held hostage and was being forced to withdraw money from the bank, but this information was not true because surveillance photos from the bank showed that Perry was not near Ray while they were at the bank. Further, the motion asserted that defendant and Cannella were arrested without probable cause and without a showing of exigent circumstances that would have justified the officers' warrantless search of the premises and seizure of a .45-caliber handgun, which the officers found underneath the bathroom rug in defendant's apartment. Collins, who was represented by separate counsel, also filed a motion to quash.

¶ 8 The trial court conducted a hearing on both motions to quash on July 2, 2014. Numerous witnesses testified at the hearing—some of whom were called by McClurkin and some of whom were called by Collins's counsel. McClurkin first called Michael Coley, who testified that on April 6, 2013, he was employed as a branch manager at Chase Bank at 6701 South Stony Island in Chicago. Coley identified several still photos of defendant and Ray in the bank lobby that were taken by the bank's surveillance cameras. Coley estimated that defendant and Ray were 20

to 25 feet away from one another. McClurkin asked Coley, "[I]s it your opinion that you had no knowledge of anybody in the bank at that time under duress[?]" and Coley responded, "Correct."

¶ 9 Collins's counsel next called Kevon Dobbins, who was 12 years old at the time of the incident. Dobbins testified that on the date at issue, he and Kyou Myles, who was also 12 years old, were with Collins "[t]o help [Perry] move." Collins was the boyfriend of Dobbins's mother. Dobbins testified that he and Myles stayed in the vehicle while Collins went into defendant's apartment. He never went into the apartment. Dobbins further testified that during the 10 minutes that he was sitting outside defendant's apartment, he did not see anything. Dobbins stated that after the police arrived, a female officer spoke to him.

¶ 10 McClurkin then called Barry Savage, who testified that he was an investigator/process server who had worked for McClurkin's firm on approximately 10 previous occasions. Savage stated that he was hired by McClurkin in this case to investigate the layout of defendant's apartment and take photos. Savage testified that he took the photos of the apartment in June 2014, which was the first time he had ever been in that apartment. Savage stated that he did not know what the apartment looked like on April 6, 2013, and thus could not say whether the photos he had taken accurately represented the layout of the apartment on the date at issue. However, Savage did not see any signs of recent remodeling at the apartment. McClurkin then briefly called Cannella to testify and she confirmed that the layout described by Savage was the exact same floor plan that existed in the apartment on the date of the incident. Cannella also testified that she had not been to the apartment since then.

¶ 11 Collins's counsel next called Officer Dale Caridine, Jr., and he was adopted as a witness by McClurkin. Officer Caridine testified that on April 6, 2013, he and his partner received a call over the radio that there was a kidnapping in progress at an address on Eberhart Avenue. Officer

Caridine stated that he was told that there were people being held at the Eberhart address while two other men went to the bank to get some money. Officer Caridine testified that while en route to the Eberhart address, he learned that the person who had initially called 911 was the significant other of one of the victims. Officer Caridine stated, "When the phone call came out, it came out that he was being taken to the bank against his will to get out some money, and that there were two people in the house that were being held hostage until they got back." Officer Caridine further acknowledged that at some point he was told that "the victim that was being taken to the bank had in fact, relayed to the 911 caller that he was in no danger and no fear for his safety at that time."

¶ 12 Officer Caridine testified that he and other officers entered the Eberhart property through the rear basement door. The officer stated that all of the officers present entered the home at the same time and through the same door. Officer Caridine testified that they knocked on the door and Cannella answered. Then, all the officers "proceeded in through the rear" and "went to the front where everybody else was *** in the main, common area *** to try to find out what was going on." Officer Caridine testified that prior to entering the house, he did not see anyone inside or outside the house who had a weapon or was pointing a weapon at anyone else. When the officers went to the front of the apartment, they found four people. Officer Caridine testified that when he first saw these four people, no one was being restrained and there were no weapons or guns pointed at anyone. He stated that no one appeared to be in danger when he first observed them. However, Officer Caridine testified that he could tell something was wrong upon entering the apartment because two of the individuals, Pierre and Steven, "refused to make any eye contact with [the officers], and then they were acting as if they were afraid." The officers did not initially place anyone under arrest, but detained everybody until they found out what was going

on. Pierre and Steven would not answer any of the officers' questions. Cannella and Collins told the officers that there was nothing going on and that they were just waiting for their friends to return. Officer Caridine testified that once defendant and Ray returned from the bank, Ray told the officers that defendant and Cannella were in the process of moving and that some money went missing. Ray also stated that Collins held the victims at gunpoint while he was ordered to go to the bank with defendant to get money from the ATM. Officer Caridine testified that, at this point, the officers were getting information "a little bit here and a little bit there" and that the officers waited until everyone returned to the apartment "to try and get clarification on what happened." Officer Caridine testified that he came to learn that Cannella and Collins stayed at the apartment to hold Pierre and Steven at gunpoint while defendant and Ray went to the bank to retrieve money. Officer Caridine explained that he received this information from the Office of Emergency Management and Communications (OEMC) and from Ray after he returned to the apartment.

¶ 13 Officer Caridine testified that upon entering the apartment, he did not see any guns, knives, or other weapons in anyone's possession. Officer Caridine did not see any guns or other weapons within the reach of the suspects in the apartment, but he and his partner "observe[d], on the table, which was maybe [5] feet from where everyone was standing, [2] clips with [6] rounds each, a box of Remington bullets, live Remington bullets containing 12 bullets, and [3] bags of marijuana." Officer Caridine testified that he first observed the gun parts on the table after everyone returned from the bank. Officer Caridine testified that when Ray returned from the bank, he was "adamant that there was a gun in the house." Officer Caridine testified that Ray had stated that prior to the officers' entry, Collins had been in and out of the bathroom and that that was a place the officers might want to check. Thereafter, Officer Russell "retrieved the weapon

from inside of the bathroom, and then that's when everybody was placed into custody." Officer Caridine clarified that it was not until after the officers spoke with Ray, after the gun was found and the ammunition and cannabis were recovered, that defendant, Cannella, and Collins were placed under arrest. Prior to finding the gun, the four individuals in the apartment were detained without handcuffs so that the officers could determine what was going on. When asked if he believed there were exigent circumstances at the time the officers entered the apartment, Officer Caridine responded, "Yes, based on the 911 call. There was someone held at gunpoint, so, yes, there was exigent circumstances." Officer Caridine also testified that the officers entered the apartment with their guns drawn, but holstered their weapons once they believed the area was secure.

¶ 14 Next, Collins's counsel called Sergeant Yolanda Irvin, who testified that on April 6, 2013, she responded to a call at the Eberhart apartment. Sergeant Irvin testified that no one was arrested until 20 to 30 minutes after she arrived on the scene. Sergeant Irvin also testified that she spoke with a "kid" that was sitting in a van parked outside the Eberhart apartment who told her that "he was just waiting on his dad."

¶ 15 Collins's counsel also called Officer Clifford Russell, who stated that on the date at issue he first responded to the apartment on Eberhart, but as he pulled up, he "monitored a flash message and then went to the Chase [B]ank." Upon arriving at the bank, he observed a white work van with two occupants inside. While still at the bank, the two occupants were ordered out of the van by Officer Russell and Officer Paul Major. Officer Russell stated that based on information received from dispatch through OEMC, he knew one of the occupants was the alleged victim and the other was the alleged offender, but he did not know who was who. Officer Russell further testified that "because there were implications that a gun could be

involved, both individuals were immediately patted down." The two van occupants were detained, placed in handcuffs, and taken from the bank to the Eberhart apartment. Defendant remained in handcuffs for the duration of the events in question. Officer Russell searched the van, but did not find a gun, restraints, rope, duct tape, or anything that would insinuate a hostage or kidnapping situation. Officer Russell denied seeing Cannella outside the apartment when they arrived back there.

¶ 16 Officer Russell testified that once inside the apartment he went into the bathroom while everyone else was in the front living room area. He estimated that the bathroom was approximately 8 to 10 feet from the living room area. Officer Russell testified that while in the bathroom, "after noticing a bulge in the rug that was on the floor, I pulled the rug back and observed a semiautomatic handgun[,]" which he determined was "a .45-caliber Chief's Special, loaded with three live .45-caliber rounds in the magazine." Officer Russell stated that the gun was found before defendant, Cannella, and Collins were placed under arrest.

¶ 17 The defense then recalled Cannella, who testified that she never opened the backdoor for the officers because she was outside when they arrived. Cannella also testified that the two doors at the rear of the apartment were both open because they were in the process of moving.

¶ 18 In closing, the State argued that exigent circumstances existed because the officers were responding to a call of a person with a gun and hostages and that the officers had probable cause to make the arrests after speaking with everyone involved. Defendant's counsel argued that there were no exigent circumstances because there was no indication that anyone was held against their will.

¶ 19 In its ruling, the court noted that there was no doubt that entry here was made without a warrant, and that it was unclear whether Cannella consented to the officers' entry. The court also

acknowledged that the 911 caller was not truly anonymous because she was identified as a victim's wife or girlfriend. The court stated that there were two scenes involved here—one at the Eberhart apartment and one at the Chase Bank parking lot. The court found that the officers properly stopped the van in the parking lot because the information that the officers had received regarding a person held hostage at gunpoint was corroborated. The court also stated that the officers received conflicting information and were investigating a serious crime, and thus a limited investigative detention was justified. Specifically, the court found that defendant's stop in the bank parking lot was "justified based on the anonymous tip, based on corroborative information and predictive information." The court ruled that this was a *Terry* stop and that further investigation was mandated. Turning to the scene at the Eberhart apartment, the court stated that at the time the officers entered the apartment, "this was a limited investigative detention" and there was no doubt that the individuals inside were "seized." The court further stated that the individuals in the apartment were not put under arrest right away and that the investigative detention may have lasted 10 or 15 minutes, which was not unreasonable. The court explained that perhaps a 20 or 25 minute stop of a car might be unreasonable, but that when officers are investigating a potential hostage situation, 15 minutes is not unreasonable. The court further stated that although one of the officers initially had the subjective belief that something was not right when Pierre and Steven would not make eye contact, once Ray was brought to the Eberhart apartment and laid out exactly what occurred, the officers had probable cause to place the individuals under arrest. The court acknowledged that:

> "While there is some inconsistent testimony with regard to whether the gun or a gun was found either before or after the individuals were placed under arrest, I don't believe it's relevant to my determination[] [b]ecause one way or another, I believe once

> the officers sorted through the information and had reason to believe that the three victims were, in fact, held against their presence and one of them was taken from one location to another, I believe there is probable cause to arrest."

The court ultimately denied the motions to quash, stating that it found the stops were reasonable, the seizures were reasonable, and the probable cause was clear at the time that the offenders were actually placed under arrest.

¶ 20 On October 20, 2014, the State filed a motion to disqualify McClurkin from representing both defendant and Cannella. Also on that date, McClurkin filed a motion to sever, arguing that the defenses of defendant and Canella were antagonistic to one another. Thereafter, the public defender's office was appointed to represent defendant and McClurkin continued to represent Cannella.

¶ 21 On August 19, 2015, defendant filed a motion *in limine* to bar the use of certain hearsay statements. Specifically, defendant's motion sought to exclude part of defendant's statement to Sergeant Irvin. Defendant argued that part of his statement—"I'll let you know where I got the gun from if we can make a deal, cause officers told me they would help me before and I went to jail."—was a hearsay statement that suggested prior bad acts and was more prejudicial than probative.

¶ 22 Prior to trial, the court denied defendant's motion *in limine*, stating that defendant's statement is "basically him attempting to negotiate, and he wants his deal up front." The court explained that "The mere reference that he went to jail before [does not] necessarily mean over what type of case, or what he might have [done] or not done." The court denied the defense's request to sever the problematic portion of defendant's statement but the court found it was "kind of hard to sever that part of the statement out because he's making a conditional offer that he's

going to give up some information to the police and the condition of it is he's got to give up a promise up front." In determining that the whole statement would be admitted, the court recognized that it would be difficult to provide context if a portion of the statement was removed, and ultimately recognized, "This is the defendant's own words. It is not the words of someone else." The court cautioned that neither side should overly highlight this issue, and stressed to the State that he did not want to see this issue over-emphasized.

¶ 23 Jury Trial

¶ 24 Defendant's and Cannella's cases proceeded to simultaneous trials before two separate juries on August 21, 2015. The State nol-prossed the charges of attempt armed robbery and aggravated unlawful restraint. The State first called Ray Scott, who testified that he was a contractor who rehabbed houses, a landlord, and someone who did side jobs, such as moving, and that he was married to Samantha Scott. Ray had a white cargo van that he used for work. Ray stated that prior to April 6, 2013, he had moved Cannella a couple times and that his nephews Pierre and Steven also helped then as they did on that date. On the date at issue, Ray arrived at the apartment around 8:30 a.m., parked his van in the alley behind the apartment, and he and his nephews entered through a door in a gangway on the side of the building. Ray did not see anyone else in the apartment at that time. Ray and his nephews then took two pieces of a sectional sofa outside to his van and when they returned inside, Cannella said that there was some money[3] missing. Ray testified that defendant then came down the hall holding a gun, which he "clicked" or chambered the bullet. Ray stated that Cannella then locked the door. Ray further testified that defendant held the gun with a straight, outstretched arm and moved it

[3] We note that in defendant's brief, he states that "Perry and Cannella accused Ray and his nephews of stealing money from the pocket of a pair of pants on a nearby chair" and cites to two pages in the record for support. However, after review of the cited record pages, we find no indication that Ray or Steven testified that the money was allegedly stolen from "the pocket of a pair of pants on a nearby chair." Thus, we are unsure from what source this supposed testimony stems.

horizontally from side to side while pointing it at Ray and his nephews. Ray stated that defendant told him and his nephews to move into the corner and they complied. Ray testified that Cannella stated, "well, they got the money what you do is just search them down [and] strip them." Ray stated, "He told us to strip and we stripped." No money was found on Ray or his nephews.

¶ 25 Ray testified that defendant then told Cannella to call someone, and he could hear Cannella saying things like "how long [are you] going to be, where you at, where are you at now, how long are you going to take, what's going on?" Ray testified that defendant told them that he had someone coming over there who knew how to search people and take care of business. Ray stated that Cannella suggested that maybe he and his nephews had put the money in the van, so she and Ray went out to the van and searched it. Defendant stayed in the basement holding the gun on Ray's nephews. Ray testified that he and Cannella searched the van but did not find any money. Then, Cannella went back to the basement and Ray stayed outside and called his wife. Ray told his wife that there was a lot going on, that they were "acting strange over here," and that if she did not hear back from him to call the police to the apartment. Ray then went back into the apartment where his nephews still were, but there had been a change in the atmosphere. Ray explained that the situation seemed to have cooled down, but was not totally diffused because defendant still had the gun and would not let his nephews leave. Ray testified that things escalated again when Collins[4] arrived and the door to the apartment was re-locked. Ray stated that defendant gave Collins the gun and Collins tried to click the gun to chamber the bullet, but because a bullet was already chambered, the gun jammed. Collins then handed the gun back to defendant, who unjammed it, and gave it back to Collins. Ray testified that while holding the gun, Collins stated that "somebody is going to tell something up in here." Ray also

[4] Ray did not know Collins's name, but identified him from a photograph.

testified that he heard Collins ask defendant to get him some hangers and some rope. Then, Ray told defendant that if this is just about money that Ray would take defendant to the bank to get some of Ray's money. Ray testified that defendant accepted this offer and they walked out the back door. Ray then drove defendant to the bank in the back of his van. At this point, Cannella and Collins remained at the apartment with his nephews. Ray stated that when he and defendant left for the bank, Collins still had the gun.

¶ 26 As Ray and defendant were driving to the bank, Ray hit redial on his phone and called his wife. Ray did not actually talk to his wife during the beginning of this call but kept his phone in his pocket so that his wife could hear defendant give him directions to the bank. Ray testified that when they got to the Chase Bank that was about one mile from the apartment, he parked the van and walked into the bank, with defendant stalling behind him. Ray testified that he was just buying time and went up to the counter like he was getting money out, even though he was not. Ray stated that his phone was on the call with his wife the whole time, and that once he observed defendant stalling while inside the bank, Ray took his phone out of his pocket and started talking directly to his wife. Ray told his wife that he was at the bank, but to "make sure you get the police over [to] the house." Ray's wife had already called the police. Ray testified that he did not ever intend to give defendant money and that he was just trying to get out of the apartment so that he could get help. At trial, Ray identified numerous photos of him and defendant at the bank.

¶ 27 Ray further stated that he then saw the police coming around the corner, so he and defendant left the bank and entered the van. As they were pulling out of the parking spot, the police arrived and Ray drove straight towards the police. Ray stated that he jumped out of the van at the same time one of the officers exited his vehicle, and the officer pointed his gun at Ray

and defendant. Ray testified that he and defendant were detained and taken to the Eberhart apartment. When they got to the apartment, Ray saw his nephews in the corner and observed that they were not talking to the police, so Ray told them to tell the police what was going on. Ray testified that Cannella told the police that there was not a gun in the apartment, but another officer found a gun as she was saying this. Ray recognized the recovered gun as the one that had been pointed at him earlier.

¶ 28 On cross-examination, Ray testified that after he was strip-searched, defendant and Cannella returned his wallet, his money, and his phone to him. Ray also testified that after he returned inside the apartment after calling his wife, he and his nephews did not start moving items again. Ray stated that neither defendant, Cannella, nor Collins ordered him to go to the bank. Ray testified that upon leaving the bank, defendant did not ask where the money that Ray purportedly withdrew was. Ray confirmed that the officers had placed both he and defendant in handcuffs before taking them to the apartment. Ray stated that the police found the gun in the apartment after he got back there. He denied ever telling the police where to find the gun and denied telling them to specifically look in the bathroom.

¶ 29 The State next called Officer Caridine, who testified that on April 6, 2013, he and his partner, Officer Gregory Petit, were on routine patrol when they received a call over the radio stating that some people were being held hostage at gunpoint in the basement apartment at 6120 South Eberhart. When the officers arrived at the apartment, there were several other officers already there. Officer Caridine stated that due to the nature of the call, *i.e.*, a person with a gun, the officers drew their weapons and knocked on the basement door. Cannella answered the door and the officers entered the basement unit. Officer Caridine testified that the officers entered through the rear of the apartment and moved down a long hallway, which had bedrooms on one

side, until they got to the living room/common area, which was in the front of the apartment. In addition to Cannella, Officer Caridine observed three males in the common area—Pierre and Steven were sitting on stools and Collins was standing. Officer Caridine testified that he did not ask any of the individuals any questions, but overheard some of the questions his fellow officers asked and heard some of the responses given by Cannella and Collins. Officer Caridine stated that he did not hear Pierre or Steven respond to any questions and described them as "a little startled" and not making eye contact with the officers. Officer Caridine stated that while at the apartment, Sergeant Gray, who was one of his sergeants in the Third District, arrived with defendant and Ray. Officer Caridine further stated that Ray "was very adamant that there was a weapon in the house," which prompted the officers to search for it. Officer Caridine started his search toward the back bedroom and Officer Petit drew his attention to the coffee table in the common area at the front of the apartment, where there was a box of 10 Remington .45-caliber bullets and 2 magazine clips, with 6 live rounds in each. The bullets and the clips were then recovered by Officer Petit and inventoried. Officer Caridine testified that Officer Russell also recovered a handgun.

¶ 30 On cross-examination, Officer Caridine testified that upon arriving at the apartment another officer knocked on the door and Cannella let the officers in. Officer Caridine also stated that Pierre and Steven did not speak to police during the entire time the police were present at the apartment, even after Ray arrived. Officer Caridine confirmed that Ray told the officers that they might want to look in the bathroom for the gun. On redirect examination, Officer Caridine explained that Ray had told some of the other officers "to maybe look in the bathroom" because he saw one of the offenders walking in and out of there.

¶ 31 Next, the State called Steven Scott, one of Ray's nephews. Steven testified that he was currently 30 years old and incarcerated in the Illinois Department of Corrections. He was serving time for a 2013 burglary, a 2014 escape from electronic monitoring, and a 2014 possession of a controlled substance. Steven also had a prior felony conviction for manufacture or delivery of a controlled substance. Steven confirmed that Ray was his uncle and that he and his younger brother, Pierre, helped Ray with moving and contracting work. Steven had helped Ray move Cannella before, but Pierre had not. Steven testified that at the beginning of the move, everything was normal until defendant said that some money went missing, went to the back of the apartment, and came out with a "chrome" gun. Steven testified that Cannella locked the doors. Steven also stated that it was Ray's idea for them to be strip-searched. Steven, Pierre, and Ray all took their clothes off but no money was found. Steven testified that it was also Ray's suggestion to search the van but that no search was done. Steven stated that no one left the apartment until Ray and defendant went to the bank. Collins came to the apartment, pointed the gun at them, and then Ray and defendant left for the bank. Steven testified that Collins said "if the money [doesn't] come up somebody is going to have to go" and "he liked hurting people." Steven testified that while his uncle and defendant went to the bank, he and Pierre stayed in the apartment while Collins continued to point the gun at them. When asked if they stayed there voluntarily, Steven responded, "They told us we couldn't go nowhere." When asked what happened when the police arrived at the apartment, Steven stated, "she ran to the back and put the gun up, put the gun in the bathroom somewhere, came back out, and she opened the door for the police and the police came in." Steven also testified that there was "cocaine, scale, weed, and everything on the table, baggies." Steven testified that he and his brother were scared and did not speak to police because Collins told them not to.

¶ 32 On cross-examination, Steven clarified that he did not "remember" Ray and Cannella leaving the apartment to search the van. Steven testified that they did not resume moving items after the strip-search was done. Steven denied ever telling the police that after the strip-search, things had cooled down and they went back to moving the furniture.

¶ 33 The State next called Jennifer Barrett, an employee of the Illinois State Police at the Forensic Science Center in Chicago, who testified that she was a forensic scientist specializing in latent finger prints. Defendant's counsel stipulated to Barrett testifying as an expert in the field of latent print examinations. Barrett stated that after examining one pistol, three live cartridges, and one magazine, "There were not any latent prints suitable for comparison on any of these items." Because of this, Barrett was not able to proceed with her identification analysis and could not say whether defendant touched the gun at any point.

¶ 34 Next, the State called Sergeant Charles Gray, who testified that on April 6, 2013, he received a dispatch around 11 a.m., which took him to the bank on 67th and Stony Island. Upon arrival, Sergeant Gray saw a white van with two men inside that was trying to leave the parking lot. He and officers in other squad cars pulled up to the van, drew their weapons, and ordered the men out of the van. Ray was in the driver seat and defendant in the passenger seat. Sergeant Gray testified that upon arriving at the Eberhart apartment, he entered through the back from the alley. He further stated that Pierre, Steven, Cannella, defendant and multiple officers were already there. Sergeant Gray brought Ray into the apartment with him. Sergeant Gray testified that he was in the apartment during the officers' search. Sergeant Gray further testified that after speaking with Officer Russell, he went into the bathroom and saw the gun under a rug that Officer Russell had lifted. Sergeant Gray was asked what else he learned was recovered from the apartment in addition to the gun and the sergeant responded, "I learned there were some

magazines from that weapon recovered and some narcotics." Defendant's counsel objected and the objection was sustained. Sergeant Gray testified that the magazines that were recovered from the coffee table would have fit the gun that was recovered from the bathroom.

¶ 35 On cross-examination, Sergeant Gray testified that he searched defendant and did not find any weapons on his person. Sergeant Gray also testified that both defendant and Ray were detained, searched, and placed in handcuffs. Sergeant Gray admitted that he never saw defendant in the bathroom and never saw him touch the gun or the magazines recovered from the coffee table.

¶ 36 The State next called Sergeant Yolanda Irvin, who testified that on April 6, 2013, she was at the Third District police station, where defendant was in custody in one of the processing rooms. Sergeant Irvin stated that defendant called out, " 'White shirt,' " which was a reference to the white shirt she was wearing that is common to all police supervisors. The sergeant testified, "When I stepped into the room, [defendant] started talking about could he get a break and basically could we make a deal, and he had a dope house for us if we was able to make a deal, and I told him we couldn't make any deals." When asked if defendant mentioned Cannella, Sergeant Irvin responded, "He said basically that he would take the whole blame, that she did nothing, she's the mother of his son and basically that everything -- we could put everything on him instead of her because she didn't do anything." When asked what she stated to defendant in response, Sergeant Irvin testified:

> "I told him -- I said, 'I can't guarantee anything.' And then I said, 'By the way, where did you-all get the guns from?' And he said -- basically, he said, 'You tell me you can guarantee me a deal, I can tell you where I got the gun from.' He said, basically,

> 'Before this,' he said, 'I was promised something by officers and they didn't follow through on it and I ended up going to jail.' "

Sergeant Irvin further testified that she did not make a deal with defendant and he stopped talking when she informed him there would not be a deal.

¶ 37 On cross-examination, Sergeant Irvin testified that she did not remember the exact words that defendant used when he spoke to her in the processing room. Sergeant Irvin also confirmed that she never asked defendant to write down what happened.

¶ 38 The State introduced into evidence a certified statement of conviction indicating that defendant was convicted of the offense of possession of a controlled substance on April 7, 2006, in case number 05 CR 24877.

¶ 39 Next, the State called Ray's wife, Samantha Scott, who testified that on the morning of April 6, 2013, Ray dropped her off at work and his two nephews were in the car because they often worked with him. Samantha testified that Ray called her approximately 45 minutes later and they had a conversation in which Ray told her what was going on and where he was. Samantha further testified that after a few moments she called his phone but was unable to reach him. Samantha stated that she was very concerned so she called the police. After several attempts to reach him, Ray eventually called Samantha but did not speak to her when she answered the phone. Samantha testified that although Ray was not talking to her, she could hear him talking to somebody and could hear the revving of an engine. Samantha stated that shortly thereafter, Ray got on the phone and told her where he was. Samantha then called the police again immediately. Samantha testified that during these two phone calls to the police, she told them what Ray had told her.

¶ 40 During cross-examination, Samantha testified that she was never at the Eberhart apartment and did not see anything that happened there. Similarly, she confirmed she was not at the Chase Bank on Stony Island and did not see what happened there.

¶ 41 Thereafter, the State rested its case-in-chief. The defense presented a stipulation from Detective Dale Potter, who, if called to testify, would have stated that on April 6, 2013, he was working for the Chicago Police Department and interviewed Ray regarding this case. Detective Potter would have testified that during the interview, Ray told him that, " 'After Cannella searched his van and did not find any money, things started to cool down and he started moving stuff again, but [defendant] was still keeping at least one nephew in the apartment.' " Detective Potter also would have testified that he interviewed Steven regarding the events on that date, and Steven stated that defendant told them to put their clothes back on, defendant and Cannella started to calm down, and he, Pierre, and Ray were told to continue to move items.

¶ 42 The defense made a motion for directed finding, which was denied, and then rested. After deliberations, the jury found defendant guilty of three counts of aggravated kidnapping for Ray, Pierre, and Steven, and one count of UUW-F.

¶ 43 Posttrial Motion and Sentencing

¶ 44 On November 12, 2015, defendant filed a motion for a new trial, arguing, in relevant part, that the court erred in denying defendant's pretrial motion to quash and suppress, and that McClurkin provided ineffective assistance by arguing incorrect legal bases in the motion to quash and suppress. Defendant's posttrial motion also argued that the court erred in denying defendant's motion *in limine*.

¶ 45 Also on that date, the court heard argument on defendant's posttrial motion and ultimately denied it. The court stated that it did not believe that defendant's motion to quash and

suppress "had any merit whatsoever" because the police officers were responding to a call regarding people being held hostage. The court explained, "If someone is being held at gunpoint, *** if that's not exigent circumstances, I don't know what is." Regarding the admission of defendant's entire statement to Sergeant Irvin, the court found that there was no proof of other crimes "discussed or even inferred" during trial. The court pointed out, "There was no argument with regard to this or any type of propensity or prior bad acts and I think standing alone it did not prejudice the [d]efendant to such a regard that he did not receive a fair trial in this matter."

¶ 46 The matter proceeded to a sentencing hearing, where the trial court heard evidence in aggravation and mitigation and defendant spoke in allocution. The court explained that defendant's conviction in this case carried a possible sentence of 21 to 45 years' imprisonment. The court stated the reasoning for its sentencing decision as follows:

> "I agree with [defense counsel] that this turned out to be a dispute over money. There's no information that -- at least in my belief that this was set up beforehand, it was a preplanned scam. They hired the Scotts and the Scotts were to move [defendant] and Miss Cannella from one location to another. They've had a former business relationship before. When the money came up missing, obviously instead of rationally talking about it or adjusting rates for the moving fees, apparently the law on the street came out instead of the law that should be followed and the gun was brought into the equation.
>
> [Defendant] was a direct actor in this. [Defendant] and Miss Cannella were the ones originally on the scene. The gun was brought out. The people were held and they were held against their will. [Ray] was allowed to go outside with Miss Cannella. [Defendant] kept the other two individuals inside the house. A third individual was

called to help secure -- at least according to the testimony here to secure the two younger Scotts and then [defendant] himself went to a bank with [Ray] in order for him to withdraw money. To say that that was voluntary is absolutely not true. *** [H]e kept an open line. His wife heard what was going on and that's when the police officers arrived. This case would not have happened but for [defendant].

While I believe Miss Cannella was involved, I believe her role was a little less than [defendant]. [Defendant] set this into motion and frankly the only reason that it stopped was because the police arrived at the bank where [defendant] was with [Ray]. Regardless of how it started[,] it escalated and there's no doubt in my mind that this verdict was, in fact, a just verdict finding the [d]efendant guilty of aggravated kidnapping.

As I stated, I have a wide range of sentencing possibilities here. I don't think a sentence at the upper extreme of the parameters would do anyone justice. I think it would be a cop out for me to sentence him to 45 years. He does have significant mitigation. He has a lack of criminal background. Apparently he -- albeit he's in his 30s now [and] he did not have family *** that most of us had or would desire to have when he was growing up, but his attitude that day and his disregard for anything legal is something that concerns me.

I take into consideration all the statutory aggravating factors and mitigation and aggravation. I take into consideration non-statutory factors. I take into consideration the [d]efendant's statement, as I stated before, the lack of criminal background. I don't believe the minimum sentence is what is required in this matter but I think a just sentence in this matter based on the [d]efendant's involvement in this case and what escalated

particularly taking one person to one place from the apartment to the bank in order to get money out is, in fact, something that I cannot ignore. Defendant is going to be sentenced to 25 years Illinois Department of Corrections."

¶ 47 The defense's oral motion to reconsider sentence was denied and this appeal followed. In denying the motion to reconsider sentence, the court noted that defendant's sentence was well within the applicable sentencing range, and was, in fact, near the bottom of that range.

¶ 48 ANALYSIS

¶ 49 Defendant raises the following arguments on appeal: (1) the State failed to prove beyond a reasonable doubt that defendant secretly confined any of the Scotts or asported Ray to the bank with the intent to secretly confine while armed for the purposes of aggravated kidnapping; (2) the trial court erred in denying defendant's motion to quash because no exception to the warrant requirement justified the officers' actions; (3) the trial court's refusal to redact a prejudicial portion of defendant's statement to Sergeant Irvin violated his right to a fair trial; and (4) defendant's 25-year sentence was excessive. We address each issue in turn.

¶ 50 Sufficiency of the Evidence

¶ 51 Defendant first argues that the State failed to prove beyond a reasonable doubt that he secretly confined any of the Scotts or asported Ray to the bank with the intent to secretly confine while armed for the purposes of aggravated kidnapping. The State prosecuted defendant on four counts of aggravated kidnapping. Three of the counts alleged that defendant knowingly and secretly confined Ray (count 1), Pierre (count 2), and Steven (count 3) against their will (secret confinement kidnapping) and that he committed the offense of kidnapping while armed with a firearm pursuant to section 10-2(a)(6) of the Criminal Code of 2012 (Code) (720 ILCS 5/10-2(a)(6) (West 2012)). The fourth count alleged that defendant "knowingly by force or threat of

imminent force carried [Ray] from one place to another with intent secretly to confine [Ray] against his will" (asportation kidnapping) while armed with a firearm pursuant to section 10-2(a)(6) of the Code. *Id.* The State proceeded with alternate theories of kidnapping as to Ray; thus, the jury convicted defendant of the secret confinement kidnapping of Ray or the asportation kidnapping of Ray, but not both. As a result, defendant was ultimately convicted of three counts of aggravated kidnapping and one count of UUW-F.

¶ 52 "When considering a challenge to the sufficiency of the evidence, a reviewing court must determine whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *People v. Sumler*, 2015 IL App (1st) 123381, ¶ 54. The trier of fact determines witness credibility and the weight to be afforded their testimony, resolves any conflicts in the evidence, and draws reasonable inferences from the evidence. *Id.* As a court of review, we do not substitute our judgment for that of the trier of fact and we must construe all reasonable inferences from the evidence in favor of the prosecution. *Id.* "We will not set aside a criminal conviction unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt." *Id.*

¶ 53 A person commits the offense of secret confinement kidnapping when he knowingly and secretly confines someone against his will (720 ILCS 5/10-1(a)(1) (West 2012)), and commits asportation kidnapping when he by force or threat of imminent force carries someone from one place to another with intent to secretly confine that other person against his will (720 ILCS 5/10-1(a)(2) (West 2012)). A person is guilty of aggravated kidnapping when he commits the felony of kidnapping while armed with a firearm. 720 ILCS 5/10-2(a)(6) (West 2012).

¶ 54 Defendant argues that the State did not prove that he secretly confined Ray, Pierre, and Steven in the apartment (count 1, count 2, and count 3, respectively), or forcibly carried Ray to the bank with the intent to secretly confine him (count 4). Although the statute does not define secret confinement, our supreme court has defined the term "secret" to mean "concealed, hidden, or not made public." *People v. Gonzalez*, 239 Ill. 2d 471, 479 (2011). The term "confinement" has been defined as "the act of imprisoning or restraining someone." *Id*. The secret confinement element of kidnapping may be shown by evidence of the secrecy of the confinement or the secrecy of the location of the confinement. *Id.*

¶ 55 At the outset of this issue, we find it pertinent to emphasize the unusual nature of this case. The facts before us do not represent what one would likely envision as a typical kidnapping. Nonetheless, a close review of the evidence presented at trial, viewed in a light most favorable to the State, results in our determination that a rational trier of fact could have found the State proved defendant guilty of the aggravated kidnapping of Ray, Pierre, and Steven. Additionally, it is worthwhile to note that "in weighing evidence, the trier of fact is not required to disregard inferences which flow normally from the evidence before it, nor need it search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt." *People v. Jackson*, 232 Ill. 2d 246, 281 (2009).

¶ 56 In order to meet its burden of proving defendant guilty of aggravated secret confinement kidnapping, the State needed only to show that defendant secretly confined Ray, Pierre, and Steven against their will while armed with a firearm. 720 ILCS 5/10-2(a)(6) (West 2012). The following evidence presented at trial was sufficient to meet the State's burden. Ray testified that on April 6, 2013, he and his nephews, Pierre and Steven, went to the Eberhart apartment to help defendant and Cannella move, which he had done on previous occasions. Ray testified that after

moving two pieces of the sectional sofa out into his van, he and his nephews returned inside and Cannella said there was some money missing. Ray stated that he asked what she was talking about, and "[t]hat's when this individual, I don't know his name, but he come down the hallway with a gun inside his hand. [Cannella] goes towards the door. When he come[s] out and clicks the gun, she locks the door." Ray subsequently identified this unnamed individual as defendant. Ray explained that the gun was loaded and when defendant clicked the gun, he was chambering a bullet. Ray testified that defendant held the gun in his hand, with an outstretched arm, while moving the gun horizontally from side to side and pointing it at Ray and his nephews. Ray testified that at defendant's direction, he and his nephews moved into the corner of the living room because "[defendant] had a gun on us." Ray further testified that when defendant told them to move to the corner, Cannella was standing by the door and stated, "[W]ell, they got the money what you do is just search them down[,] strip them." Defendant told Ray and his nephews to strip and they complied by taking off all of their clothes. Ray testified that defendant and Cannella did not find any money on them besides Ray's own personal money. Ray also testified that after the strip search, defendant kept Ray and his nephews in the corner and directed Cannella to call someone. Ray overheard Cannella's side of the call and could hear her asking where this person was and when they were going to be at the apartment. Defendant then told Ray and his nephews that this person who was coming over "know[s] how to really search [] people down and take care of some business." Thereafter, Cannella and Ray went outside to search his van.

¶ 57 Steven similarly testified that once he, Ray, and Pierre moved the couch out to the van, "[t]hey [said] some money came up missing, and the person in the room cocked the gun back." Steven later identified this person as defendant. Steven testified that defendant, while armed

with a chrome gun, shut the door to the apartment and Cannella locked the door. Steven testified that he, Ray and Pierre were searched. Contrary to Ray, Steven testified that it was Ray's idea to conduct the strip search. Steven testified that while he removed his clothes, defendant had the gun in his hand.

¶ 58 Defendant makes much of the fact that subsequent to the above events, Ray was able to call his wife on two occasions and eventually inform her that he was at the bank, and that his nephews were being held at gunpoint at the apartment. Defendant asserts that as a result of Ray's ability to communicate with his wife, the State did not meet its burden of proving the element of secret confinement because the Scotts' location was not secret and the fact that they were being confined against their will was not secret. The State responds, and we agree, that a critical flaw in defendant's argument is that the Scotts' actual confinement was secret when the Scotts were locked inside the apartment at gunpoint and strip-searched. The State argues that even if Samantha knew the Scotts' location, she did not know they were being held against their will.

¶ 59 After review of the above testimony from Ray and Steven, we find that a rational trier of fact could have determined that the State proved the element of secret confinement beyond a reasonable doubt. Although Ray testified that it was defendant's idea for the strip search, and Steven testified that it was Ray's, it is well settled that "[c]onflicting testimony is to be resolved by the trier of fact." *People v. Quintana*, 332 Ill. App. 3d 96, 104 (2002). Further, although Samantha knew from the outset that Ray, Pierre, and Steven were at the Eberhart apartment that morning to help move, she was unaware that after returning inside from moving the sectional couch, they were being confined and strip-searched at gunpoint, rendering secret the fact of their confinement. We reiterate that the secret confinement element of kidnapping may be shown by

evidence of the secrecy of the confinement *or* the secrecy of the location of the confinement. (Emphasis added.) *Gonzalez*, 239 Ill. 2d at 479. The evidence established that Ray and his nephews were confined against their will, *i.e.* at gunpoint, inside defendant's apartment, specifically in the corner of the living room, and that their confinement was secret, which was sufficient to lead a rational trier of fact to convict defendant of aggravated kidnapping pursuant to section 10-2(a)(6) of the Code. 720 ILCS 5/10-2(a)(6) (West 2012). We note that the evidence also established that the Scotts' confinement against their will subsequently became known to Samantha and eventually the police. However, in Illinois, unlike a number of states[5], there is no durational threshold that the State must prove in order to meet its burden under the applicable kidnapping statute.

¶ 60 Although we have not found another case that factually mirrors the bizarre scenario in this case, "[a] determination of whether the victim has been confined necessarily depends on the circumstances of each case." *Gonzalez*, 239 Ill. 2d at 474. In *Gonzalez*, the defendant went to a hospital where she saw two acquaintances from her neighborhood with their baby. *Id.* at 481. The defendant claimed to be seven or eight months' pregnant but it was later revealed at trial that she could no longer have children. *Id.* at 476. The defendant offered to hold the baby while the baby's mother took a phone call and the father completed paperwork. *Id.* After completing the paperwork, the father could not find the defendant or the baby. *Id.* at 474. The father went outside to look and was informed by a stranger that they had seen a woman recently leave with a baby and pointed the father in that direction. *Id.* at 474-75. Upon finding out her baby was

[5] The following states have kidnapping statutes that require that the confinement "interfere substantially" with the victim's freedom: Alabama, Alaska, Arizona, Arkansas, Connecticut, Delaware, Hawaii, Kentucky, Nebraska, North Dakota, Tennessee, Texas, and Washington. 3 W. La Fave, Substantive Criminal Law § 18.1(c), at 16 (2018). The following states require that the confinement be for a "substantial period": Maine, Montana, New Jersey, Pennsylvania, South Dakota, Utah, and Vermont. *Id.* New York's kidnapping statute takes the durational requirement a step further and provides that, "A person is guilty of kidnapping in the first degree when he abducts another person and when he restrains the person abducted for a period of more than twelve hours." N.Y. Penal Law § 135.25 (McKinney 2018).

missing, the baby's mother called 911 and flagged down a police vehicle she saw on the street. *Id.* at 475. The mother got into a police vehicle to search for the defendant and the baby. *Id.* The police then received a dispatch that a possible suspect had been apprehended at a hospital two blocks away. *Id.* The police drove the mother to the hospital, where they found the defendant and the baby. *Id.* The appellate court reversed the defendant's conviction for kidnapping, finding that "because the baby was in constant public view or awareness the baby was not secretly confined within the meaning of the aggravated kidnapping statute." *Id.* at 478. However, our supreme court reversed the appellate court's finding and affirmed the defendant's conviction. *Id.* at 482. The court stated that "secret confinement can be shown through evidence that the defendant isolated the victim from meaningful contact with the public." *Id.* at 480. The court reasoned that a trier of fact could reasonably have found that the defendant's conduct isolated the baby from meaningful contact with the public because the baby was unable to escape, cry out, or call attention to her confinement. *Id.* at 481.

¶ 61 Here, the State's evidence showed that while the Scotts were held at gunpoint in the apartment and strip-searched, they were not able to escape or call attention to their confinement. Once defendant pulled the gun on the Scotts, it was reasonable to infer that any noncompliance with his directives could result in violence. Simply put, the Scotts were no longer free to act in a manner of their own choosing without risking being shot. It was not until after Ray and Cannella went out to search the van that Ray was able to use his cell phone. While it is true, as defendant points out, that Ray's cell phone was returned to him after he was searched, there is no evidence that defendant or Cannella ever knew that Ray used his phone while outside the apartment to call Samantha. Further, there is no evidence that defendant was aware that Ray used his phone to again call Samantha while on their way to the bank. The fact that Ray stayed outside during the

first call to Samantha and did not talk directly to her during the second call creates a reasonable inference that his ability to make meaningful contact was curtailed. Ray knew that any action he took risked the safety of his nephews, who were held at gunpoint in the apartment throughout the entirety of the day's events.

¶ 62 We next compare this case with *People v. Pasch*, 152 Ill. 2d 133 (1992), where the defendant was convicted of, *inter alia*, aggravated kidnapping after he held the victim in her own apartment for 36 hours in a hostage stand-off while armed with weapons. *Id.* at 155-56. Prior to the stand-off, the defendant and his landlord got into a heated discussion, defendant chased his landlord into the yard, and then the defendant shot his landlord several times, killing him. *Id.* at 155. Immediately thereafter, the defendant ran next door and struggled with an older woman named Mary Wagner on the porch of her apartment that she shared with her sister, Jean Wiwatowski. *Id.* Wagner was able to escape but the defendant then ran into her and Wiwatowski's apartment carrying weapons while Wiwatowski was still inside. *Id.* After Wagner escaped, she told a neighbor what happened, and officers arrived shortly thereafter because they were responding to a call of shots fired. *Id.* The defendant issued a warning that no one should come into the apartment, shot and killed a plainclothes police officer, and a 36-hour stand-off ensued. *Id.* at 155-56. On appeal, the defendant argued that he was not proved guilty beyond a reasonable doubt of aggravated kidnapping because the State failed to show that he held Wiwatowski secretly throughout the 36-hour stand-off period. *Id.* at 187. The State argued that Wiwatowski's confinement was secret because "(1) for the entire 36 hours, no one was allowed to rescue her; or (2) for the first 10 minutes of the ordeal, the authorities were not aware that she was inside the apartment with defendant." *Id.* at 188. The court rejected the State's argument, explaining that "the fact no one could rescue her because of the hostage

situation did not convert that which was otherwise well known to something that was secretive" and "there is no authority to support the proposition that a confinement is secret until the 'authorities' are notified of it, as long as non-law-enforcement personnel are aware of it." *Id.* The court concluded that the State failed to meet its burden to present evidence beyond a reasonable doubt of secret confinement where the defendant never made an attempt to keep Wiwatowski's presence a secret during his discussions with the police. *Id.* The court also found pertinent that shortly after the defendant entered Wiwatowski's apartment, her sister told a neighbor that Wiwatowski was in the apartment with the defendant. *Id.* Overall, the court found that "many people were quite aware that Wiwatowski was restrained inside the apartment with [the] defendant since he made it well known that he was holding her as a hostage." *Id.* at 187-88.

¶ 63 We find this case distinguishable from *Pasch* because neither defendant nor his codefendants made any attempt to broadcast the fact that they were holding the Scotts at gunpoint in the apartment. Additionally, unlike *Pasch* where Wagner saw the defendant enter the apartment that she knew Wiwatowski was inside of, no one in this case was initially aware of the Scotts' confinement in the apartment. Even more damaging to defendant's assertion that *Pasch* supports his position, is the lack of evidence that during the first phone call Ray told his wife that the Scotts were being held against their will. Ray never testified that he told his wife that he and his nephews were being held against their will. Rather, Ray testified that during his first call to his wife, he told her that defendant and Cannella were "acting strange over here." We also find convincing the State's argument that this case differs from *Pasch* because it was Ray, *i.e.*, a victim, who eventually called someone who called the police, not defendant or her codefendants. Had defendant, Cannella, or Collins contacted the authorities, like the defendant in *Pasch*, then a reasonable inference that the offenders lacked intent to secretly confine may

have existed. Further, another important distinction from *Pasch* is that, here, when the officers first arrived at both the bank and the apartment, they were unaware what role each individual played. This case differs significantly from *Pasch*, where the defendant, by his own actions, made it well-known that he was holding Wiwatowski hostage in her own apartment.

¶ 64 In *People v. Calderon*, 393 Ill. App. 3d 1, 3 (2009), a case cited by the State, the victim testified that when he returned to his vehicle after purchasing cigarettes inside the gas station, the defendant, whom he did not know, was sitting in his passenger seat. When the victim told the defendant to get out of the car, the defendant refused and told the victim to get in the car or else the defendant's friends in a nearby car would beat him. *Id.* The victim testified that because he was scared of the defendant, he did as he was told, which included sitting in the car at the gas station for up to two hours and driving the defendant to an apartment because the defendant believed that the victim was in a gang that stole money from him. *Id.* at 4. The victim also testified that he did not try to reenter the gas station or flag anyone down because he was afraid of the defendant's friends in the nearby car. *Id.* On appeal, the defendant argued that the State failed to prove that he secretly confined the victim because they were in the public view while at the gas station and driving in the car, but this court affirmed the jury's finding of secret confinement. *Id.* at 11.

¶ 65 Here, Ray testified that he did not intend to withdraw money from the bank and was only trying to get out of the apartment so that he could get help. Ray's testimony creates a reasonable inference that he only went to the bank and offered to withdraw money because he was afraid for the safety of his nephews, and thus was confined without actually being physically restrained or held at gunpoint. This is similar to *Calderon*, where the victim testified that he did not reach out for help because he was afraid for his safety. Although Ray was able to drive his van to the

bank, a public place, a trier of fact could have reasonably found that his decision to go to the bank and act like he was withdrawing money was motivated by a fear for his and his nephews' safety, and thus was evidence of his confinement. Ray's clandestine phone call to Samantha on the way to the bank is further evidence of his secret confinement. As in *Calderon*, merely because Ray was visible on public roadways and in a public place, like a bank, does not render his confinement known to the public.

¶ 66 After viewing the evidence in a light most favorable to the State, we find that a rational trier of fact could have found that the State proved defendant guilty of the aggravated secret confinement kidnapping of Ray, Pierre, and Steven. We note that having determined that the State met its burden to prove defendant guilty beyond a reasonable doubt of the secret confinement kidnapping of Ray, we need not determine whether the State met its burden of proving defendant guilty for the asportation kidnapping of Ray because the jury was presented with alternative theories of guilt, but defendant was only convicted of one count of aggravated kidnapping.

¶ 67 Alternatively, defendant argues that if this court finds that secret confinement or asportation occurred, we should nonetheless reverse because any such action was incidental to a robbery, specifically an attempted armed robbery, under the *Levy-Lombardi* doctrine. In general, the *Levy-Lombardi* doctrine provides that "a defendant cannot be convicted of kidnapping where the asportation or confinement of the victim was merely incidental to another crime, such as robbery, rape[,] or murder." *People v. Eyler*, 133 Ill. 2d 173, 199 (1989). In this case, the only question is whether the confinement was incidental because we have already determined that the State met its burden to prove defendant guilty of aggravated secret confinement kidnapping. The State asserts the doctrine is inapplicable because the kidnapping here was not incidental to

another offense because defendant and his codefendants secretly confined the Scotts and evidenced an intent to prolong the secret confinement.

¶ 68 "To determine whether [a] *** detention rises to the level of kidnapping as a separate offense, this court considers the following four factors: (1) the duration of the *** detention; (2) whether the *** detention occurred during the commission of a separate offense; (3) whether the *** detention that occurred is inherent in the separate offense; and (4) whether the *** detention caused a significant danger to the victim independent of that posed by the separate offense." *Sumler*, 2015 IL App (1st) 123381, ¶ 56. We make this determination based on the facts and circumstances of each case. *Id.*

¶ 69 Applying these factors to the present case, we conclude that contrary to defendant's assertions, the aggravated secret confinement kidnapping of Ray, Pierre, and Steven was not merely incidental to the offense of aggravated unlawful restraint, aggravated assault, and/or attempted armed robbery. As to the first factor, the Scotts were held at gunpoint and strip-searched in a locked apartment. No one testified to the exact length of time they were confined in the apartment, but Ray testified that he arrived at the apartment around 8:30 a.m. Ray further testified that he and his nephews only moved two items out to the van before Cannella informed them that some money was missing and locked them inside while defendant held them at gunpoint. Sergeant Gray testified that he received the dispatch that directed him to the Chase bank on 67th and Stony Island around 11 a.m. Thus, a number of hours elapsed between when the Scotts first arrived at the apartment and when the police received dispatches to respond to the bank. Ray's testimony that they only moved two pieces of the couch before they were confined at gunpoint indicates that not much time had elapsed before the kidnapping began. We note that Ray's detention could be considered intermittent given that he was able to remain outside alone

after searching the van. However, Ray was again confined in the apartment after Collins arrived when Collins motioned to him to come back inside and re-locked the door. Also, as previously explained, although Ray drove to the bank, he was confined by the threat of violence to his nephews who were being held at gunpoint throughout the time he went to the bank. Additionally, the evidence established that Pierre and Steven remained in the same corner at gunpoint throughout the entirety of events until police arrived. Thus, we do not consider the confinement here brief.

¶ 70 Second, the detention or confinement was not merely part of a separate offense because, as we have already found, the State presented sufficient evidence to show that defendant secretly confined Ray, Pierre, and Steven. It is well-settled that secret confinement is the gist of kidnapping. *People v. Banks*, 344 Ill. App. 3d 590, 593 (2003). Defendant further evidenced his intent to prolong the secret confinement when he made sure that Cannella called someone who knew how to search people and take care of business. Once Collins arrived, he asked defendant for some hangers and rope, and although no hangers or rope were ever produced, Collins's request manifested his intent to continue the secret confinement of the Scotts. The trier of fact could have reasonably inferred defendant's intent to continue the confinement based on his lack of objection to Collins's actions and the fact that defendant took steps to ensure that the gun was working before he left for the bank with Ray. Specifically, Ray testified that after Collins "clicked" the gun, it jammed, defendant un-jammed it, and returned it to Collins.

¶ 71 Third, secret confinement is not an element of attempted armed robbery. A person commits attempted armed robbery when, with the intent to commit armed robbery—*i.e.*, the knowing taking of property from the person or presence of another by the use of force or threat of imminent force—he takes a substantial step toward the commission of that offense. 720 ILCS

5/8-4 (West 2012); 720 ILCS 5/18-2 (West 2012). Although some form of detention may arguably be inherent in some instances of attempted armed robbery, it is clear from the attempted armed robbery statute that secret confinement is not inherent in every instance of that crime, as it is in every kidnapping. Further, "[a] person commits the offense of unlawful restraint when he or she knowingly without legal authority detains another" (720 ILCS 5/10-3(a) (West 2012)) and "[a] person commits the offense of aggravated unlawful restraint when he or she commits unlawful restraint while using a deadly weapon" (720 ILCS 5/10-3.1 (West 2012)). Although it is clear from the statute that detention, in general, is inherent in the offense of aggravated unlawful restraint, secret detention or confinement is not.

¶ 72 Fourth, the detention created a significant danger to the Scotts independent of any threat posed by an aggravated unlawful restraint, attempt armed robbery, or aggravated assault, because the detention was secret. As a result, their confinement was not readily discoverable which created an additional danger that would not be present in the other offenses. Having considered all the necessary factors, we conclude that defendant's aggravated kidnapping conviction was not merely incidental to an attempted armed robbery.

¶ 73 Trial Court's Denial of Motion to Quash

¶ 74 Defendant next asserts that the trial court erred in denying his motion to quash arrest, search, and seizure. Defendant acknowledges that the officers entered his apartment based on consent or exigent circumstances but argues that the exigent circumstances that may have justified the initial warrantless entry dissipated prior to the officers' search and recovery of the gun. The State responds that defendant has waived this argument because he presented a different legal theory at the hearing on his motion to quash. For clarity, we note that waiver is the voluntary relinquishment of a known right, while forfeiture—which is likely what the State

intended to assert—applies to issues that could have been raised but were not. See *People v. Phipps*, 238 Ill. 2d 54, 62 (2010). In this case, defendant has not intentionally relinquished a known right, and thus we use the term "forfeiture." See, *e.g.*, *People v. Williams*, 2015 IL App (1st) 131359, ¶ 14.

¶ 75 Defendant contends that to the extent that the grounds articulated in his pretrial motion to quash and his posttrial motion differed from one another, we should still review this issue because it was substantially raised and addressed by counsel in defendant's posttrial motion. In the alternative, defendant argues that his pretrial counsel, McClurkin, was ineffective for failing to argue the motion correctly. "To preserve an issue for review, a party ordinarily must raise it at trial and in a written posttrial motion." *People v. Cregan*, 2014 IL 113600, ¶ 15 (citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)). However, "[i]t is not necessary for the defendant's objection to state identical grounds for contesting the issue." *People v. Hyland*, 2012 IL App (1st) 110966, ¶ 27.

¶ 76 We find that defendant did not forfeit this issue on appeal. "Failure to raise issues in the trial court denies that court the opportunity to grant a new trial, if warranted." (Internal quotation marks omitted.) *People v. Hughes*, 2015 IL 117242, ¶ 38. In defendant's motion to quash, he asserted that he was arrested without probable cause and without exigent circumstances or a reasonable suspicion that a crime was being committed. Specifically, defendant's motion concluded "[t]hat no exigent circumstances existed that justified the warrantless arrest, search[,] and seizure of the [d]efendants." Similarly, in defendant's posttrial motion, he argued that no exigent circumstances existed. Defendant acknowledged that there may have initially been reasonable grounds to believe that there was an emergency, but argued that any exigency dissipated prior to the officers' search and seizure. In both motions, defendant's argument

hinged on the assertion that exigent circumstances did not exist at the time the officers conducted a warrantless search of the apartment and recovered the gun. Defendant's argument in his posttrial motion was merely more detailed, and such an argument was not forfeited because the trial court was adequately afforded the opportunity to award defendant a new trial, if it believed such an outcome was merited. Because we have found this issue was not forfeited, we need not address defendant's contention that his counsel was ineffective. We now turn to the merits of this issue.

¶ 77 We apply a two-part standard of review when reviewing a ruling on a motion to quash arrest and suppress evidence. *People v. Grant*, 2013 IL 112734, ¶ 12. "While we accord great deference to the trial court's factual findings, and will reverse those findings only if they are against the manifest weight of the evidence, we review *de novo* the court's ultimate ruling on a motion to suppress involving probable cause." *Id.* Further, we may consider evidence presented at defendant's trial and the suppression hearing. *People v. Almond*, 2015 IL 113817, ¶ 54. "Although a defendant initially bears the burden of proof on a motion to suppress, where a defendant makes a *prima facie* case that the evidence was obtained by an illegal search or seizure, the burden shifts to the State to go forward with evidence countering the defendant's *prima facie* case." *People v. Kowalski*, 2011 IL App (2d) 100237, ¶ 9. A defendant presents a *prima facie* case when he shows that the search was conducted without a warrant. *Id.* Here, it is undisputed that the officers' search was conducted without a warrant, and thus the burden was on the State to present evidence that the search of defendant's bathroom was justified under a recognized exception to the warrant requirement.

¶ 78 The fourth amendment to the United States Constitution ensures "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and

seizures." U.S. Const., amend. IV. In Illinois, it is well-recognized that a warrantless search or arrest is *per se* unconstitutional unless one of the following exceptions applies: (1) the search was based on consent; (2) probable cause existed but exigent circumstances made it impractical to obtain a warrant; or (3) the search was conducted incident to arrest. *People v. Franklin*, 2016 IL App (1st) 140059, ¶ 13.

¶ 79 Defendant argues that none of the exceptions to the warrant requirement apply to the officers' search of the bathroom and we address each in turn. First, the consent exception does not apply because the evidence did not establish that Cannella consented to the officers' entry into the apartment or their search and seizure. At the hearing on the motion to suppress, Officer Caridine testified that Cannella answered the door. Cannella contrarily testified that she was outside when the officers arrived. After the hearing on the motion to suppress, the trial court determined that it was unclear whether Cannella consented to the officers' entry, but found that the officers' actions were justified. At trial, Officer Caridine testified that he did not see anyone outside when he pulled up to the Eberhart apartment and that he and other officers, with their guns drawn, knocked on the door to defendant's apartment and Cannella "opened the basement door." Officer Caridine's testimony does not establish that Cannella consented to the officers' entry. Merely because she opened the door does not prove that she consented to their entry. We find that even if Cannella had not contradicted the officer at the suppression hearing, the evidence presented by the State was not adequate to satisfy their burden to present evidence that the search of defendant's bathroom was justified under a recognized exception to the warrant requirement.

¶ 80 Next, we turn to the exigent circumstances exception. "Factors which have been considered relevant to a determination of exigency include whether: (1) the crime under

investigation was recently committed; (2) there was any deliberate or unjustified delay by the police during which time a warrant could have been obtained; (3) a grave offense was involved, particularly a crime of violence; (4) there was reasonable belief that the suspect was armed; (5) the police officers were acting on a clear showing of probable cause; (6) there was a likelihood that the suspect would escape if he was not swiftly apprehended; (7) there was strong reason to believe the suspect was in the premises; and (8) the police entry was made peaceably, albeit nonconsensually." *People v. Williams*, 161 Ill. 2d 1, 26 (1994). Another consideration is whether the evidence would likely disappear without prompt action. *People v. Martin*, 2017 IL App (1st) 143255, ¶ 34. Our primary consideration in determining whether an exigency existed is whether the officers acted reasonably, which is a question we answer by considering the totality of the circumstances that confronted the officers when the entry was made. *Id.*

¶ 81 Defendant concedes that exigent circumstances may have justified the officers' entry into the apartment, but asserts that any exigency that was present did not exist when the officers searched the bathroom. Defendant points out that there were at least seven officers on the scene, and by the time the bathroom was searched, any exigency had dissipated. The State contends that the factors weigh in favor of finding that exigent circumstances existed up until the point the firearm was recovered.

¶ 82 Applying the factors to this case and examining the totality of the circumstances when the entry was made, we find that exigent circumstances existed at the time the officers entered the apartment and were present until Officer Russell located the firearm in the bathroom. First, the offense at issue had been very recently committed, and, in fact, was still on-going, when the officers received the OEMC dispatches. Second, there was no evidence that the officers deliberately or unjustifiably delayed their investigation. After the hearing on defendant's motion

to quash, the trial court determined that the investigative detention of those in defendant's apartment was not unreasonable because it only lasted 10 or 15 minutes. We agree with this assessment where Officer Russell testified that he and the other officers did not know who played what role in the events that led to the 911 call. Officer Caridine similarly testified that everyone was initially detained so that the officers could determine what was going on. Thus, because the officers were initially unsure who was who, no unjustified delay existed. Third, kidnapping is certainly a grave crime that connotes violence, especially here, where officers received information that individuals were being held at gunpoint. Fourth, as already stated, the officers received information from dispatch that a suspect was holding individuals at gunpoint, and thus their belief that one of the offenders was armed was reasonable. Further, Officer Caridine testified that Ray was "adamant" that there was a gun present in the apartment. Fifth, the officers were acting on a clear showing of probable cause because Samantha's 911 call, wherein she identified herself, established that some individuals were being held at gunpoint at defendant's apartment and that two others went to a bank to get money. Samantha's call was corroborated when the officers arrived at the bank and found two individuals (Ray and defendant) about to leave the parking lot. Additionally, Officer Caridine testified that he learned that Samantha was the significant other of one of the victims while on the way to defendant's apartment. Sixth, although it is not entirely clear that a suspect might have escaped, it is reasonable to infer that an escape was possible because Ray and defendant were in a mobile vehicle when the officers received the dispatch, requiring a swift response. Seventh, based on Samantha's 911 call, the officers had strong reason to believe that at least one of the offenders was in defendant's apartment. Officer Caridine testified, "When the phone call came out, it came out that [a victim] was being taken to the bank against his will to get out some money, and

that there were two people in the house that were being held hostage until they got back." Eighth, the police entry was made in a mostly peaceable manner, albeit without consent. There was no evidence that the officers had to knock down the door or physically force their way in. Officer Caridine testified that the officers knocked on the back door to the apartment and Cannella answered and Cannella conversely testified that she was outside when the officers arrived. However, neither Officer Caridine, nor Cannella testified that the officers used force when entering the apartment.

¶ 83 We further look to whether the evidence would likely disappear without prompt action and whether the officers acted reasonably based on the totality of the circumstances that confronted the officers when the entry was made. *Martin*, 2017 IL App (1st) 143255, ¶ 34. Here, we find the officers' actions reasonable in light of the circumstances that they faced. They responded to an OEMC dispatch that relayed the contents of a 911 call from Samantha, an identified individual with personal knowledge of the events in question. Officer Caridine testified that he was made aware that individuals were being held at gunpoint at the Eberhart address and that another individual was being taken to the bank against his will to withdraw money. Officer Caridine testified that when the officers arrived on the scene, Ray insisted that there was a gun in the apartment. Sergeant Gray corroborated this testimony at trial and testified that he recalled that Ray indicated that there was a gun in the apartment.

¶ 84 The trial court determined that the officers' actions were reasonable and that probable cause was clear at the time the offenders were placed under arrest, but stated that there was conflicting testimony regarding whether the gun was found before or after the offenders' arrests. At the hearing on the motion to quash, Officer Russell testified that he found the gun before the offenders were placed under arrest. Officer Caridine testified that defendant, Cannella, and

Collins were placed under arrest after the gun was found. The statement of facts in defendant's brief reflects that, "According to [Officer] Caridine, the arrest occurred before the gun was found." This is simply incorrect[6]. After a careful review of the two pages of the record that defendant cites as support for this statement, it is apparent to this court that Officer Caridine actually testified that he first observed *the gun parts and pieces* on the coffee table in the living room of the apartment after everyone returned from the bank and after the offenders were placed under arrest. He did not testify that the gun was found after the arrests. Thus, contrary to defendant's argument and the trial court's reference to conflicting testimony, the testimony on this point is consistent.

¶ 85 Defendant also asserts that the officers had an opportunity to obtain a warrant before searching the bathroom. Officers Russell and Caridine testified consistently with one another that all of the offenders were not yet under arrest at the time the bathroom was searched. Officer Russell's testimony established that defendant was still in handcuffs from his initial detainment at the bank. However, if the gun had not been found, it is still entirely possible that Cannella or Collins might have had an opportunity to access the gun and either use or dispose of it. As a result, we find the officers' search of the bathroom was entirely reasonable. At the point they searched the bathroom, the officers had received information that there was a gun used to hold individuals in the apartment against their will. Without a prompt search of the scene, the gun could have been disposed of. As such, the officers' entry and eventual search were justified by exigent circumstances.

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[6] In the argument section of defendant's brief, he again erroneously presents the evidence by stating, "[Officer] Russell recovered the gun under the bathroom rug after all of the suspects had been handcuffed in the hallway." The page of the record that defendant cites to as support does not contain the testimony that defendant says it does. In fact, there is no testimony from Officer Russell that the offenders were arrested before the gun was found. More troubling still is the fact that on the page of the record that immediately follows the one cited by defendant as support, Officer Russell is asked, "And it was after that weapon was recovered and after you spoke to the three Scott victims, the three defendants were then placed under arrest?" and he responds "Yes, sir."

¶ 86 Defendant cites to *People v. McNeal*, 175 Ill. 2d 335 (1997), a case where exigent circumstances were found to exist, to contrast with the instant case. In *McNeal*, two women informed a police officer that the defendant and one of the women had just gotten into an argument and that the defendant punched the victim in the neck and threw her to the ground. *Id.* at 343. The defendant told the victim that he was going to go get a gun. *Id.* The two women also told the officer, who was standing with his back to the defendant's building at the time he spoke with the women, that " '[The defendant] had just come out, saw the police, dropped a bag into the garbage can and went back into the door real quick.' " *Id.* The women described the bag as a brown paper one. *Id.* The officer then walked over to the defendant's building and the garbage can in front, opened the can, and saw a brown paper bag on top of another bag of garbage. *Id.* When the officer opened the brown paper bag, he found a loaded 9-millimeter handgun inside. *Id.* On appeal, the defendant argued that the trial court should have granted his motion to suppress because the gun was recovered during a warrantless search of one of his garbage cans. *Id.* at 341. Defendant asserted that he had a reasonable expectation of privacy in the contents of his garbage cans. *Id.* at 342.

¶ 87 Our supreme court did not reach the issue of the defendant's privacy interest in his garbage contents but rejected the defendant's suppression argument based on its finding that the exigencies of the situation justified the officer's warrantless search. *Id.* The court examined the relevant factors and determined that "the officer had reason to believe that in his presence defendant was furthering the criminal activity under investigation." *Id.* at 346. The court noted that prior to opening the paper bag and observing its contents, the officer could not know whether the bag contained the gun that the defendant said he was going to get. *Id.* The officer also did not know whether the defendant was in the process of making good on his promise to

get a gun, which meant that the two women and other passersby might be in danger of an attack. *Id.* at 346-47. Further, the court found pertinent that, "[t]he officer limited his search to the garbage can in which defendant had reportedly deposited the brown paper bag and to the brown paper bag itself, in accord with the principle that warrantless police action must be strictly circumscribed by the exigencies that justify its initiation." *Id.* at 347. The court concluded that based on the totality of the circumstances that existed at the time the officer entered the garbage can, the officer acted in a reasonable fashion. *Id.*

¶ 88 Defendant argues, unlike *McNeal*, the exigent circumstances exception to the warrant requirement is not applicable to this case because although the police were conducting an investigation involving a firearm, the offenders were all detained by the time the search was conducted. We disagree. As previously stated, the testimony in this case established that the officers searched for, and found, the gun in defendant's bathroom before Cannella and Collins were handcuffed and before all three offenders were placed under arrest. Thus, Cannella and Collins, the two individuals who were left with the gun when defendant and Ray went to the bank, and thus presumably the only two individuals who knew where the gun was located, could have accessed the firearm to dispose of it or to use it. The State contends that *McNeal* actually supports the trial court's decision to deny suppression because the gun in that case was similarly out of reach for the defendant there, as it was here, but the court nonetheless found that an exigency existed. Defendant argues that there was no longer an exigency where the gun was not within the offenders' reach and where there was time to secure a warrant. We find the State's argument convincing.

¶ 89 Here, it is undisputed that the gun was found in the bathroom and that none of the offenders were in the bathroom at the time the gun was found. In *McNeal*, the gun was similarly

out of the defendant's reach because the defendant had gone back inside his building. Notwithstanding this, the court found the officer's search reasonable. We similarly find Officer Russell's search of the bathroom to be reasonable given the circumstances that existed at the time the officers entered the apartment. At that point, the officers were not sure who played what role in the kidnapping and were trying to secure any victims from danger. The evidence showed that OEMC dispatches informed the responding officers that individuals were being held at gunpoint in the apartment and Ray subsequently corroborated this information when he told officers that there was a gun in the apartment. Ray's information that there was a gun in the apartment was similarly corroborated when Officer Caridine, while looking for a weapon, observed gun parts and pieces, *i.e.*, 2 magazines with 6 lives rounds and a box of bullets with 12 live rounds, on the coffee table in defendant's living room. That the officers continued to look for a weapon after receiving a 911 call that people were being held at gunpoint in the apartment, after hearing Ray was "adamant" there was a gun in the apartment, and while two offenders were not in handcuffs was entirely reasonable. Further, when the police spoke with Cannella and Collins, they were not handcuffed and were less than 10 feet from the bathroom, where the gun was eventually located. We find the officers' search of the bathroom was reasonable based on the totality of the circumstances.

¶ 90 Defendant also cites to *People v. Franklin*, 2016 IL App (1st) 140059, and argues that the officers could have secured a warrant prior to searching defendant's apartment. In *Franklin*, the defendant, who was convicted of two counts of UUW-F, appealed, arguing that the trial court erred in denying his motion to suppress. *Id.* ¶ 1. The evidence showed that the police received a call regarding a theft of cash from a hotel room at the Super 8 Motel. *Id.* ¶ 2. The victim described the offender as a "26-year-old, 6-foot-3-inch, 300-pound black male going by the

nickname 'DB' " and that he could be found in room 301. *Id.* When the officers approached room 301, the defendant, who was not DB, was leaving the room. *Id.* The officers identified themselves, and the defendant informed them that the room was rented in his name and that DB was inside his room. *Id.* The defendant let the officers into his room using his keycard and the officers observed a man matching DB's description on one of the beds. *Id.* ¶ 3. DB woke up and was questioned by the officers while the defendant stood by the window. *Id.* One of the officers observed a clear plastic baggie containing a green leafy substance on the nightstand in between the two beds that appeared to be cannabis, and handed it to a fellow officer. *Id.* The officer who first observed the suspect cannabis then did "a quick search of the room and the bathroom and noticed nothing was out of place in the bathroom." *Id.* Specifically, the officer looked at the ceiling tiles in the bathroom, which appeared undisturbed, because "experience told him that contraband or weapons were often concealed there." *Id.* After another officer radioed for a drug sniffing dog, DB got nervous and ran out of the room, carjacked a vehicle, and the officers gave chase. *Id.* ¶¶ 4-5. When one of the officers realized the defendant was still in the room, he returned to the room, walked in through the still-propped-open door, and observed the defendant with a surprised expression. *Id.* ¶ 5. The defendant did not tell the officer that he was not permitted to enter the room or ask him to leave. *Id.* The officer then examined the bathroom and observed that the ceiling tiles had been pushed up two inches. *Id.* The officer handcuffed the defendant, had him sit on the bed, and inspected the ceiling tiles in the bathroom by standing on the toilet. *Id.* The officer reached behind the tiles and felt two plastic bags that he believed contained guns but did not pull them down at that point. *Id.* Instead, he brought the defendant down to his squad car, secured him in the back seat, went back to the room, and recovered from the ceiling two plastic bags containing an automatic weapon with an extra ammunition clip, a 9-

milimeter firearm with a full clip, and some cash. *Id.* The officer never observed the defendant in the bathroom or reaching up to the ceiling tiles. *Id.*

¶ 91 On appeal, the defendant argued that although he consented the first time the officer entered his room, the officer's second entry was without his consent and was not justified by any exception to the warrant requirement. *Id.* ¶ 11. This court agreed and found that neither the search incident to arrest or exigent circumstances exception applied, and reversed defendant's conviction because the recovered firearms were the only evidence supporting his conviction. *Id.* ¶ 25, 30. On the issue of exigent circumstances, the court determined that the State had conflated the circumstances that existed the first time the officers entered the room, *i.e.* pursuit of suspect that was known to be armed, with the circumstances that existed after the officer returned to the room. *Id.* ¶ 28. The court explained that when the officer returned to the room, even though it was only a short time later, only the defendant was present and the officer did not see the defendant reaching up into the ceiling tiles, and the tiles were not within the defendant's immediate reach. *Id.* The court noted that although the officer's experience as a police officer led him to (correctly) believe that contraband was in the ceiling tiles, "that is just probable cause." *Id.* ¶ 30. The court concluded, "because [the defendant] was already in custody and handcuffed (indeed, he was outside the room locked in [the officer's] squad), no exigent circumstances justified the search of the ceiling area without a warrant." *Id.*

¶ 92 Defendant argues that although the officers had probable cause to arrest defendant, as they did in *Franklin*, the probable cause to arrest did not justify the search of the bathroom which was down the hallway and not accessible to defendant. Specifically, defendant argues that Ray's suggestion that the gun might be in the bathroom did not justify the warrantless search where the officers could have left and returned with a warrant. The State responds that *Franklin* is

distinguishable and we agree. We find this case differs from *Franklin* because, here, neither Cannella or Collins were in handcuffs at the time the officers conducted their search and were both still inside the apartment where the firearm was located, unlike in *Franklin* where the defendant was handcuffed outside the hotel room in the officer's squad car. In addition to the officers, the victims were also still inside the apartment when the officers looked for the gun. Until the officers found the gun, danger to the officers' and the victims' safety existed here in contrast to *Franklin*, where DB had already fled the room and the defendant was handcuffed in the officer's squad car. The facts of this case simply do not align with *Franklin*.

¶ 93 Affording the requisite deference to the trial court's factual findings (*Grant*, 2013 IL 112734, ¶ 12), we find that the court's decision to deny defendant's motion to quash arrest, search, and seizure was not against the manifest weight of the evidence. We further find that the court's ultimate decision to deny suppression of the gun was proper. Because we determined that the exigent circumstances exception justified the officers' warrantless entry into defendant's apartment and search of the bathroom, we need not address defendant's alternative argument regarding the search incident to arrest exception.

¶ 94 Defendant's Right to a Fair Trial

¶ 95 Defendant contends that he was denied a fair trial because an irrelevant, prejudicial portion of his statement to police implying his involvement in other crimes was improperly admitted over the defense's objection. Defendant argues that a portion of his statement to Sergeant Irvin—"I'll let you know where I got the gun from if we can make a deal, cause officers told me they would help me before and I went to jail"—was more prejudicial than probative and should have been excluded from trial. As a threshold matter, we note that this statement does not refer to a specific crime allegedly committed by defendant, nor does it

indicate that defendant was previously convicted of a crime. Defendant's statement that he "went to jail" is vague and ambiguous. However, for purposes of conducting a complete analysis, we assume *arguendo* that this statement is, in fact, other-crimes evidence.

¶ 96 We will not reverse a trial court's decision to admit other-crimes evidence unless we find that the court abused its discretion. *People v. Donoho*, 204 Ill. 2d 159, 182 (2003). An abuse of discretion occurs where the trial court's evaluation is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court. *Id.* "Generally, evidence of other crimes is inadmissible where that evidence is relevant solely to demonstrate defendant's propensity to engage in criminal activity." *People v. Richee*, 355 Ill. App. 3d 43, 50-51 (2005). "Such evidence is admissible however, where relevant for any purpose other than to show propensity to commit crime." *Id.* at 51.

¶ 97 Here, defendant's statement merely referenced him having gone to jail at some previous point in time for an unknown reason. It did not include reference to any specific crime or conviction. Defendant's statement was offered to show what he said to police regarding his involvement in the crimes at issue and his desire to make a deal while in custody at the Third District police station. The statement was not offered to show defendant's propensity to commit crime, and thus was offered for a permissible purpose.

¶ 98 "When evidence of other crimes is offered, even if relevant for a permissible purpose, it may be excluded if its prejudicial effect substantially outweighs its probative value." *Id.* We do not find that the admission of the entirety of defendant's statement was an abuse of discretion where the prejudicial effect was non-existent to minimal compared to the probative value. The trial court stated that it would have been difficult to sever the allegedly prejudicial portion of defendant's statement because viewing the statement in its entirety provided context to

defendant's offer to provide police with information regarding where he got the gun if they gave him a deal. We find the trial court's assessment reasonable and neither arbitrary, nor fanciful. The trial court recognized that defendant's statement did not indicate why he went to jail previously, for what type of case, or what he might or might not have done to go to jail. Additionally, at trial, the State admitted a certified statement of conviction for possession of a controlled substance. As a result, the jury was aware that defendant was previously convicted of a felony, and thus it is possible that they inferred that defendant's statement to Sergeant Irvin was a reference to that conviction. If so, then the prejudicial effect would have been non-existent. Even if the jury did not make such an inference, any prejudicial effect was minimal because defendant's statement was vague and there was no indication of the type of offense the defendant referenced or whether he was convicted. As a result, we find that the prejudicial effect of admitting defendant's entire statement, if any existed, did not outweigh the probative value and the court's decision to allow the entire statement to be presented was not an abuse of discretion.

¶ 99 Defendant next asserts he was deprived of a fair trial and the effective assistance of counsel where a state witness testified without objection that there were drugs and paraphernalia found in defendant's apartment. Defendant notes that his counsel's objection was sustained when Sergeant Gray was asked what else he learned was recovered from the apartment in addition to the gun and the sergeant responded, "I learned there were some magazines from that weapon recovered and some narcotics." Defendant, however, takes issue with Steven's testimony that when the police came in, there was "cocaine, scale, weed, and everything on the table, baggies." Defendant's trial counsel did not object to Steven's testimony, and thus this issue was not preserved. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) ("*Both* a trial

objection *and* a written post-trial motion raising the issue are required for alleged errors that could have been raised during trial." (Emphasis in original.)) As a result, defendant asserts that we should review this issue for plain error.

¶ 100 "The plain error doctrine is a narrow and limited exception to the general rule of procedural default." *People v. Downs*, 2015 IL 117934, ¶ 15. The plain error doctrine allows a reviewing court to consider unpreserved error when "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error 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. Piatkowski*, 225 Ill. 2d 551, 565 (2007). In order to obtain relief, defendant must first show that clear or obvious error occurred. *Downs*, 2015 IL 117934, ¶ 15. Our review in determining whether there was error is *de novo*. *Id.*

¶ 101 Defendant asserts that the first prong of plain error applies here because the evidence was "weak." We note that defendant does not actually argue that the court committed any specific error but instead asserts that Steven's testimony was prejudicial. Likely, this is because his counsel failed to object to Steven's testimony and the trial court, therefore, did not make a ruling that defendant could now argue was erroneous. Even assuming *arguendo* that error occurred, the admission of Steven's statement did not amount to plain error because the evidence was not closely balanced. As we previously found, the State's evidence satisfied its burden to prove that defendant secretly confined the Scotts against their will while using a firearm. The evidence showed that the Scotts were held at gunpoint in defendant's basement apartment and that no one knew they were being held against their will and strip-searched. The evidence of defendant's

guilt was strong. Although defendant presented a stipulation from Detective Potter that things began to cool down after the search of the van, such testimony does little to impact the evidence of defendant's guilt where it is clear that the secret confinement kidnapping occurred when defendant and Cannella first confined the Scotts against their will and strip-searched them at gunpoint. Defendant's stipulation regarding subsequent events did little, if anything, to negate the abundant evidence of defendant's guilt presented by the State. As a result, the plain error doctrine does not apply.

¶ 102 Alternatively, defendant argues that his counsel was ineffective for failing to object to Steven's testimony. In order to prevail on an ineffective assistance of counsel claim, defendant must satisfy the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under the *Strickland* test, a defendant must show both that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense. *Id*.; *People v. Johnson*, 2015 IL App (1st) 123249, ¶ 52. A claim of ineffective assistance cannot be established if either of the two prongs is not met. *Johnson*, 2015 IL App (1st) 123249, ¶ 52.

¶ 103 Defendant argues that his counsel's failure to object to Steven's testimony was unreasonable and perplexing because there were no drug charges in this case. Because defense counsel objected to similar testimony by Sergeant Gray, we assume *arguendo* that defense counsel's failure to object to Steven's testimony was unreasonable. However, defendant's argument fails on the second prong of *Strickland* because counsel's deficient performance in failing to object to Steven's testimony on this issue did not result in prejudice. Defendant was not prejudiced because Steven's testimony regarding narcotics on the coffee table was a brief, vague statement during a trial that consisted of numerous witnesses and voluminous testimony. Neither the State, nor the defense ever re-raised the issue of Steven's testimony in front of the

jury. The State did not mention Steven's testimony regarding what he saw on the table in the living during its closing argument. The State never argued that because defendant had drugs and paraphernalia on his coffee table that he was more likely to commit crimes. Thus, defendant's argument that the jury made such an inference is pure speculation. Defendant was convicted of aggravated kidnapping, a far more serious offense than possession or distribution of a controlled substance, and thus we do not believe that Steven's testimony regarding paraphernalia and drugs on the coffee table impacted the jury's decision to find defendant guilty of such a serious crime. There is simply no indication that Steven's limited testimony on this issue impacted the jury in any way. As a result, we find that defendant was not denied his right to a fair trial or his right to effective assistance of counsel.

¶ 104 Defendant's 25-Year Sentence

¶ 105 Finally, defendant argues that his 25-years sentence was excessive and should be reduced to the minimum term of 21 years. The State responds that defendant's sentence was a proper exercise of the trial court's discretion.

¶ 106 "It is well settled that the trial court has broad discretionary powers in imposing a sentence [citation], and the trial court's sentencing decision is entitled to great deference [citation]." *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). This is because the trial court is typically in a better position than a reviewing court to determine the appropriate sentence. *Id.* Prior to issuing a sentence, a trial judge has the opportunity to weigh such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *Id.* As a result, we must not substitute our judgment for that of the trial court merely because we might have weighed these factors differently. *Id.* Although Illinois Supreme Court Rule 615(b)(4) grants a reviewing court the power to reduce the sentence imposed on a

defendant by the trial court (Ill. S. Ct. R. 615(b)(4) (West)), such a reduction is not permitted unless the trial court abused its discretion. *Id.* at 209-10. "For example, a sentence within statutory limits will be deemed excessive and the result of an abuse of discretion by the trial court where the sentence is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *Id.* at 210.

¶ 107 Here, defendant was convicted of three counts of aggravated kidnapping and one count of UUW-F. The trial court merged the aggravated kidnapping counts and the UUW-F count into one count of aggravated kidnapping and sentenced defendant to 25 years. Section 10-2(b) of the Code provides that aggravated kidnapping pursuant to section 10-2(a)(6) of the Code, *i.e.*, kidnapping while armed with a firearm, is a Class X felony for which 15 years shall be added to the term of imprisonment imposed by the court. 720 ILCS 5/10-2(a)(6),(b) (West 2012). Class X felonies are punishable by a range of 6 to 30 years' imprisonment. 730 ILCS 5/5-4.5-25(a) (West 2012). Thus, the minimum sentence for defendant's conviction for aggravated kidnapping while armed with a firearm was 21 years and the maximum sentence was 45 years. The trial court sentenced defendant to 25 years' imprisonment, which is 4 years above the minimum and well-within the sentencing range. Nonetheless, defendant argues that in light of the nature of the offense and defendant's negligible criminal background, disability, and potential for rehabilitation, the trial court abused its discretion.

¶ 108 Defendant contends that the facts of this case, his criminal background, and his remorsefulness do not justify the imposition of a sentence higher than the minimum. At sentencing, the trial court provided a detailed explanation of its basis for defendant's sentence. The court stated that it took into consideration all the statutory aggravating and mitigating factors. Specifically, the court took into consideration defendant's lack of criminal background

and his statement in allocution. The court also noted that defendant was a "direct actor" in this crime and that he set the events in motion. The court recognized that defendant had a lack of criminal background but also stated that it was concerned by defendant's lack of regard for "anything legal." The court noted that instead of talking rationally about the missing money, "the law on the street came out instead *** and the gun was brought into the equation." Further, the court recognized that this case would not have happened but for defendant. We agree that defendant played the most significant role in the events in question, and thus find that the trial court did not abuse its discretion when it determined defendant's sentence.

¶ 109 Defendant asserts that the court improperly considered his use of a weapon as an aggravating factor because it was already the basis for the 15-year sentencing enhancement. Unlike *People v. Walker*, 392 Ill. App. 3d 277, 302 (2009), a case cited by defendant where the appellate court determined that the trial court improperly found the defendant's use of a firearm to be a significant factor in sentencing, there is no indication in the record before us that the trial court placed significance on the fact that defendant used a gun. Rather, the court's statements prior to imposing a sentence show that the court actually sentenced defendant to four years more than the minimum based on defendant's role in the kidnapping and his decision to take the law into his own hands to get his money back. Defendant escalated the situation by holding the Scotts at gunpoint instead of calling the police. Additionally, defendant prolonged the Scotts' confinement by agreeing to go to the bank with Ray while Pierre and Steven remained at the apartment at gunpoint. The court did not place emphasis on defendant's use of a gun, but instead focused on defendant's role as the catalyst for the entire series of criminal events that occurred here. Simply put, none of the events that occurred here would have happened without defendant.

¶ 110 We recognize, as did the trial court, that aggravated kidnapping is a serious offense. Defendant points to his lack of a criminal history in arguing that his sentence was disproportionate and should be reduced. The 25-year sentence which the trial court imposed was 4 years above the statutory minimum. It is a significant sentence. While we may have imposed a different sentence had we been tasked with that responsibility, that is not the criteria by which we must determine whether defendant's sentence should be reduced. Defendant's sentence, albeit a lengthy one, is well-within the low end of the statutory range for these crimes. Accordingly, we cannot say that the trial court abused its discretion such that the defendant's sentence is disproportionate to the offenses for which he was convicted. As a result, we reject defendant's request to reduce his sentence.

¶ 111 CONCLUSION

¶ 112 Based on the foregoing, we find that the State presented sufficient evidence to prove defendant guilty beyond a reasonable doubt of three counts of aggravated kidnapping; the trial court properly denied defendant's motion to quash arrest, search, and seizure; defendant was not denied the right to a fair trial; and defendant's 25-year was not excessive.

¶ 113 Affirmed.