2017 IL App (1st) 160421-U

No. 1-16-0421

Order filed July 28, 2017

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 15 CR 467
	)	
JOSE ORTIZ,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HALL delivered the judgment of the court.
Justices Gordon and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for armed robbery affirmed over his contentions that the evidence was insufficient due to the victim's incredible testimony and the State's failure to prove he was armed with a dangerous weapon. We reduce his convictions for aggravated kidnaping to kidnapping where there was insufficient evidence he was armed with a dangerous weapon, as defined by the armed violence statute, and remand for resentencing. We vacate defendant's conviction for aggravated unlawful restraint where the conviction was based on the same physical act as his kidnapping conviction.

¶ 2 Following a bench trial, defendant Jose Ortiz was convicted of two counts of aggravated kidnaping (720 ILCS 5/10-2(a)(5) (West 2014)), one count of armed robbery (720 ILCS 5/18-2(a)(1) (West 2014)) and one count of aggravated unlawful restraint (720 ILCS 5/10-3.1(a) (West 2014)). After merging defendant's aggravated kidnaping convictions together, the trial court sentenced him to concurrent terms of 16 years' (aggravated kidnaping), 18 years' (armed robbery) and 4 years' (aggravated unlawful restraint) imprisonment.[1] On appeal, defendant contends that: (1) the State failed to prove he committed the offenses beyond a reasonable doubt where the victim's testimony was incredible and alternatively, it failed to prove he used or possessed a dangerous or deadly weapon, specifically a bludgeon, while committing the alleged offenses; and (2) his conviction for aggravated unlawful restraint must be vacated under the one-act, one-crime doctrine. For the reasons that follow, we affirm defendant's conviction for armed robbery, but reduce his two convictions for aggravated kidnaping to kidnapping and remand for resentencing. We also vacate his conviction for aggravated unlawful restraint.

¶ 3 The State charged defendant in a nine-count indictment: four counts of aggravated kidnaping, two based on being armed with a firearm (Counts 1 and 3) and two based on being armed with a dangerous weapon, other than a firearm, specifically a bludgeon (Counts 2 and 4); two counts of armed robbery, one based on being armed with a firearm (Count 5) and one based on being armed with a dangerous weapon, other than a firearm, specifically a bludgeon (Count 6); one count of vehicular invasion (Count 7); and two counts of aggravated unlawful restraint,

[1] We note that kidnapping is spelled differently depending on the offense. Section 10-2 of the Criminal Code of 2012 refers to aggravated "kidnaping" (720 ILCS 5/10-2 (West 2014)), whereas section 10-1 of the Criminal Code of 2012 refers to the non-aggravated version of the offense as "kidnapping" (720 ILCS 5/10-1 (West 2014)). Our spelling will comport with the statutory differences.

one while using a deadly weapon, specifically a firearm (Count 8) and one while using a deadly weapon, specifically a bludgeon (Count 9).

¶ 4 At trial, Karla Diaz testified that, at around noon on November 9, 2014, after purchasing a gas line for her dryer at a Home Depot located near West 47th Street and South Western Avenue, she walked back to her vehicle parked near the store's entrance. After putting the gas line in the backseat, she sat in the driver's seat with her door closed, the engine off and the keys in her pocket. Suddenly, a man, identified in court as defendant, knocked on the driver's window. Diaz opened her window slightly and asked him what he wanted. Defendant instructed her to "[a]ct like nothing's going on" and opened his jacket to display the handle of a gun, which was "black and silver." The gun appeared to be metal and "[j]ust like" the ones police officers carry. Defendant told Diaz to open the passenger's side door and to "act normal."

¶ 5 As defendant walked around the vehicle, he used a cell phone. Diaz could only hear him say "[o]h, it's me, Jose." From the passenger side door, defendant instructed Diaz to again open the door, which she did, explaining that "[her] engine was not running that I could leave." At the time, there were "many" other vehicles in the parking lot, but not "many" people present. Diaz could not yell for help because defendant told her if she did not "act normal," he would "shoot [her]." Defendant entered the vehicle. With his right hand inside his jacket, concealing the gun from view, defendant pointed, what Diaz believed to be, the gun at her. Defendant asked Diaz if she was familiar with the area, but Diaz said no, so defendant told her to drive and that he would tell her where to go.

¶ 6 Diaz drove her vehicle away from the Home Depot. As they were leaving, defendant told her to give him all the money she had. Diaz gave him $100. Defendant also told her to drive to

an address. Diaz followed his instructions, drove five or six blocks and eventually parked in an alley behind a house. He told her to turn off the engine, but did not take her keys. Before exiting the vehicle, defendant told her that he would be watching her and if she "tr[ied] to leave," he would "shoot [her]." Defendant exited the vehicle and knocked on a window of a house. Diaz observed defendant talking, but could not see to whom. Defendant immediately returned to the vehicle and told Diaz to drive.

¶ 7 Defendant instructed Diaz to drive another three or four blocks, which she did, and she parked her vehicle on a public street. Defendant changed his mind and told her to drive to the back through an alley. Once they were in the alley, defendant exited the vehicle, again not taking her keys. Diaz noticed that defendant was "not able to see [her]," so she drove away. She returned to the Home Depot, hoping there would be video of the incident at the store and called the police. Diaz told them what defendant did, including that he threatened to shoot her, and showed them the locations defendant took her.

¶ 8 The following day, Diaz viewed a photo array and identified defendant as the man from the Home Depot. A few days later, she went to the police station to further discuss the incident with the police and again told them that defendant threatened to shoot her.

¶ 9 Chicago police officer Sheahan (no first name given) testified that, at around 1 p.m. on November 9, 2014, he responded to a call of a kidnapping at the Home Depot and met with Diaz. She told him that the name of the offender was "Jose" and described the two locations she went with him that day, but never told Sheahan that defendant threatened to shoot her. Sheahan and Diaz drove to both locations, which were houses located within six blocks of the Home Depot. Sheahan and other officers canvassed the areas around the houses, but did not locate anyone.

¶ 10 The parties stipulated that Chicago police officer Augle (no first name given) would testify that he learned the possible offender in the case was named "Jose" and compiled a list of individuals named Jose who lived in the area around the Home Depot. He canvassed the areas around the Home Depot and where defendant had taken Diaz and spoke with "individuals." After these discussions, he began looking for defendant. On November 10, 2014, Augle met with Diaz and presented her a photo array, in which she identified defendant. Five days later, Augle arrested defendant. He did not have a gun on him or any money.

¶ 11 Defendant moved for a directed finding without argument. The trial court, without explanation, granted the motion on Counts 1, 3, 5 and 8, all of the counts that alleged defendant was armed with a firearm during the commission of the offenses.

¶ 12 Defendant testified that he worked at a golf course, but when he was off work, he would walk around the Home Depot parking lot and help people "put the things [in their vehicle] when they come out." On the day in question, defendant knocked on Diaz's window and asked her if she wanted to buy a tablet. Diaz told defendant she did, but that she only had $100 to spend on it. Defendant responded that they would have to drive to his friend's house to get the tablet, but since he did not have a vehicle, they would have to go in hers. Defendant entered Diaz's vehicle, and they drove to the rear of a residence located near the intersection of West 45th Street and South Maplewood Avenue. Defendant walked back and forth twice from Diaz's vehicle to the front of the residence, informing her that he was attempting to negotiate the price of the tablet. He eventually told Diaz the price was $100. She gave him the money, and defendant walked back to the front of the residence. He returned to Diaz a short time later and told her that they would have to drive to the residence of his friend's sister because she had the tablet.

¶ 13 They drove to the front of a residence near the intersection of West 43rd Street and South Fairfield Avenue and parked. Defendant went to the back of the residence and returned to Diaz a minute later. He told Diaz that he would have to go to the alley, but Diaz told him "[n]o, no, come, come, come." Defendant got in the vehicle, and Diaz drove to the alley and parked the vehicle. Defendant told her to stay in the vehicle and that he would go get the tablet, but added that there were actually two tablets available. Diaz asked him how much the other tablet would cost because her brother wanted to buy it. Defendant responded "I'm not making any money with you, I can sell the other one to someone else." Defendant, who still had Diaz's $100, "pretended" to go get the tablet, walked to the front of the residence and boarded "the California bus," leaving Diaz behind. Defendant denied robbing or kidnapping Diaz with a gun or having any metal object in his pocket that day. He explained that he was just "trying to get money."

¶ 14 On November 16, 2014, the police interviewed defendant, but he did not tell them about selling a tablet to Diaz. He explained at trial that he did not have time to because the police immediately began asking him about a gun.

¶ 15 In rebuttal, the parties stipulated that Chicago police detective Antonio Navarrete would testify that he interviewed defendant on November 16, 2014. Defendant told him that he asked Diaz for $100, and she "just gave it to him." Defendant also told him that he asked Diaz for a ride, and she gave him one. Defendant never mentioned anything about selling tablets.

¶ 16 The trial court found defendant guilty on the remaining counts: two counts of aggravated kidnaping (Counts 2 and 4), one count of armed robbery (Count 6), one count of vehicular invasion (Count 7) and one count of aggravated unlawful restraint (Count 9). The court observed that the case hinged on "credibility" and noted that it had carefully scrutinized both Diaz's and

defendant's testimony. The court stated that, while defendant admitted to "a theft," he denied committing "a robbery," something that "defie[d]" belief. Defendant unsuccessfully moved for a new trial.

¶ 17 The trial court merged defendant's two convictions for aggravated kidnaping into one conviction (Count 2) and merged his conviction for vehicular invasion into the armed robbery conviction (Count 6). It subsequently sentenced him to 16 years' imprisonment for aggravated kidnaping, 18 years' for armed robbery and 4 years' for aggravated unlawful restraint, all to be served concurrently. This timely appeal followed.

¶ 18 Defendant first contends that there was insufficient evidence to prove beyond a reasonable doubt that he committed aggravated kidnaping, armed robbery and aggravated unlawful restraint. Within defendant's challenge to the sufficiency of the evidence, he raises two separate arguments. First, he argues Karla Diaz testified in a manner that was so "unreasonable, improbable, and contrary to human experience" that her testimony cannot be considered credible evidence against him, requiring reversal of all of his convictions. Alternatively, defendant argues that, even if Diaz's testimony were to be deemed credible evidence against him, the State failed to prove he used or possessed a dangerous or deadly weapon, specifically a bludgeon, requiring us to reduce his convictions to kidnapping, robbery and unlawful restraint.

¶ 19 When a defendant challenges his convictions based upon the sufficiency of the evidence presented against him, we must ask whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could find all the elements of the crimes proven beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). All reasonable inferences must be allowed in favor of the State.

People v. Lloyd, 2013 IL 113510, ¶ 42. While we must carefully examine the evidence before us, credibility issues, resolution of conflicting or inconsistent evidence, weighing the evidence and making reasonable inferences from the evidence are all reserved for the trier of fact. *Brown*, 2013 IL 114196, ¶ 48. We will not overturn convictions unless "the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt." *Id.*

¶ 20 To establish defendant committed aggravated kidnaping, the State had to prove that, in the course of kidnapping Diaz, he was "armed with a dangerous weapon, other than a firearm, as defined in Section 33A-1 of [the Criminal Code of 2012]." 720 ILCS 5/10-2(a)(5) (West 2014). In turn, to prove defendant kidnapped Diaz, the State had to show that he knowingly and secretly confined her against her will (Count 2) and that he knowingly, by force or threat of imminent force, carried Diaz from one place to another with the intent to secretly confine her against her will (Count 4). 720 ILCS 5/10-1(a)(1), (2) (West 2014).

¶ 21 To establish defendant committed armed robbery, the State had to prove that he robbed Diaz while "armed with a dangerous weapon other than a firearm." 720 ILCS 5/18-2(a)(1) (West 2014). In turn, to prove defendant robbed Diaz, the State had to show that he knowingly took money from her by force or threat of imminent force. 720 ILCS 5/18-1(a) (West 2014).

¶ 22 To establish defendant committed aggravated unlawful restraint, the State had to prove that he committed unlawful restraint "while using a deadly weapon." 720 ILCS 5/10-3.1(a) (West 2014). In turn, to prove defendant unlawfully restrained Diaz, the State had to show that he knowingly detained her without legal authority. 720 ILCS 5/10-3(a) (West 2014).

¶ 23 In defendant's first argument about the sufficiency of the evidence, he does not dispute that, if Diaz's testimony was credible, there would be sufficient evidence to convict him of the

non-enhanced versions of the offenses (kidnapping, robbery and unlawful restraint).[2] Rather, he argues that Diaz's testimony should be rejected as "wholly unreasonable and improbable," namely because she did not attempt to escape while he was on his cell phone at the Home Depot or while he was "distracted" at the first residence talking to an unknown person. Defendant further alleges that Diaz's testimony was unworthy of belief because, although she testified that he threatened to shoot her, Officer Sheahan testified that Diaz never made this assertion to him.

¶ 24 As previously noted, credibility determinations are reserved for the trier of fact (see *Brown*, 2013 IL 114196, ¶ 48), here, the trial court. By finding defendant guilty and expressly dismissing his testimony as incredible, the court implicitly found Diaz's testimony was credible. Although we must greatly defer to these credibility findings (*People v. Cunningham*, 212 Ill. 2d 274, 280 (2004)), they are not conclusive or binding on us. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 59. We will reject the court's credibility findings if a witness' testimony was "so wholly incredible or so thoroughly impeached that it is incapable of being used as evidence against [the] defendant." *People v. Sanders*, 2012 IL App (1st) 102040, ¶ 15. We do not find this to be the case with Diaz's testimony.

¶ 25 Diaz testified that defendant showed her the handle of a gun and threatened to shoot her if she disobeyed his instructions. Based on defendant's menacing actions, it is not incredible that Diaz would not attempt to escape while he was on his cell phone circling her vehicle and later while he was talking to the unknown person at the first residence and still visible to her. See *People v. Redman*, 141 Ill. App. 3d 691, 703-04 (1986) (finding a sexual assault victim's

[2] As previously discussed, defendant's alternative argument concerns the sufficiency of the evidence to prove he used or possessed a dangerous or deadly weapon, specifically a bludgeon, to sustain his convictions on the enhanced versions of the offenses (aggravated kidnaping, armed robbery and aggravated unlawful restraint).

testimony believable and her behavior "not unreasonable" where she did not attempt to escape from the defendant who appeared at her residence with "a knife and making threats" as "[t]here is no requirement that a [sexual assault] victim attempt to escape where to do so would endanger her life"). While Diaz did escape at the second residence, this was the first instance where defendant could not see her. It is not unbelievable that she would use this opportunity as her first attempt to escape from him. Moreover, as illustrated by both Diaz's and Officer Sheahan's testimony, Diaz immediately returned to the Home Depot, called the police and reported what defendant did, thus providing corroboration for her account of the events. See *People v. Washington*, 240 Ill. App. 3d 688, 705 (1992) (finding a victim's testimony that she was sexually assaulted by the defendant corroborated because she "promptly notified the police" about the attack).

¶ 26 It is true that there was conflicting evidence of whether defendant threatened to shoot Diaz. Diaz testified that defendant threatened to shoot her and that she told the police of this fact. Conversely, Sheahan testified that Diaz never told him about defendant threatening to shoot her. However, we cannot find Diaz's testimony so thoroughly impeached due to this lone inconsistency. As Diaz's testimony was neither wholly incredible nor thoroughly impeached, we have no basis to reject the trial court's credibility finding in her favor.

¶ 27 Defendant further suggests that his explanation at trial was "more reasonable" than Diaz's. Citing to the Federal Bureau of Investigation's website, he argues his version of events parallels a common fraud scheme known as an "advance fee scheme." Initially, we note that we will not consider any evidence that was not before the trial court and thus not part of the record on appeal. See *People v. Heaton*, 266 Ill. App. 3d 469, 476-77 (1994). Consequently, we give no consideration to the information on the FBI's website. Furthermore, the trial court was under no

obligation to believe defendant's testimony. See *People v. McCarter*, 2011 IL App (1st) 092864, ¶ 22. Rather, the court could consider the "probability or improbability" of his version of events "in light of the surrounding circumstances." *People v. Ferguson*, 204 Ill. App. 3d 146, 151 (1990). The court did just this and expressly found his version of events to defy believability. As we have already found that the court's credibility determination in favor of Diaz was proper, we see no basis to disturb the court's credibility finding against defendant and accept his version of events over Diaz's.

¶ 28 Defendant lastly compares his case to *People v. Coulson*, 13 Ill. 2d 290, 291, 298 (1958), in which our supreme court reversed multiple defendants' convictions for armed robbery. The court found that the victim's testimony "taxe[d] the gullibility of the credulous" because the defendants allegedly "voluntarily accompanied him to his home on the vague promise of more money, and permitted him to go inside alone while they obligingly waited outside, trusting that [he] would keep his promise and not call the police." *Id.* at 296. However, in the present case, as previously discussed, nothing about Diaz's testimony was incredible. *Coulson* therefore does not compel a different result in this case.

¶ 29 In sum, we find that the trial court's credibility finding in favor of Diaz was proper. The testimony of a single, credible witness may be sufficient to convict (*People v. Smith*, 185 Ill. 2d 532, 541 (1999)), even if the witness is the victim and the defendant's version of events contradicts the victim's. *People v. Brink*, 294 Ill. App. 3d 295, 300 (1998). Given Diaz's credible testimony that defendant entered her vehicle by threat of imminent force, demanded and eventually took money from her by threat of force, forced her to drive to two different residences and ordered her to remain in the vehicle by threat of force, the State sufficiently proved that he kidnapped, robbed and unlawfully restrained Diaz.

¶ 30 Defendant alternatively argues that, even if the State's evidence sufficiently proved him guilty of the non-enhanced offenses of kidnapping, robbery and unlawful restraint, the State failed to prove beyond a reasonable doubt that, as charged, he used or possessed a dangerous or deadly weapon, specifically a bludgeon, to enhance the offenses to aggravated kidnaping, armed robbery and aggravated unlawful restraint.

¶ 31 To prove defendant committed armed robbery, the State had to show that he was "armed with a dangerous weapon other than a firearm." 720 ILCS 5/18-2(a)(1) (West 2014). To prove he committed aggravated unlawful restraint, the State had to show that defendant used "a deadly weapon." 720 ILCS 5/10-3.1(a) (West 2014). Neither offense defines deadly or dangerous weapon. See 720 ILCS 5/10-3.1, 18-2 (West 2014). We therefore employ the common law definition of the terms. See *People v. Ligon*, 2016 IL 118023, ¶ 21. In contrast, aggravated kidnaping does define dangerous weapon by directing the reader to the definition contained in section 33A-1 of the Criminal Code of 2012. 720 ILCS 5/10-2(a)(5) (West 2014).

¶ 32 In analyzing whether an object constitutes a "dangerous weapon" under the common law, Illinois courts have defined three categories of dangerous objects: "(1) objects that are dangerous *per se*, such as loaded guns; (2) objects that are not necessarily dangerous, but were actually used in a dangerous manner ***; and (3) objects that are not necessarily dangerous, but may become dangerous when used in a dangerous manner." *People v. Ross*, 229 Ill. 2d 255, 275 (2008). The trier of fact may make an inference of dangerousness based upon the evidence presented. *Id.* at 276. A bludgeon may be considered a dangerous weapon. *Id.* The State may present evidence that a gun was capable of being used a bludgeon due to its size, weight or composition and thus dangerous even though it was not actually used as a weapon. *Id.* at 275-77.

¶ 33 Similarly, "[a] deadly weapon is one that is 'dangerous to life' or 'one likely to produce death or great bodily injury,' or one that 'may be used for the purpose of offense or defense and capable of producing death.' " *People v. Stanley*, 369 Ill. App. 3d 441, 445 (2006) (quoting *People v. Dwyer*, 324 Ill. 363, 364 (1927)). Many weapons are inherently deadly while others may become deadly based on their manner of use. *Id.* For instance, " '[a] gun, pistol, or dirk-knife is itself deadly, while a small pocket knife, a cane, a riding whip, a club or baseball bat may be so used as to be a deadly weapon.' " *People v. Blanks*, 361 Ill. App. 3d 400, 411 (2005) (quoting *Dwyer*, 324 Ill. at 364-65). A bludgeon may be considered a deadly weapon. *Ross*, 229 Ill. 2d at 275 (citing *People v. Skelton*, 83 Ill. 2d 58, 64-66 (1980)). It is the role of the trier of fact to determine whether the weapon used by the defendant is a deadly weapon based upon the circumstances of the case, the description of the weapon and its manner of use. *Blanks*, 361 Ill. App. 3d at 411-12.

¶ 34 Here, the evidence revealed that, as Diaz was sitting in her vehicle, defendant knocked on her window and showed her the handle of a gun, which she described as appearing to be metal, "black and silver" and identical to the ones police officers carry. When this evidence is viewed in the light most favorable to the State, a rational trier of fact could have found that the gun defendant possessed could have been used as a bludgeon. See *People v. Hill*, 346 Ill. App. 3d 545, 548 (2004) (finding sufficient evidence that a "chrome or nickel-plated automatic pistol" could have been used as a bludgeon, even if the gun was inoperable); *People v. Greer*, 53 Ill. App. 3d 675, 683 (1977) (finding an unloaded pellet gun could have been used as a bludgeon because it was made of metal).

¶ 35 Although defendant did not use the gun as a bludgeon, the circumstances described by Diaz support the inference that he was armed with some type of weapon that, even if only by its

apparent metallic handle, could have been used as a bludgeon. See *Skelton*, 83 Ill. 2d at 66 (finding that "[m]ost, if not all, unloaded real guns and many toy guns, because of their size and weight, could be used in deadly fashion as bludgeons" and "can properly be classified as dangerous weapons although they were not in fact used in that manner during the commission of the particular offense"). Therefore, the State sufficiently proved defendant committed armed robbery while armed with a dangerous weapon and aggravated unlawful restraint while using a deadly weapon.

¶ 36 However, we find the State failed to sufficiently prove defendant committed the two counts of aggravated kidnaping, as indicted based on being "armed with a dangerous weapon, other than a firearm, to wit: a bludgeon." To prove the offenses, the State had to show that defendant was "armed with a dangerous weapon, other than a firearm, as defined in Section 33A-1 of [the Criminal Code of 2012]." 720 ILCS 5/10-2(a)(5) (West 2014). Section 33A-1 is known as the armed violence statute (720 ILCS 5/33A-1 (West 2014)), and it defines being armed with a dangerous weapon as being "armed with a Category I, Category II, or Category III weapon." 720 ILCS 5/33A-1(c)(1) (West 2014). Category I weapons include firearms that can be concealed on a person. 720 ILCS 5/33A-1(c)(2) (West 2014). Category II weapons include other firearms and knife-like objects. *Id.* Category III weapons are "a *bludgeon*, black-jack, slungshot, sand-bag, sand-club, metal knuckles, billy, or other dangerous weapon of like character." (Emphasis added.) 720 ILCS 5/33A-1(c)(3) (West 2014).

¶ 37 "[T]he dangerous weapons categories in the armed violence statute are defined by the statute and therefore limited to the weapons identified by the statute." *Ligon*, 2016 IL 118023, ¶ 23. Because of this, "the common-law definition of 'dangerous weapon' found in the armed robbery statute is broader than the definition of 'dangerous weapon' in the armed violence

statute." *People v. Hernandez*, 2016 IL 118672, ¶ 16. Thus, an object that qualifies as a dangerous weapon under the common-law definition of dangerous weapon may not qualify as a dangerous weapon under the armed violence statute. *Ligon*, 2016 IL 118023, ¶ 24.

¶ 38 Our supreme court has found that metal pellet and BB guns, though "capable of being used as a bludgeon" are "not typically identified as such and, under the doctrine of *ejusdem generis*, cannot be interpreted to be 'of like character' to the bludgeon-type weapons included in the category [III]" definition of dangerous weapons in the armed violence statute.[3] *People v. Davis*, 199 Ill. 2d 130, 141 (2002).

¶ 39 The armed violence statute does not define the word "bludgeon." *People v. Vue*, 353 Ill. App. 3d 774, 780 (2004). "Dictionaries generally describe a bludgeon as being a short stick used as a weapon usually having one thick, heavy, or loaded end." *Id.* (citing Webster's Third New International Dictionary 240 (1993) and *People v. Fink*, 94 Ill. App. 3d 816, 817 (1981)); see *Hernandez*, 2016 IL 118672, ¶¶ 14-15 (finding "tin snips," a handyman's tool, which "are often heavy and large enough that when used in the manner they were in this case, to strike a victim, they become dangerous" may not "be considered a bludgeon 'or other dangerous weapon of like character' under the armed violence statute").

¶ 40 In the present case, the alleged bludgeon was defendant's gun, including its metallic handle. However, a gun or its handle is not similar to any of the Category III weapons. Rather, they are distinct, as exemplified by a gun's inclusion in various forms as Category I and Category II weapons. See 720 ILCS 5/33A-1(c)(2) (West 2014). Although a gun is inherently

[3] "The doctrine of *ejusdem generis* provides that when a statutory clause specifically describes several classes of persons or things and then includes 'other persons or things,' the word 'other' is interpreted as meaning 'other such like.' " *Davis*, 199 Ill. 2d at 138 (quoting *Farley v. Marion Power Shovel Co.*, 60 Ill. 2d 432, 436 (1975)).

dangerous and capable of being used a bludgeon, it is not the type of weapon typically identified as being a bludgeon or similar in character to the other bludgeon-like weapons included in the Category III definition of dangerous weapons. See *Davis*, 199 Ill. 2d at 141. Consequently, we find that the State failed to prove beyond a reasonable doubt that defendant was armed with a bludgeon, and thus a dangerous weapon other than a firearm as defined by the armed violence statute, while he kidnapped Karla Diaz. Accordingly, we must vacate defendant's convictions for aggravated kidnaping (Counts 2 and 4), reduce them to kidnapping and remand for resentencing. See *Ross*, 229 Ill. 2d at 277 (finding that, where there was insufficient evidence to convict the defendant of armed robbery based on insufficient proof of him being armed with a dangerous weapon, the proper remedy was to reduce the offense to robbery and remand the matter for resentencing on the lesser offense).

¶ 41 Defendant next contends that convicting him of aggravated unlawful restraint violates the one-act, one-crime doctrine because the offense was based on the same underlying act as his kidnapping offenses. Although defendant did not raise this claim in the trial court, "forfeited one-act, one-crime arguments are properly reviewed under the second prong of the plain-error rule because they implicate the integrity of the judicial process." *People v. Nunez*, 236 Ill. 2d 488, 493 (2010).

¶ 42 In the State's brief, it concedes a violation of the one-act, one-crime doctrine as defendant's conviction for aggravated unlawful restraint "was based on the same single ongoing event of the aggravated kidnapping [*sic*]." As previously discussed, we have found insufficient evidence to support defendant's two convictions for aggravated kidnaping and reduced them accordingly to kidnapping. However, we still find a violation of the one-act, one-crime doctrine.

¶ 43 Under the doctrine, a defendant may not be convicted of multiple offenses based on the same physical act. *People v. Johnson*, 237 Ill. 2d 81, 97 (2010). When multiple convictions result, the defendant's conviction on the less serious offense must be vacated. *Id.*

¶ 44 Defendant's conviction for aggravated unlawful restraint was based on him unlawfully "detain[ing]" Diaz. His now-reduced conviction for kidnapping under Count 2 was based on secretly "confin[ing]" Diaz against her will. Kidnapping is a continuing offense. See *People v. Turner*, 128 Ill. 2d 540, 577 (1989). Therefore, defendant's act of kidnapping Diaz continued throughout the entire time she was secretly confined in his vehicle despite his repeated exiting of the vehicle. Further, there is no distinction between the word "confine[]" in the kidnapping statute (720 ILCS 5/10-1(a)(1) (West 2014)) and the word "detain[]" in the unlawful restraint statute (720 ILCS 5/10-3(a) (West 2014)), as the Committee Comments to the unlawful restraint statute treat detention without legal authority "as being synonymous with confinement." *People v. Banks*, 344 Ill. App. 3d 590, 596 (2003).

¶ 45 Consequently, defendant's conviction for aggravated unlawful restraint was based upon the same physical act as his kidnapping conviction under Count 2. See *People v. Bell*, 217 Ill. App. 3d 985, 1014-15 (1991) (vacating a conviction for unlawful restraint where the defendant had also been convicted of an aggravated kidnaping because "both charges were based upon the detention or confinement of [the victim]"). Defendant's conviction for aggravated unlawful restraint is therefore improper. See *Johnson*, 237 Ill. 2d at 97.

¶ 46 Because kidnapping is a Class 2 felony (720 ILCS 5/10-1(c) (West 2014)) and aggravated unlawful restraint is a Class 3 felony (720 ILCS 5/10-3.1(b) (West 2014)), aggravated unlawful restraint is the less serious offense and it must be vacated. See *Johnson*, 237

Ill. 2d at 97. Accordingly, pursuant to Illinois Supreme Court Rule 615(b)(1), we vacate defendant's conviction for aggravated unlawful restraint.

¶ 47 For the foregoing reasons, we affirm defendant's conviction for armed robbery (Count 6), vacate his conviction for aggravated unlawful restraint (Count 9), and reduce his convictions for aggravated kidnaping to kidnapping and remand the cause for resentencing (Counts 2 and 4).

¶ 48 Affirmed in part, vacated in part and remanded with directions.