2015 IL App (1st) 132737-U

FOURTH DIVISION
December 31, 2015

No. 1-13-2737

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 2059701
	)	
ANTHONY CORREA,	)	Honorable
	)	Thomas V. Gainer, Jr.,
Defendant-Appellant.	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: The trial court's findings of not not guilty for attempted aggravated kidnapping and child abduction are reversed because the State failed to establish that defendant, who is mentally disabled with an IQ of 56, had the requisite intent necessary to commit these crimes.

¶ 2 Defendant Anthony Correa was charged by information with attempted aggravated kidnapping, child abduction, unlawful restraint, and aggravated battery following an incident in a Chicago park with a nine-year-old girl. Following a fitness hearing, defendant was found unfit to stand trial, and after a period of treatment, it was determined that no reasonable probability existed that defendant could be restored to fitness. After a discharge hearing, the trial court

found defendant not "not guilty" of attempted aggravated kidnapping, child abduction, and unlawful restraint pursuant to section 104-25 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/104-25 (West 2010)). Defendant was found not guilty of aggravated battery. Subsequently, the trial court ordered defendant to be involuntarily committed to the Department of Mental Health for a period not to exceed 15 years.

¶ 3 Defendant appeals, arguing that: (1) defendant was not proven not "not guilty" beyond a reasonable doubt of attempted aggravated kidnapping and child abduction because the evidence was insufficient to establish that defendant, who has an IQ of 56 and the developmental age between 5 and 11 years old, attempted to take or lure Kristal S. from the park with candy; and (2) the trial court erred in committing defendant to the maximum 15-year period where the State's evidence failed to establish by clear and convincing evidence that defendant posed a serious threat to public safety. Defendant does not challenge the not "not guilty" finding for unlawful restraint.

¶ 4 Defendant, who was 44 years old at the time, was arrested in October 2009 based on allegations of an incident with nine-year-old Kristal S. in Mayfair Park in Chicago. Kristal was at the park with her 12-year-old brother Frank S. and her nine-year-old cousin Toriana P. Frank was on the swings nearby while Kristal and Toriana were together. Defendant was alleged to have approached Kristal, and asked her if she wanted candy and he had more at his house. Kristal declined, and defendant then grabbed Kristal's wrist and a belt loop on her pants. Kristal was unable to free herself from defendant. She called to Frank, who came over and "smacked" defendant's hands from Kristal. Kristal ran home and reported the incident to her parents, who called the police.

¶ 5 After his arrest, defendant was released on bond and lived at his parents' house. In May 2010, defendant was arrested on the charge of criminal trespass to land. The circumstances from the arrest are unclear. According to statements from attorneys from both parties, including defendant's brother, a former assistant State's Attorney, in the record, an off-duty Chicago police officer was changing her child's diaper in the woman's restroom at the Irish American Heritage Center when defendant was seen exiting a stall with a 13-year-old girl. No allegations of any improper conduct by defendant were made. Defense counsel stated that the girl and her mother were interviewed and both said nothing happened. The case was stricken with leave to reinstate when the complaining witness failed to appear in court. The case was reinstated, but later dismissed again.

¶ 6 During the pendency of the 2010 charge, the State filed a petition for a violation of defendant's bail bond. A different trial judge was assigned to this case during the pendency of the petition. The petition was withdrawn after the case was dismissed. Defendant then went to live with his brother.

¶ 7 In July 2011, the trial court granted an order for defendant to be examined to assess his fitness to stand trial. In August 2011, a report was filed by Dr. Nicholas Jasinski. Dr. Jasinski evaluated defendant earlier in August regarding defendant's fitness to stand trial. Dr. Jasinksi found that defendant was unfit to stand trial. He stated that defendant "suffers from significant cognitive impairment at a level consistent with mild mental retardation. His cognitive difficulties impede his ability to meaningfully understand the nature and purpose of legal proceedings as well as his ability to rationally assist counsel in preparing his defense." Dr. Jasinski recommended an outpatient treatment facility, and that "with consistent and structured education," defendant would likely attain fitness within a year.

¶ 8 Dr. Jasinski's report noted that defendant's speech was "mildly slowed," and his demeanor was "childlike." Dr. Jasinski stated that defendant needed questions to be asked in "basic language" for him to understand, and he "frequently required repetition and rephrasing of questions due to his significant cognitive limitations." Dr. Jasinski administered the Wechsler Adult Intelligence Scale-Fourth Edition (WAIS-IV), a broad measure of general intellectual functioning. Defendant's full scale IQ score was 56, which is in the extremely low range.

¶ 9 Regarding fitness to stand trial, Dr. Jasinski found that defendant could describe the charges against him, was aware of the basic meanings of guilty and not guilty, and could provide a basic understanding of the concept of a witness and evidence. However, defendant "exhibited significant difficulty understanding the implications of his plea options." Defendant "could not describe the purpose of a trial as more than, 'Go to court.' " "Even with extensive explanation, [defendant] demonstrated inconsistent learning and retention of information."

¶ 10 In October 2011, the trial court entered another order referring defendant for an evaluation for fitness to stand trial. In November 2011, Dr. Erick Neu filed a report based on his October 2011 evaluation of defendant. The trial court also conducted a hearing regarding defendant's fitness in November 2011. Dr. Neu appeared as an expert in the field of forensic psychology. Dr. Neu testified about his evaluation and report of defendant. He concluded that defendant was unfit to stand trial and that defendant "suffers from Mild Mental Retardation." He recommended inpatient treatment with education about the legal system in a manner sensitive to his cognitive deficits. He found there was a "reasonable probability" that defendant could be restored to fitness within the statutory time period.

¶ 11 Dr. Neu found that defendant "knew the month, but was unable to provide the year, the date, the day of the week or even his age or date of birth." Defendant was unable to name the

current president, but said "Daley." Dr. Neu described defendant's speech as organized and coherent, but "the content was generally sparse, concrete and childlike." Dr. Neu noted as an example that defendant "offered the sheriff deputy who searched him for contraband a piece of candy." Dr. Neu stated that defendant's "insight is poor, his judgment impaired (because of his cognitive deficits) and his impulse control appeared to be fair." As for fitness to stand trial, Dr. Neu noted that defendant was asked approximately two dozen questions to assess his understanding of courtroom procedures, responsibilities of courtroom personnel, and his ability to work with defense counsel, but he was only able to answer two correctly, aware of his charge and role of defense counsel. Dr. Neu stated that defendant was unable to retain any information when he educated defendant and quizzed him after a brief delay.

¶ 12 During cross-examination, the trial court interjected to ask Dr. Neu questions. The court asked if Dr. Neu believed that defendant presented a danger to himself or others, and Dr. Neu responded that he did not address that issue, he was asked to address fitness to stand trial. Dr. Neu further said that "there was nothing striking from the mental status examination to suggest that he was an imminent danger," but maintained that he would need to do an evaluation to give a formal opinion. The court also asked "if given the nature of the allegations, he might be subject to involuntary commitment for any reason?" Dr. Neu answered that "there was nothing that jumped out from the evaluation to suggest to [him that defendant] needs to be hospitalized."

¶ 13 The trial court found defendant unfit for trial, but likely to attain fitness within one year. The court ordered outpatient treatment and for the Department of Human Services (DHS) to issue a report within 14 days as to whether outpatient treatment was appropriate.

¶ 14 On December 12, 2011, Dr. Ray Kim, a doctor with DHS, evaluated defendant. Dr. Kim concluded that defendant was unlikely to attain fitness to stand trial based on "significant

cognitive deficits." In his report, Dr. Kim observed that defendant "exhibited difficulty focusing, was easily distracted, and appeared confused during the interview." "His judgment and impulse control were marginal, his frustration tolerance was fair, and his insight was poor." Dr. Kim noted that defendant's memory was "poor, and his intellectual functioning was estimated to be in the Mild Mental Retardation range." Dr. Kim further found that based on the results of a structured risk assessment for violence, defendant is "considered to be a low risk for violent behavior. Consequently, he is not considered an imminent danger to himself or others at this time." Regarding fitness for trial, defendant "lacks an adequate understanding of the court process. Dr. Kim noted that defendant was unable to retain any of the information that was taught and answered, "I don't know," to all of the questions asked about the court process. Dr. Kim found that the "established and chronic nature of his cognitive deficits interferes with his ability to participate in a meaningful manner" with his own defense. "His ability to retain and recall learned information is severely impaired, posing a serious barrier to attaining fitness."

¶ 15 In January 2012, the trial court entered an order for defendant to be reevaluated for fitness to stand trial and appropriateness of treatment in light of Dr. Kim's report. In February 2012, Dr. Neu evaluated defendant a second time. He concluded that defendant remained unfit to stand trial, but stated that an intensive outpatient program with education on the legal system would be appropriate. Provided that such a program is intensive, Dr. Neu found there was a reasonable probability that defendant could attain fitness within the statutory time.

¶ 16 In his report, Dr. Neu observed that at the evaluation defendant "was unable to state the date, even the month or year." Defendant "evidenced significant cognitive deficits in that his speech had sparse content, his thinking was concrete, his memory appeared to be poor and he quite frequently required inquiries to be simplified." Dr. Neu noted that while defendant's

overall performance during questioning about the courtroom process was "quite poor," he did perform "slightly better" than during his October 2011 evaluation.

¶ 17 In March 2012, the trial court conducted a hearing to resolve the difference of opinion as to whether defendant would ever attain fitness to stand trial. Both Dr. Neu for the State and Dr. Kim for the defense testified consistently with their respective reports. Dr. Kim stated that defendant's brother Ricardo Correa was present during the evaluation, but did not prompt defendant in any way. Dr. Kim was informed by defendant's brother that defendant participated in special education classes since the first grade and defendant was currently involved in a "day program where he [was] receiving training services designed for individuals with developmental disabilities."

¶ 18 When asked if hypothetically defendant could be restored to fitness through an inpatient program, Dr. Kim said it was "very guarded to unlikely." He stated that with more intensive services, defendant is capable of repeating back or memorizing certain terms, but he did "not have confidence that [defendant] would actually grasp or understand what the concepts mean and how they might apply to him and his case." Dr. Kim explained that his main role with DHS was to supervise the forensic outpatient program. He stated that the program defendant attends at El Valor is "very beneficial for someone with developmental disabilities." Dr. Kim testified that he does not think defendant meets the criteria for inpatient treatment because he is not an imminent danger to himself or others, he is cooperative with treatment, and he has more than adequate support in the community in terms of family being able to monitor him and get him to appointments.

¶ 19 On cross-examination, Dr. Kim was asked about his knowledge of the allegations in the case. He stated that he was aware of the allegations. When asked if it "endangers other people

when he's trying to force a child to go with him," Dr. Kim responded that while he does not know all of the details in the case, "typically someone with cognitive deficits developmentally they are more on the level of someone of that age." Further, "because of those deficits and developmental delays, they don't have the same kinds of sense of boundaries that we might have in terms of what's appropriate, what's not appropriate." At that point the trial court interrupted to ask if Dr. Kim was told that "in May of 2010, after his 2009 arrest, he was charged with a violation of bail bond for being in the stall of a woman's bathroom in a park house with a 13-year-old child?" Dr. Kim responded no. The court then asked if that would change his opinion or did he think that more testing might be necessary to determine whether or not defendant is a danger to other people. Dr. Kim stated that he would factor that into his opinion. Dr. Kim then referred to his report on defendant's violence assessment. He noted that defendant's risk factors were a lack of insight due to his cognitive deficits, some degree of impulsivity, some difficulty managing stress. Dr. Kim stated that other than the instant case, defendant does not have any history of violence of which he was aware. Dr. Kim gave defendant a very low rating.

¶ 20 Dr. Kim was asked if the new information from the May 2010 incident changed his assessment. Dr. Kim asked for more information, but no one was able to give him more details other than what was stated in the petition for violation of bail bond, that it was alleged that defendant committed the offense of criminal trespass to land in that he was observed in the women's restroom in a stall with a 13-year-old girl. Dr. Kim responded that this information seemed more related to what he considered sexual dangerousness as opposed to violence, and he would have to do a further evaluation on that subject.

¶ 21 Following arguments, the trial court held that defendant was unfit to stand trial, and that based on the weight of the evidence, there is a likelihood that defendant could attain fitness

within one year. The trial court found that the least restrictive and most therapeutic setting for restoration services for defendant was an inpatient treatment in a secure DHS facility. The court remanded defendant to the custody of DHS.

¶ 22 In July 2012, defendant filed a petition for discharge hearing under section 104-23 and 104-25 of the Code (720 ILCS 5/104-23, 25 (West 2010)), seeking a hearing as to whether defendant is unlikely to attain fitness to be conducted within 120 days. In September 2012, Dr. Neu filed a new report following a September evaluation of defendant. Dr. Neu's opinion was that defendant was unfit to stand trial and, that despite minimal gains following inpatient restoration services, defendant is unlikely to attain fitness within the statutory time period.

¶ 23 Dr. Neu examined defendant at Choate Mental Health Center, where he has been hospitalized following the trial court's previous ruling. Dr. Neu observed that defendant was alert, but "only marginally cooperative." Defendant's memory "presented as being quite poor." He noted that "inquiries very frequently had to be simplified and repeated and even then [defendant] at times failed to grasp what was being asked." Defendant initially claimed not to know what he was charged with, but eventually acknowledged being aware that he is charged with " 'kidnapping,' " and he also referenced being accused of " 'pushing someone.' " Defendant "appeared oblivious as to the severity of the charges or penalties he may face if convicted." Despite initially denying he knew the role of defense counsel, defendant eventually said his lawyer's job was "to help" him. He was unable to state the role of the prosecutor or the trial judge, nor could he explain the difference between a bench or jury trial. He was able to identify himself as the defendant, but also referenced himself when asked who the victim was. Defendant was educated about the questions he had not answered correctly, but after a brief

delay, he was only able to answer one of the eight questions correctly. Dr. Neu believed it was unlikely that defendant will attain fitness.

¶ 24 In March 2013, Michael Jasmon filed a progress report for defendant, finding that defendant remained unfit to stand trial and he was unlikely to achieve legal fitness. Defendant was administered several tests to determine fitness, but he received low scores that indicated he remained unfit for trial. The report noted that defendant's "insight and judgment were limited." Jasmon also stated that defendant is not able to read or write. Jasmon also filed an addendum, which observed that defendant has reached "a learning plateau despite his best efforts." Defendant's cognitive deficits are "not likely to be remediated by any known treatments or technologies." Jasmon further recommended that as to future treatment defendant should "be afforded the opportunity to participate in structured educational/vocational programming in the community if all legal barriers are satisfied." Defendant "should also be provided adequate supervision and guidance as he is not viewed to be capable of living independently at this time."

¶ 25 On May 20, 2013, defendant filed a petition for discharge from treatment or in the alternative, for conditional release for outpatient treatment.

¶ 26 Also on May 20, 2013, the trial court conducted a discharge hearing under section 104-25 (725 ILCS 5/104-25 (West 2010)). The following evidence was presented at the hearing.

¶ 27 Kristal S. testified that at the time of the hearing she was 12, but in October 2009, she was 9 years old. She lived with her parents and two brothers, one is older and one is younger. On the evening of October 29, 2009, she was playing in Mayfair Park with her brothers and her cousin Toriana P. In 2009, her older brother Frank was 12 years old, her younger brother was 7, and Toriana was 9.

¶ 28 Kristal was playing in park, approximately five feet away from Toriana, when defendant approached her. She testified that she recognized him from the neighborhood. Defendant had been on a skateboard, but he put it down when he approached her. She stated that defendant came up to her and said, "do you want some candy? I have some more at my house." Kristal testified that defendant had Smarties candy in his hand. She stated that she said no. When she said no, defendant then "went to grab my arm and stuff." She said that defendant grabbed her wrist and "then he started grabbing [her] by [her] pants." Kristal testified that she screamed for her brother Frank. She was trying to get free from defendant, but was not able to do so. Frank ran over and "smacked" defendant's arms off of her. She was able to get away from defendant and ran home.

¶ 29 When she got home, she told her parents what had happened. She testified that her father went outside. She stated that she told the police what happened and the next day, she viewed a lineup and identified defendant. She denied giving defendant permission or authority to grab her wrist or by her pants.

¶ 30 On cross-examination, defense counsel asked Kristal if defendant said, "come with me and I will buy you some candy?" Kristal said he did. Counsel then asked Kristal if defendant said anything else about where he would buy the candy, and she said no. Defense counsel asked her if she remembered speaking to the police that night, she stated that she did. Counsel then asked Kristal if she told the police officer that "the man who approached [her] in the park said come with me and I'll buy you some candy," Kristal answered "yes." Counsel next asked Kristal if she told the police officer that "the guy who approached you said come to my house or come to my home?" Kristal responded, "no." Defense counsel asked Kristal if she remembered speaking with an investigator about a week later, Kristal stated that she remembered. Counsel asked

Kristal if she told the investigator that "the man who approached you in the park stated, come to the store with me and I'll buy you more candy as he began to pull" her, Kristal said "yes." Counsel asked her if she made any statement to the investigator about the guy in the park wanting to take her to his home, and Kristal answered, "no."

¶ 31 Defense counsel asked Kristal that when defendant grabbed her, was one hand on her wrist and one hand on her belt loop. Kristal responded, yes as to both. She stated that defendant tried to pull her, but her feet did not move and she was standing the whole time.

¶ 32 Frank S. testified that he is Kristal's brother. At the time of the hearing, he was 16 year old, but in October 2009, he was 12. On October 29, 2009, he was at Mayfair Park with Kristal, his brother, and his cousin. He was on the swings separate from Kristal, but he could see her. He did not hear any of the conversation between defendant and Kristal. He noticed what was happening when Kristal screamed his name, and then he "saw that [defendant's] hands were on [his] sister." Frank saw defendant's hand on Kristal's arm and pants, and "he was like yanking her towards him." Frank jumped from the swing and ran over. He "whacked" defendant's arms off of Kristal. They ran to their house and got their dad. The next day, he viewed a lineup and identified defendant.

¶ 33 Steve S. testified that he is Kristal and Frank's father, as well as a younger son. Steve stated that he did not give defendant permission or authority to touch Kristal. He also did not give defendant permission or authority to take Kristal anywhere. He did not know defendant before October 29, 2009.

¶ 34 After the State rested, defendant moved for a directed finding. The trial court denied the motion as to the attempted aggravated kidnapping, child abduction, and unlawful restraint, but

granted the motion as to aggravated battery. The defense rested without presenting any evidence.

¶ 35 Following arguments, the trial court found defendant not "not guilty" of the remaining charges. The court noted that it believed Kristal's testimony. "Her demeanor was such that she did not appear to be telling a lie to tailor her testimony to fit the allegations in the charging document." The court further stated that she "admitted readily" that she did not mention the house to the police officer, and that "she admitted that she said to an investigator, come to the store with me and I'll buy you more candy." The court found that considering Kristal's testimony, defendant "tried to forcibly move her."

> "He tried to forcibly take this child out of the park by luring her with candy, all of which I believe constitutes a substantial step toward the commission of the offense of aggravated kidnapping, child abduction, and unlawful restraint."

¶ 36 The trial court found that "there is sufficient evidence to prove beyond a reasonable doubt that the defendant committed the offenses I've said with the exception of aggravated battery." The trial court continued the hearing to determine whether defendant should remain in the custody of DHS and to allow the State an opportunity to respond to defendant's petition for discharge from treatment.

¶ 37 In July 2013, the trial court resumed the discharge hearing. The court denied defendant's motion for a new trial. The court found that since defendant had been found not "not guilty" of a Class 1 felony, it should remand defendant to DHS for a treatment period of two years under section 104-25(d)(1) (725 ILCS 5/104-25(d)(1) (West 2010)), which would expire on November 20, 2013. The trial court then found that based on the expert testimony and reports, defendant

would likely never attain fitness, and waiting for the four months to pass did not make sense. The court proceeded to defendant's petition for discharge.

¶ 38 Michael Jasmon testified on behalf of the State. Jasmon is the director of forensics at the Choate Developmental Center in Anna, Illinois, and was qualified as an expert in forensic psychology. Jasmon met defendant in April 2012, when defendant was admitted to Jasmon's unit at Choate. He did an evaluation of defendant in March 2013.

¶ 39 During the evaluation, Jasmon administered the Illinois Forensic Fitness Test (IFFT) and Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR). For the IFFT, one section is to determine if the individual has a mental illness, which defendant does not. The other section is about court orientation. Jasmon testified that they look for a score of 80%, but defendant only answered 6 of 20 questions correctly, for 30%. For the CAST-MR, there are three sections: basic legal terminology, basic skills to assist in one's defense, and understanding case events. Jasmon again looked for scores of 80%. Defendant scored 28% on the first section, 40% on the second section, and 20% on the third section. Defendant's total score was 30%.

¶ 40 Jasmon further stated that he did not believe that defendant could live independently in the community.

¶ 41 Jasmon evaluated defendant again in June 2013. His opinion remained the same. When asked if defendant is a risk to society, Jasmon answered yes if defendant were to live independently without adequate supervision. The trial court then asked Jasmon if he was saying that defendant "constitutes a serious threat to public safety if he is living alone in the community," Jasmon responded, "yes."

¶ 42 On cross-examination, defense counsel asked Jasmon what would be defendant's ideal placement. Jasmon indicated that the nonsecure step-down unit, which "provides enhanced treatment opportunities in all clinical areas, and there is an effort to begin the transition back into the community." Defense counsel asked if defendant was dangerous because there is no guarantee he would have 24 hour supervision, and Jasmon answered that was one of his concerns. Jasmon testified that another concern was defendant's "inability or unwillingness to participate in pro-social sexual classes on the secure setting. He has a difficult time talking about those issues. And based on the nature of the allegations, that was an area of clinical concern on our experience." Counsel asked if defendant was intellectually capable of participating in that discussion, and Jasmon said he does.

¶ 43 Jasmon stated that the only behavioral issue was defendant having a comb on one occasion, when he should have turned in the comb. Defendant has not been aggressive. Jasmon testified that one of defendant's strengths is his "interested, caring family that supports him." Defendant has benefitted from "being raised in a little more enriched environment than some of the individuals [they] work with. Therefore, he does have some higher level social skills than most people of his intellectual level." Jasmon also stated that defendant "does seem to be very interested in trying to achieve returning to the community. In other words, improving, trying to do better." Jasmon concluded that it was not necessary for defendant to be kept in a secure environment, but that he met the criteria for involuntary commitment.

¶ 44 The trial court then questioned Jasmon. The court asked if Jasmon believed defendant constituted a serious threat if allowed to live in the community, Jasmon answered, "Independently." The court asked Jasmon if he was aware of the allegations, in that it involved a child under the age of 13, Jasmon said yes. Jasmon reiterated that one of the reasons defendant

constituted a serious threat was his refusal to participate in the pro-social sexual classes. The court asked, "How is it that he then does not need to be in a secure program in your opinion?" Jasmon explained that the secure program is "not unlike a correctional facility," with locked doors and lots of security procedures. He continued, "our experience with him is that we believe he can function in a nonsecure setting and actually have greater opportunity for treatment in the pro-social sexual skills areas." The trial court stated that its concern was that "the structure [defendant] had in place broke down, and he was at place without any supervision, and he encountered this young child, and I want to make sure that that doesn't happen again."

¶ 45 Ricardo Correa, defendant's brother, testified on defendant's behalf. He stated that at the time of the incident, defendant was living with their parents, who were 76 years old then. After he was arrested, defendant went to live with Ricardo. Defendant would go to a workshop everyday at El Valor. It is a day program recommended by Dr. Kim. If defendant was released from custody, he would live with Ricardo. Ricardo stated that he would be available 24 hours a day to supervise defendant, and other family members are also available to help supervise defendant. Ricardo said defendant would live with him and Elsa Arubio in Burr Ridge. Arubio would also be available to supervise defendant. Another brother also lives in Burr Ridge and is available to help.

¶ 46 Ricardo testified that the safety plan was for defendant to attend his day program from 8:30 a.m. until 2:30 p.m. Ricardo would pick up defendant and defendant would remain with Ricardo.

¶ 47 At the conclusion of the hearing, the trial court found that defendant was subject to involuntary commitment under the Mental Health and Disabilities Code and he constitutes a serious threat to public safety. The court remanded defendant to DHS for further treatment. The

court found that "the period of this treatment may last as long as the longest period of incarceration would incur if convicted in the criminal proceedings which is 15 years." The court noted Ricardo's commitment to his brother's case, but defendant refuses to participate in education necessary to facilitate his return.

> "No matter how dedicated Mr. Correa and his friend are to the care and custody of Defendant Correa, I am not willing to take the chance that Defendant Correa can be returned to the community without the necessary education that Mr. Jasmon said he needs and he refuses to participate in."

¶ 48 The trial court ordered defendant to nonsecure step-down unit, and for DHS to seek court approval for any change in security structure. The court also requested a report every 90 days outlining the level of security in place as well as defendant's treatment, especially as it pertains to the pro-social sexual education. The court denied defendant's motion for discharge or in the alternative conditional release for outpatient treatment.

¶ 49 This appeal followed.

¶ 50 On appeal, defendant first argues that he was not proven not "not guilty" beyond a reasonable doubt of attempted aggravated kidnapping and child abduction because the State failed to establish defendant's intent to take Kristal to his home. The State maintains that Kristal's testimony supported the finding and we should affirm.

¶ 51 A discharge hearing pursuant to section 104-25 of the Code is not a criminal prosecution, but is civil in nature. *People v. Waid*, 221 Ill. 2d 464, 472 (2006). "In Illinois, a section 104-25 discharge hearing takes place only after a defendant has been found unfit to stand trial." *Id* at 470. "Accordingly, in keeping with due process requirements, a discharge hearing under section

104-25 is 'an "innocence only" hearing, that is to say, a proceeding to determine only whether to enter a judgment of acquittal, not to make a determination of guilt.' " *Id.* (quoting *People v. Rink*, 97 Ill. 2d 533, 543 (1983)). "Although a court's determination at a discharge hearing that the State has proved the defendant's guilt beyond a reasonable doubt does not constitute a technical determination of guilt, the standard of proof is the same as that required for a criminal conviction." *People v. Williams*, 312 Ill. App. 3d 232, 234 (2000). A guilt determination is reserved until the defendant is fit to stand trial. *Waid*, 221 Ill. 2d at 470. "It 'enables an unfit defendant to have the charges dismissed if there is not enough evidence to prove he committed the acts charged beyond a reasonable doubt.' " *Id.* at 472 (quoting *People v. Christy*, 206 Ill. App. 3d 361, 365 (1990)).

¶ 52 Under section 104-25(d), if the discharge hearing does not result in an acquittal, *i.e.*, defendant is found *not* not guilty, the defendant may be remanded for further treatment: (1) if the most serious charge is a Class 1 or Class X felony, the period may be extended for a maximum of up to two years; or (2) if the most serious charge is a Class 2, 3, or 4 felony, then the period may be extended for a maximum of 15 months. 725 ILCS 5/104-25(d) (West 2010).

> "If, at the expiration of this initial treatment period, a defendant continues to be unfit to stand trial, the court must determine whether he is subject to involuntary admission under the Mental Health and Developmental Disabilities Code, or if he constitutes a serious threat to the public safety. 725 ILCS 5/104-25(g)(2) (West 2004). If so, the defendant is remanded to the Department of Human Services (DHS) for further treatment. However, '[i]n no event may the treatment period be extended to exceed the

> maximum sentence to which a defendant would have been subject had he or she been convicted in a criminal proceeding.' 725 ILCS 5/104-25(g)(4) (West 2004). The potential maximum prison sentence thus serves as a ceiling rather than a floor." *Id.* at 471-72.

¶ 53 Here, defendant was found not not guilty of attempted aggravated kidnapping, child abduction, and unlawful restraint. Defendant challenges this finding for attempted aggravated kidnapping and child abduction because, according to defendant, the State failed to prove the charges beyond a reasonable doubt. Defendant does not contest the not not guilty finding for unlawful restraint. Since the standard of proof remained beyond a reasonable doubt as in criminal cases, our standard of review is also consistent with criminal challenges to the sufficiency of the evidence. Our inquiry is limited to "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); accord *People v. Cox*, 195 Ill. 2d 378, 387 (2001).

¶ 54 Under the charging instruments for attempted aggravated kidnapping in this case, the State had to prove that defendant did any act, which constituted a substantial step toward the commission of aggravated kidnapping, by "force or threat of imminent force" grabbed or "enticed" Kristal, a child under 13, to get her into his house with the "intent secretly to confine her against her will." See 720 ILCS 5/8-4(a) (West 2008); 720 ILCS 5/10-1(a)(2) (West 2008).

¶ 55 To be guilty of child abduction under the charging instruments, the State had to prove that defendant "intentionally lured or attempted to lure" Kristal, a child under 16, into a dwelling place without the consent of her parents for other than a lawful purpose. See 720 ILCS 5/10-5(b)(10) (West 2008). "The phrase 'other than a lawful purpose' in the child abduction statute

implies actions which violate the Criminal Code of 1961 (720 ILCS 5/1-1 *et seq*. (West 2008))." *People v. Velez*, 2012 IL App (1st) 101325, ¶ 30.

¶ 56 "Criminal intent is a state of mind that is usually inferred from the surrounding circumstances." *People v. Woodrum*, 223 Ill. 2d 286, 316 (2006). "The required showing that a defendant had 'other than a lawful purpose' [in child abduction] is essentially a statement of the criminal intent, or *mens rea*." *Id.* The question of a defendant's state of mind is a fact to be determined by the trier of fact. *People v. Carlisle*, 2015 IL App (1st) 131144, ¶ 59.

¶ 57 The facts of this case present a unique situation. It is uncontested that defendant is mentally disabled with an IQ of 56 and a developmental age between 5 and 11 years old. As shown in his many fitness evaluations, defendant is unable to retain information and understand simplified legal concepts. Jasmon observed that defendant cannot read or write. However, both attempted aggravated kidnapping and child abduction require an intentional act, *i.e.*, to secretly confine or to lure. "Lure" is defined as "an inducement to pleasure or gain," "to draw with a hint of pleasure or gain." Merriam-Webster's Collegiate Dictionary 694 (10th ed. 1995). While evidence of criminal intent can be inferred from the surroundings, such a determination has a different significance when the defendant has the mental state of a young child.

¶ 58 In *People v. Burt*, 142 Ill. App. 3d 833, 834-35 (1986), the defendant was charged with three counts of criminal sexual assault, in that he knowingly committed two acts of sexual penetration with a 7 year old girl and an 8 year old girl. The defendant was found unfit to stand trial, and after a discharge hearing, the trial court found the evidence sufficient beyond a reasonable doubt and remanded the defendant to the custody of the Department of Mental Health and Developmental Disabilities. *Id.* at 835.

¶ 59 On appeal, the defendant argued that the State failed to prove the "defendant's knowledge of the fact that the child complainants did not understand the nature of the sex act or that the complainants were unable to give effective consent" because of "his mental retardation, he could not have understood the nature of the sex act any more than the two little girls." *Id.* at 836. The reviewing court observed that while the defendant was 18 years old, he had an IQ of 59 and a developmental age of 7 or 8 years old. *Id.* According to the defendant's psychological evaluations, "defendant's low I.Q. makes it difficult for him 'to grasp the significance of events or situations which occur within his environment' and to be aware 'of social situations and associated cause and effect themes.' " *Id.*

¶ 60 The reviewing court believed that when the defendant began to sexually penetrate the girls and they began to cry, he knew he was doing something he should not be doing. However, the court found that this knowledge only went to the question of consent, but did not constitute the defendant's knowledge of the fact that the girls were too young to understand the nature of the sex act. *Id.* at 837. The court reversed the trial court's finding of not not guilty, concluding that:

> "Our review of the circumstantial evidence in this case, in particular, the psychological evaluations of the defendant, and records of other assessments made of defendant in 1983 and 1984 by a psychologist for the Hope DeWall School, lead us to conclude that this defendant, functioning at the mental level of a 7- or 8-year-old, did not possess the requisite mental state to commit the offenses of criminal sexual assault." *Id.*

¶ 61 In the present case, the trial court found Kristal's testimony credible and that defendant "tried to forcibly take this child out of the park by luring her with candy, all of which I believe constitutes a substantial step toward the commission of the offense of aggravated kidnapping, child abduction, and unlawful restraint." The trial court made no explicit findings as to defendant's intent to commit these crimes, or whether he even has the ability to have the requisite mental state. Even if we viewed the State's evidence, including Kristal's testimony in the broadest term and accept that her testimony is credible, as required by the standard of review, there is insufficient evidence to establish that defendant had the requisite mental state to commit the crimes of attempted aggravated kidnapping or child abduction. Kristal's statement does not establish defendant's intent to secretly confine her at his house or to lure her to a dwelling place for other than a lawful purpose.

¶ 62 The State's evidence showed that defendant came to the park on a skateboard and then approached Kristal in the park during daylight hours. Kristal's cousin Toriana was standing approximately five feet away at this time, and her brothers were nearby. He offered her candy, which he had in his hand, and stated he had more at his house. When Kristal refused, defendant grabbed her by the wrist and a belt loop, pulled her, and did not let go until Kristal's brother Frank struck defendant's arms. We point out that Dr. Neu's report from his October 2011 evaluation noted that defendant "offered the sheriff deputy who searched him for contraband a piece of candy." Given defendant's mental age of a child and significant cognitive deficits, the evidence cannot support a finding that defendant intended to secretly confine Kristal at his house or that he intended to lure Kristal.

¶ 63 Further, we find the State's reliance on *People v. Williams*, 295 Ill. App. 3d 663 (1998) , to be misplaced. In that case, the defendant was found guilty of two counts of attempted

aggravated kidnapping. The evidence at trial showed that the defendant drove up to two young girls, reached across his passenger seat and offered them candy, and said if they got in the car, he would take them wherever they wanted to go. *Id.* at 664. The girls walked to the nearest house. They saw the defendant's car a second time as they ran to their destination, one of the girls' grandmother's house. *Id.* The girls reported the incident and as they waited for the police, they saw the defendant's car drive by again and the mother of one of the girls chased the defendant on a bicycle, but failed to apprehend him. The defendant was arrested later at home. *Id.* He initially denied the incident altogether, although subsequently he admitted he spoke to the girls but could not recall the substance of the conversation. At trial, the defendant testified that he asked the girls for directions. *Id.* at 664-65.

¶ 64 On appeal, the defendant argued that the State failed to prove him guilty beyond a reasonable doubt. The reviewing court rejected the defendant's argument, finding that the girls' credible testimony and circumstances were sufficient to show intent, and the trial court was not required to believe the defendant's alternate explanation for the incident. *Id.* at 666.

¶ 65 While the facial circumstances are similar, in which an adult man approached young girls and offered candy, the similarities end there. Significantly, *Williams* did not involve the question of intent when the defendant is mentally disabled. Defendant's mental state is specifically relevant for that reason, and we find *Williams* unpersuasive on this issue.

¶ 66 The State asserts that evidence that defendant could form and execute a plan was shown in the record. The State points to an incident noted in Dr. Neu's September 2012 evaluation, in which defendant informed staff at Choate that " 'he could not participate in the walking program because he had vomited, then later said he had not vomited but a peer had called him names. He then admitted that he had lied and neither statement was true – he simple did not want to walk.' "

We decline to find the similarity in an instance of lying to avoid an undesired activity to show that defendant has the mental sophistication to form an intent to take a child from the park to secretly confine in his house or lure a child to a dwelling place for other than a lawful purpose. These lies to avoid the walking program appear very childlike and not indicative of an individual with the mental capacity to commit the crimes charged. The State offers no further proof of defendant's requisite mental state other than the circumstantial evidence to be inferred from Kristal's testimony. However, as we have observed, we do not find that this evidence was sufficient to show that defendant, with the developmental age of a young child and an IQ of 56, could have had such an intent.

¶ 67 As Dr. Kim testified at a fitness hearing, typically someone with defendant's cognitive deficits "developmentally they are more on the level of someone of that age" when referring to the allegations of defendant approaching Kristal. "[B]ecause of those deficits and developmental delays, they don't have the same kinds of sense or boundaries that we might have in terms of what's appropriate, what's not appropriate." The record established that defendant has the developmental age of a child, his memory is poor, his judgment is impaired, his insight is poor, and he has fair impulse control. When we consider the evidence before the trial court, including all of defendant's psychological evaluations, we cannot hold that the State established defendant's mental state, his intent to commit these crimes, beyond a reasonable doubt. Therefore, we reverse the trial court's finding of not not guilty for attempted aggravated kidnapping and child abduction, and enter a finding of not guilty.

¶ 68 The finding of not not guilty for unlawful restraint against defendant stands. Because we have reversed the not not guilty finding attempted aggravated kidnapping which has a maximum penalty of 15 years, we need not reach defendant's remaining argument that the trial court erred

in ordering the involuntary commitment of defendant for the maximum of 15 years. We remand to the trial court for a determination of whether defendant remains subject to a term of involuntary commitment for unlawful restraint, a Class 4 felony, as specified under section 104-25(g)(4) (725 ILCS 5/104-25(g)(4) (West 2010)).

¶ 69 Based on the foregoing reasons, we reverse the decision of the circuit court of Cook County finding defendant not "not guilty" of attempted aggravated kidnapping and child abduction, and remand for further proceedings consistent with this decision.

¶ 70 Reversed and remanded.