2016 IL App (1st) 143717-U

FIRST DIVISION
September 12, 2016

No. 1-14-3717

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. 12C660629-01
	)	
DIEUSEUL POMPILUS,	)	Honorable
	)	Anna H. Demacopoulas,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court
Presiding Justice Connors and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction of aggravated kidnapping with a firearm is affirmed where the evidence sufficiently supports the jury's finding that defendant secretly confined the victim while they were riding in a car, and that he had a firearm. Also, the trial court did not commit reversible error where defense counsel acquiesced to the definition of "secretly" given to the jury, defense counsel requested that the trial court not provide further definitions to the jury, and where no *bona fide* doubt existed to compel the trial court to order a fitness evaluation. Finally, we find that the record is inadequate to address defendant's ineffective assistance of counsel claim and leave the issue for a post-conviction petition.

¶ 2 Defendant, Dieuseul Pompilus, was convicted after a jury trial of aggravated kidnapping with a bludgeon and aggravated kidnapping with a firearm, and sentenced to 25 years' imprisonment. His sentence included a mandatory 15-year enhancement for possession of a firearm. On appeal, defendant contends 1) the State failed to prove him guilty beyond a reasonable doubt of aggravated kidnapping with a firearm where a friend knew the victim's location during the ordeal and the police never recovered a firearm; 2) the trial court erred in providing the jury with a misleading definition of the term "secretly" and failing to clarify the definition when the jury expressed confusion; 3) his trial counsel was ineffective for failing to file a motion to suppress his statement; and 4) the trial court violated his due process rights when it acquiesced to the forensic clinical services' refusal to conduct a fitness evaluation on him. For the following reasons, we affirm.

¶ 3 JURISDICTION

¶ 4 The trial court sentenced defendant on October 17, 2014. Defendant filed a motion to reconsider sentence which the trial court denied on November 14, 2014. He filed a notice of appeal on November 14, 2014. Accordingly, this court has jurisdiction pursuant to Article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, §6), and Illinois Supreme Court Rule 603 (eff. Feb. 6, 2013) and Rule 606 (eff. Dec. 11, 2014), governing appeals from a final judgment of conviction in a criminal case entered below.

¶ 5 BACKGROUND

¶ 6 Defendant was charged with one count of attempt first degree murder, one count of aggravated kidnapping with a firearm, one count of aggravated kidnapping with a dangerous weapon other than a firearm, one count of kidnapping, two counts of aggravated unlawful

restraint, two counts of aggravated battery, and one count of unlawful restraint, for conduct occurring in May of 2012.

¶ 7 I. Pretrial Proceedings

¶ 8 At a hearing on June 11, 2012, defense counsel stated that defendant was "on a number of different medications" and she requested a forensic clinical examination and an order to request hospital records. The cause was continued and at a hearing on December 4, 2012, the trial court asked the parties whether a fitness hearing was set for that day. Defense counsel responded that no fitness hearing was set and the assistant state's attorney stated that "[t]here is no reason to have fitness" because the issues were defendant's sanity at the time of the offense and his ability to understand *Miranda*. After a recess, the parties determined that there was a report on the *Miranda* and sanity issues, but that a report giving an opinion on defendant's fitness to stand trial was missing. The assistant state's attorney stated that defendant "hasn't ever been found unfit." The court entered an order for all reports generated between August 2 and October 18, 2012.

¶ 9 At a hearing on March 20, 2013, the new judge on the case asked whether a fitness hearing had been held. The trial court looked at a report dated October 22, 2012, but noted that it was "stale" and only addressed the issues of sanity at the time of the offense and ability to understand *Miranda*. The trial court stated that "the tasks between now and the next court date is for both the State and the Defense to determine whether or not there was, one, a request for evaluation of fitness, two, whether that has been returned, and, three, whether the defendant has been found fit by a court so that we can proceed further." At the next hearing on April 23, 2013, defense counsel informed the court that she had requested an evaluation for fitness to stand trial because defendant was on medication, and a prior finding of fitness was when he was not on medication. Defense counsel then stated that after talking to defendant, she does not "have an

issue with fitness at this point." The trial court responded, "[l]et's just do a fitness evaluation and then if he's fit, that's fabulous. We can go forward from there. So let's just do another fitness hearing just to be safe."

¶ 10 At a hearing on May 23, 2013, the trial court stated the director of forensic clinical services sent a letter stating that defendant was evaluated on August 2, 2012, and the report found he was fit for trial. Defendant was evaluated again on September 10, 2012, by another physician who opined that defendant was fit to stand trial, and also was capable of understanding *Miranda* and legally sane. The director's letter stated the forensic clinical services' position that two doctors separately evaluated defendant and found him fit for trial, and he was also found legally sane and able to understand *Miranda*. It stated that there has been no diagnosis of mental illness. As a result, forensic clinical services would not reevaluate defendant because there is no bona fide doubt as to his fitness. The letter indicated that it is an abuse of their services to conduct repeated evaluations on a defendant when there is no bona fide doubt as to his fitness, but if the public defender wished to have another evaluation it could be done by an independent entity. The trial court agreed with the director's assessment, noting that "[t]here has been nothing presented to this Court or to the State that would overcome" the presumption that defendant is fit to stand trial. The trial court informed the parties that it would not order another fitness evaluation, but defense counsel could order an independent evaluation. Defense counsel responded, "[t]hat's fine, Judge. I didn't ask for the evaluation on the last court date."

¶ 11 II. Trial Proceedings

¶ 12 At trial, Sabrena Boutte, who resided in Calumet City, testified that she and defendant dated for six or seven years before she ended the relationship on May 15, 2012. Defendant was cheating on her, and Boutte had caught him with another woman multiple times. After the

relationship ended, defendant called Boutte repeatedly for the next few days but she avoided his calls. On the night of May 19, 2012, Boutte was with defendant and planned on attending a party with him, but when she discovered that he had been with another woman the night before she left. The next morning, she woke around 10 a.m. and heard "a suction sound, like somebody's lips were sucking." Boutte opened her eyes and saw defendant in the room drinking from a bottle of Grey Goose she had left on the side of her bed. She testified that "he had drank [*sic*] a substantial amount of it."

¶ 13 Boutte testified that defendant "was mad" because someone had broken his glasses and he blamed it on her. Defendant grabbed Boutte's nightgown in the upper chest area and pulled her to the end of the bed. They began fighting, "tussling" and Boutte stated that she was "throwing punches" and "biting," "scratching, kicking" him. Defendant did not strike back, however; he just kept grabbing her. Defendant wanted to leave but Boutte was only wearing a nightgown so he threw her the clothes she wore the day before to wear. They went downstairs and as they passed Boutte's daughter defendant gave something to her. Boutte told him, "Don't say s**t to her. Come on, let's go. You want to go, let's go." As they left, Boutte told her children to go to their rooms.

¶ 14 When they got to the car, defendant told Boutte to drive and he sat in the passenger's seat. Boutte still had the Grey Goose bottle in his hand and his broken eyeglasses. As Boutte drove, they began to fight again throwing punches at each other. Boutte began to swerve due to the fighting, and defendant told her to change seats so he could drive. He warned her, "if you run…" and he waived his finger at her. As defendant drove, he tried to hand Boutte a blunt to smoke but she did not want to smoke. Defendant hit her again, striking Boutte in the elbow with the Grey Goose bottle. Boutte struck him in the face, causing defendant to press down on

the gas pedal which resulted in a multi-vehicle accident. Defendant pulled over and started to get out of the car. However, defendant saw that Boutte would "jump in the driver's seat" as soon as he got out so defendant stayed in the car and started driving on the expressway.

¶ 15 As they drove, their friend Tawonda Goode called Boutte's phone. Defendant spoke with Goode and she told him to bring Boutte to her. When defendant parked in front of Goode's house, Boutte had "made up [her] mind [that she] was going to run." However, when she grabbed for the keys, "he had grabbed them already." Boutte got out of the car and she ran for two blocks. She heard defendant running behind her but he could not catch up to her. She hid under a bush and a man approached and asked if she wanted him to call the police. She told him to call the police. Some teenagers also walked by and Boutte told them, "Call the police, he got a gun." Boutte soon heard sirens but saw the police pass her. When she saw the police come again she jumped out from under the bush and "flagged them down."

¶ 16 Boutte testified that she spoke with a police officer at the hospital and she told him that defendant pulled out a gun. She told him that as they were driving defendant put the gun down and she took it and threw it out the window of the car. She also told him that defendant had put the gun to her head and that after their accident, he got out of the car to look for the gun. Boutte was not sure whether defendant recovered the gun. At trial, Boutte stated that she told the police "everything," that defendant had a gun and beat her, because she "didn't want her to have him."

¶ 17 Sergeant Steven Goldberg of the Evanston police department testified that he responded to a call about a man with a gun on May 20, 2012. As he passed by Boutte, she flagged him down. She "was highly upset" and "made statements that were concerning" to him. She told him that the offender struck her with a handgun. Sergeant Goldberg called for an ambulance.

¶ 18 Officer Kyle Wideman also responded to the call of a man with a gun on May 20, 2012. He saw defendant trying to park his car and he approached him, telling defendant to put his hands on the steering wheel. Defendant told Officer Wideman that "you can kill me now, my life's over because of my girlfriend's gone." As Officer Wideman instructed defendant to keep his hands on the steering wheel, two officers arrived to assist him and they took defendant into custody. They searched defendant's vehicle and recovered a bullet wedged between the floor mat of the vehicle. As they transported defendant to the police station, he passed out and was taken to the hospital.

¶ 19 The parties stipulated that Officer San Roman met with Boutte on May 20, 2012, and she told him that while travelling in the car on the expressway defendant pulled out a silver handgun and pistol-whipped her. When he put down the gun, Boutte grabbed it and threw it out the window. She stated that defendant stopped the car and got out to look for the gun. Boutte was unsure whether he found the gun. Defendant continued driving and he continued to hit Boutte as he drove. Boutte stated that near the area of Mulford and Custer she was able to exit the vehicle and flag down a person who called the police. Officer Roman stated that Boutte "was visibly upset and possibly injured."

¶ 20 Daniel Bailey, a paramedic, testified that he spoke with Boutte when she was in the ambulance and she told him that she had been "kidnapped and driven around and was beaten with a bottle and a gun" and that they were involved in a minor accident. She said the accident occurred because she was "struggling to get possession of the gun" and then she "threw the gun out the window." She had some swelling on her right arm which he treated. At the hospital, Boutte told nurse Nancy de Napoli that she had been hit three times each by a gun and a bottle of Grey Goose.

¶ 21 At the Evanston police station, Boutte spoke with Detective David Cepiel. She told him that she woke up that morning to find defendant drinking Grey Goose in her bedroom. He cursed at her and hit her lip with a gun. He told her she was going to die that day. Defendant punched her and threatened to stab her.

¶ 22 Later that day, Boutte spoke with Officer William Slough from the Calumet City police department. Officer Slough testified that Boutte was "physically shaking" and he observed "fresh injuries to her." He noticed "[r]edness, swelling and bruising" to her hands and her arms. The injuries appeared to have been inflicted "within a couple hours." Officer Slough took photographs of the injuries.

¶ 23 Boutte told Officer Slough that "defendant woke her up in her bedroom" and told her that she was not going to leave him. Defendant grabbed her by her shirt and told her to put on some clothes. Boutte responded, "no," and defendant pulled out a silver gun, hit her lip with it, then held the gun to her and told her he would kill her. They got into the car and defendant told Boutte to drive to Evanston. On the drive, defendant struck her several times with the gun and told her, "I'm going to kill you and myself right here." Boutte was driving erratically so defendant told her to pull over and switch seats. As defendant drove, he tried to hit Boutte with the gun but he lost control and dropped the gun. Boutte grabbed the gun and threw it out the window. Defendant slammed the brakes, causing a multi-vehicle accident. Defendant got out of the car to look for the gun but Boutte was not sure if he recovered the weapon. She did not see the gun again.

¶ 24 Defendant continued to drive, telling Boutte he was "going to stab her to death" when they got to Goode's house. Defendant drank from the Grey Goose bottle as he drove and he also hit Boutte with the bottle. When they arrived in Evanston, defendant again told Boutte that

he was "going to kill her when they got inside the apartment." At this point, Boutte ran away and called for help. After speaking with Boutte, Officer Slough transported defendant from the Evanston police station to the Calumet City police station.

¶ 25 Goode testified that she has known defendant for "[m]ost of [her] adult life." She stated that they are "close, like family." She has known Boutte for about 10 years, having met her through defendant. Goode was also very close to Boutte. On the morning of May 20, 2012, she received a call from defendant saying, "[y]ou might as well say good-bye to your sister (referring to Boutte), because I'm tired of her." Goode did not call the police. On cross-examination, Goode stated that defendant and Boutte regularly had arguments and they would either call Goode or come to her house so she could mediate "and it ends up fine." While speaking to defendant and Boutte over the speakerphone on May 20, 2012, Boutte did not tell Goode that defendant was hitting her or that she was frightened. Boutte did not tell Goode that defendant had a gun or that he pistol-whipped her. Goode testified that in their first conversation Boutte agreed to meet Goode with defendant. Goode spoke on the phone to defendant and Boutte four times during the incident.

¶ 26 Detective James Randall testified that he met with defendant at the Calumet City police station on May 21, 2012. He read defendant his *Miranda* rights and defendant stated that he understood them. Defendant placed his initials next to each right listed on the form. Defendant told Detective Randall that on the morning of May 20, 2012, he was intoxicated and went to see Boutte, who had recently ended their relationship. He knocked on the door and her daughter let him inside. Defendant hit Boutte in the leg with a bottle of Grey Goose in order to wake her up. They began to argue and defendant told Boutte that he would kill both of them if she refused to take him back. Defendant wanted Boutte to go with him to Goode's house in

order to mediate their argument. Boutte did not want to go but defendant insisted they go. Boutte got dressed and they left the house and drove to Evanston. Boutte, who was driving, kept swerving and defendant thought she was attempting to attract the attention of police. She pulled over so he could drive. When they arrived in Evanston, defendant parked the car and Boutte got out and ran away. Defendant was taken into custody shortly thereafter.

¶ 27 At first, defendant denied he had a gun during the incident. Detective Randall asked defendant if his fingerprints would be found on any gun that may have been used in the incident, and defendant then stated that he had a gun. He stated that the gun belonged to Boutte, and that she had taken it from a drawer in her bathroom. Defendant took the gun from her and put it in his pocket. While driving, defendant took the gun out of his pocket and placed it on the seat between them. At that point, Boutte took the gun and threw it out of the window. He slammed the brakes which caused a minor accident. He got out of the car to look for the gun but he did not find it. He then returned to the car and drove to Evanston. Also while driving, defendant stated that he had a broken pair of glasses and he bent the ear piece and poked Boutte with it, pretending it was a knife. Defendant stated that he did not point the gun at Boutte or use it to threaten her.

¶ 28 Assistant state's attorney (ASA) Allison Sise testified that she met with Boutte on May 21, 2012, at the Calumet City police station. Boutte gave a typed statement and afterwards, ASA Sise reviewed the statement with Boutte. Boutte signed the bottom of each page to indicate it was a true and accurate statement of the events. ASA Sise also signed each page.

¶ 29 In the statement, Boutte stated that on May 20, 2012, she woke up around 11:35 am to a "suction sound." She saw defendant, who she had dated for seven years. She stated that their relationship ended on May 15, 2012. Defendant was at the foot of her bed, drinking from a

bottle of Grey Goose. He threatened to kill her and grabbed her by the neck of her jumpsuit. Defendant pulled a gun from his right pocket and put it to her forehead, between her eyes. He also hit her lip with the gun. Boutte described the gun as "small and black." He told her that he would shoot her. Boutte put her hands over the barrel of the gun and told defendant not to do anything with the children present in the house. Defendant put the gun back into his pocket and pulled her out of bed.

¶ 30 As Boutte tried to find clothes to wear, her cell phone rang and defendant answered. He told the person "[s]ay goodbye to her" and put the phone to Boutte's ear. Boutte heard Goode's voice. Goode was a friend she had met through defendant. Defendant then told Goode that "he was going to kill everyone in the house," and Boutte heard Goode trying to calm him down. Goode told defendant to bring Boutte to Goode's house to "hang out."

¶ 31 As they left the room, defendant grabbed her by the hoody and tried to throw Boutte down the stairs. She believed that if she did not go with defendant, he would "kill her right there." Boutte saw her daughter downstairs and she ran upstairs to get money for her daughter. When she returned downstairs, she saw defendant standing close to her daughter and talking to her. Boutte told defendant "to get out[] of her daughter's face," gave her daughter the money and told her to go to her room.

¶ 32 Boutte and defendant got into her car and she started driving. Defendant pulled out the gun and struck her in the elbow. As she got onto the expressway, defendant hit her elbow again with the gun. Boutte started shaking and began to swerve. Defendant told her that the police will stop her because of the way she was driving. Defendant was drinking from the bottle of Grey Goose and he struck Boutte in the arm with the bottle. Defendant told Boutte that he would drive and she stopped the car and moved into the passenger's seat. As defendant drove,

he told Boutte that "she was wrong for trying to leave him." Boutte tried to convince defendant to turn around, but he continued to drive and threatened to kill her. As he drove, defendant hit Boutte in the arm and on her side.

¶ 33 As they drove on the expressway, defendant pulled out the gun and the gun hit the steering wheel and fell onto his lap. Boutte grabbed the gun and threw it out the window. Defendant then slammed the brakes and they were struck in the back of their car by another vehicle. Defendant got out of the car to look for the gun. He returned and continued to drive, eventually arriving at Goode's house. When defendant parked the car, Boutte got out of the car and ran away. She flagged down an officer and told him what had happened. Boutte was taken to a hospital and treated for her injuries.

¶ 34 In court, Boutte identified her typewritten statement and her signature at the bottom of each page, but stated that she had not read the statement. Boutte stated that she signed the statement to indicate that it was the "content that [she] had received from [ASA Sise]" and not the events as they occurred on May 20, 2012. She denied she told a police officer that defendant pistol-whipped her, or that he had taken the gun out and placed it on her forehead or hit her lip with it in her bedroom. Boutte denied that defendant threatened to kill her or that he hit her with the gun in the car or threatened to stab her with the broken eyeglass earpiece. On cross-examination, Boutte stated that she lied about the incident because she wanted to hurt defendant. She stated that her lies "got bigger and bigger and bigger." Boutte testified that she never observed defendant with a gun in the car, and that the statement she gave to ASA Sise was a lie. Boutte acknowledged that she had visited defendant ten times since the incident occurred.

¶ 35 Boutte further testified that on September 24, 2012, she made her own typewritten statement at home which "contained the truth about what occurred on May 20." The letter was not allowed into evidence. Boutte eventually retained her own attorney in order to "come clean." She paid for half of the attorney's cost, and Goode paid the other half. The state rested its case and the defense rested without calling witnesses.

¶ 36 During jury deliberations, the trial court received a note from the jury requesting a definition of "secretly" as it applies to the aggravated kidnapping charge. After a conference in chambers, the parties relied on *People v. Aurelia Gonzalez*, 239 Ill. 2d 471 (2011) to construct the following definition: "Confinement to secret where it serves to isolate or insulate from meaningful contact or communication with the public when the confinement is in a place or in a manner which makes it unlikely that the members of the public will know or learn of the unwilling confinement." The trial court asked defense counsel, "[I]s this the proposed definition that you would like me to give to the jury based upon the case law?" Defense counsel answered, "Yes." The state also agreed to this definition. Later, the jury sent a note requesting a definition for "public." Defense counsel responded, "at this point if we keep providing definitions, we will be providing them all night, so they have all the evidence. Please continue to deliberate." The state agreed and the trial court informed the jurors that they "have received all of the instructions. Continue to deliberate."

¶ 37 The jury found defendant guilty of aggravated kidnapping with a bludgeon and aggravated kidnapping with a firearm. The trial court sentenced defendant to 10 years' imprisonment for the aggravated kidnapping with a firearm, and added a mandatory 15 years for the firearm enhancement, for a total of 25 years' imprisonment. Defendant filed a motion for a

new trial and a motion to reconsider his sentence, both of which the trial court denied. Defendant filed this timely appeal.

¶ 38 ANALYSIS

¶ 39 On appeal, defendant contends that the State failed to prove him guilty of aggravated kidnapping with a firearm beyond a reasonable doubt. When presented with a challenge to the sufficiency of the evidence, this court determines whether any rational trier of fact, when viewing the evidence in the light most favorable to the prosecution, could have found the elements of the crime beyond a reasonable doubt. *People v. De Filippo*, 235 Ill. 2d 377, 384-385 (2009). It is not the function of a reviewing court to retry the defendant; rather, it is the trier of fact who assesses the credibility of witnesses, determines the appropriate weight to give testimony, and resolves conflicts or inconsistencies in the evidence. *People v. Evans*, 209 Ill. 2d 194, 209-11 (2004). This court will not reverse a conviction unless the evidence proves so unreasonable, improbable, or unsatisfactory so as to raise a reasonable doubt of defendant's guilt. *Id.* at 209.

¶ 40 Section 10-1(a)(2) of the Criminal Code of 2012 (Code) provides that "[a] person commits the offense of kidnapping when he or she knowingly *** by force or threat of imminent force carries another from one place to another with intent secretly to confine that other person against his or her will." 720 ILCS 5/10-1(a)(2) (West 2012). One commits the offense of aggravated kidnapping when he or she commits kidnapping while armed with a firearm. 720 ILCS 5/10-2(a)(6) (West 2012).

¶ 41 Defendant first argues that the State failed to prove that he secretly confined Boutte, where Boutte was in a car on the highway, visible to passing vehicles, and Goode was in contact with them throughout the incident and knew of Boutte's location. In the context of kidnapping, our supreme court has defined "confinement" as "the act of imprisoning or restraining someone."

People v. Gonzalez, 239 Ill. 2d 471, 479 (2011). Also, it has defined "secret" as "concealed, hidden, or not made public." *Id*. The State may prove the secret confinement element of kidnapping through evidence of the secrecy of the confinement or the secrecy of the location of the confinement. *Id*. Under section 10-1(a)(2) of the Code, the issue is whether, during the course of the incident, the circumstances show beyond a reasonable doubt that defendant acted with the intent to secretly confine Boutte. See *People v. Calderon*, 393 Ill. App. 3d 1, 7-8 (2009).

¶ 42 The intent to secretly confine someone may be established even where defendant confines the victim in a moving vehicle in plain view of the public. See *People v. Bishop*, 1 Ill. 2d 60, 64 (1953) (evidence that defendant forced the victim at gunpoint to drive to various locations in full view of the public, and before releasing the victim forced the victim to hand over his personal belongings, supported a finding that the defendant secretly confined the victim). The supreme court in *Bishop* reasoned that "[a] person forcibly confined in an automobile constantly moving from place to place may be more secretly and effectively confined from the kidnapper's standpoint than one kept in a building or other place of incarceration." *Id*.

¶ 43 In *People v. Kittle*, 140 Ill. App. 3d 951 (1986), the victim stopped at a restaurant to get coffee and on her way into the restaurant she saw the defendant, whom she did not know. They exchanged greetings and after getting her cup of coffee, the victim entered her car and saw the defendant sitting in the front passenger seat. *Id*. at 953. At first, the victim was not nervous and asked the defendant if he needed a ride. She indicated that she could take him a certain distance but would have to drop him off. The victim started driving and the defendant asked her to follow his directions. She complied but began to worry when the defendant asked her to turn around. *Id*. After driving another block, the defendant pulled on the steering wheel causing the car to go

off the road. When the victim tried to exit the car, the defendant grabbed her around the neck and waist. The victim began to scream and honk the horn, and the defendant threatened to hurt her if she did not keep quiet. To calm him down, the victim told the defendant that she would drive them back to her house where they could have some privacy. He released her and she began to drive into a subdivision. Once there, the victim pulled into a driveway, jumped out of the car, and started banging on the door of a house. The defendant, who exited the car and ran down the street, was later apprehended by the police. *Id*. This court found that "[t]he evidence that the defendant physically prevented the [victim] from exiting her car when she attempted to do so and allowed her to continue driving under the belief that she was taking him to a place where they could be alone" indicated that the defendant intended to secretly confine the victim against her will. *Id*. at 955.

¶ 44 In *Calderon*, the victim returned to his car at a gas station and saw the defendant, whom he did not know, sitting in the passenger's seat. *Calderon*, 393 Ill. App. 3d at 3. The defendant refused to leave the car and told the victim to get in or defendant's friends in a nearby black sports utility vehicle (SUV) would beat the victim. The defendant asked to see the victim's money because he believed the victim had stolen money from him. The defendant returned the money and asked the victim to drive to a specific apartment building where the victim's friend lived. *Id*. at 4. The victim stated that he did as he was told because he was scared. The black SUV followed them. After arriving at his friend's apartment, the victim and the defendant knocked on the door and entered the apartment. *Id*. The defendant asked the friend for money and threatened the friend if he did not turn over more money. The friend gave the defendant money he had in his pocket. After leaving the apartment, the defendant began walking away from the victim toward the black SUV. He stopped and ordered the victim to give him his money and

jewelry the victim was wearing. After the victim complied, the defendant entered the SUV and it drove off. *Id.*

¶ 45 The defendant argued that the secret confinement element could not be established because the victim's car had clear glass, and he was parked on a public street near a busy intersection during the day. *Id.* at 7. Defendant further argued that the victim voluntarily entered the car and the defendant did nothing to prevent the victim from exiting the car as he did not display a weapon. *Id.* This court found significant the fact that while the victim was not physically restrained in the car and did not attempt to flee, he testified that he did as the defendant told him to do out of fear that defendant had a weapon in his pocket and that defendant's friends in the SUV would beat him. *Id.* at 10. We determined that the facts "established sufficient circumstances from which the jury could determine that the defendant's acts proved beyond a reasonable doubt that he intended to secretly confine [the victim] in transporting [the victim] from the gas station to [the apartment.]" *Id.*

¶ 46 In her statement to ASA Sise, Boutte stated that on May 20, 2012, she woke to find defendant in her room. He threatened her and pulled a gun out of his pocket and placed it on her forehead. Boutte placed her hands on the gun and asked defendant not to do anything with her children in the house. Defendant wanted her to leave with him but Boutte did not want to go. Defendant pulled her out of bed and as she got dressed, her cellphone rang. Defendant answered the phone and told the caller, Goode, to "say goodbye" to Boutte and he put the phone to Boutte's ear. Goode tried to calm defendant down and told him to bring Boutte to her house. Boutte testified that they left the house and she believed that if she did not go, defendant would "kill her right there."

¶ 47 The couple continued to fight as they drove in the car, and defendant struck Boutte with the Grey Goose bottle. When defendant insisted they switch seats so he could drive, he waived his finger at her warning, "if you run…" While driving, defendant pulled out the gun and it fell on his lap when it hit the steering wheel. Boutte grabbed the gun and threw it out the window. Although defendant stopped the car to look for the gun, Boutte did not know whether he had actually retrieved the weapon. When they arrived at Goode's house, defendant parked the car. Boutte took the opportunity to exit the car and run away. Boutte told police that she hid under a bush and told a passerby to call the police because defendant had a gun. She told teenagers walking by to call the police and that defendant had a gun. As in *Kittle* and *Calderon*, the evidence here supports the jury's finding that Boutte rode in the car with defendant because she was scared and that defendant intended to secretly confine Boutte.

¶ 48 Defendant's case in support of his argument that he had no such intention, *People v. Pasch*, 152 Ill. 2d 133 (1992), is distinguishable. *Pasch* involved a hostage situation where the defendant "made it well known that he was holding [the victim] hostage" against her will. *Id*. at 188. The supreme court found no secret confinement, reasoning that "the fact that no one could rescue her because of the hostage situation did not convert that which was otherwise well known to something that was secretive." *Id*. Although Goode was aware of Boutte's location in the car, there is no indication whether she was aware that Boutte was being transported against her will. Defendant did not tell Goode that he was bringing Boutte against her will, and Boutte had no opportunity to speak with Goode outside the presence of defendant during the incident. Rather, Goode expected that they were coming to her house voluntarily because the couple fought often and would come to her to help talk through their issues. From her phone

conversations with the couple on May 20, 2012, Goode had no reason to believe Boutte was traveling against her will. *Pasch* is inapplicable here.

¶ 49 Defendant also argues that the State failed to prove he committed aggravated kidnapping with a firearm because at trial, Boutte recanted her prior statements that he had a gun and no gun was recovered. First, we note that "[t]he recantation of testimony is regarded as inherently unreliable." *People v. Morgan*, 212 Ill. 2d 148, 155 (2004). Boutte had been involved in a long-term relationship with defendant, giving her a motive to recant her prior statements at trial. See *People v. Brazziel*, 406 Ill. App. 3d 412, 431 (2010) (a witness's "relationship to a defendant is clearly a possible basis for bias"). The jury was aware of Boutte's recantation at trial and clearly found her prior statements more reliable. Although no gun was recovered, Boutte told other witnesses, police officers, the paramedic, her treating nurse, and ASA Sise that defendant had a gun during the incident. Furthermore, in their statements to police, both defendant and Boutte stated that he had a gun. They both stated that at some point during their ride, Boutte grabbed the gun and threw it out the window. Presented with this evidence, the jury could have reasonably inferred that defendant had a gun. See *People v. Washington*, 2012 IL 107993, ¶¶ 36-37 (even though no gun was recovered the jury reasonably inferred from the victim's testimony that the defendant possessed a gun while he committed the offenses of kidnapping, vehicular hijacking and robbery).

¶ 50 Defendant further argues that the evidence does not support his conviction because he was intoxicated when he gave his statement, that he only insisted Boutte come with him to see Goode, and that although he threatened Boutte, he assured her that he did not intend to harm her. The jury was aware of defendant's alcohol and drug consumption during the incident. It is not the function of this court to retry defendant; rather, it is the jury's function to assess the

credibility of witnesses, weigh their testimony, and make inferences drawn from the evidence. *People v. Tenney*, 205 Ill. 2d 411, 428 (2002). The jury is "not required to accept any possible explanation compatible with the defendant's innocence and elevate it to the status of reasonable doubt." *Id*. (quoting *People v. Herrett*, 137 Ill. 2d 195, 206 (1990)). The jury found credible Boutte's statements that defendant had a gun and threatened to harm Boutte if she did not ride in the car with him to see Goode, and believed that defendant intended to secretly confine her during the car ride. Viewed in the light most favorable to the State, the evidence supports the jury's determination and we affirm defendant's conviction of aggravated kidnapping with a firearm.

¶ 51 Next, defendant contends that the trial court improperly provided the jury with a misleading definition of "secretly" and then failed to clarify the definition when the jury expressed confusion. During deliberations, the jury sent a note requesting a definition of "secretly" as it applied to the aggravated kidnapping charge. The parties had a conference in chambers and subsequently agreed to the definition given to the jury. The trial court asked defense counsel "[I]s this the proposed definition that you would like me to give to the jury based upon the case law?" and defense counsel answered, "Yes." When the jury later sent out another note requesting a definition for "public," defense counsel recommended that the jury keep deliberating without further aid. "Under the doctrine of invited error, an accused may not request to proceed in one manner and then later contend on appeal that the course of action was in error." *People v. Carter*, 208 Ill. 2d 309, 319 (2003). Therefore, where the challenged conduct was procured or invited by defendant, he is barred from claiming error based on that conduct. *People v. Harvey*, 211 Ill. 2d 368, 386 (2004). Since defense counsel here acquiesced to the definition given to the jury, and asked the trial court not to provide the jury

with further definitions, defendant may not now raise this issue on appeal. *Id*. at 385 (the issue of invited error is one of estoppel rather than mere waiver). Notwithstanding this outcome, counsel's unwillingness to provide an answer to the jury's second question and her statement that "if we keep providing definitions we will be here all night" is concerning to this court. Although defendant did not raise the issue of counsel's possible ineffectiveness regarding the jury's questions, defendant may do so in a post-conviction petition.

¶ 52 Defendant next argues that his trial counsel provided ineffective assistance when she failed to file a motion to suppress his statements to police. He contends that he was not on his medication, and that he had been under the influence of alcohol and drugs hours before he made the statements. To prevail on an ineffective assistance of counsel claim, defendant must show that counsel's performance was deficient and that counsel's deficient performance prejudiced him. *People v. Domagala*, 2013 IL 113688, ¶ 36. To establish prejudice from counsel's failure to file a motion to suppress, defendant must show a reasonable probability that the trial court would have granted the motion, and that had the evidence been suppressed, the outcome of his trial would have been different. *People v. Patterson*, 217 Ill. 2d 407, 438 (2005).

¶ 53 Here, there was no testimony about the effect of alcohol or drugs on defendant during the incident, or when he was at the police station hours later giving his statements. Although the investigative report listed defendant's history of depression and bipolar disorder, at trial there was little to no testimony about how defendant's medication or lack thereof influenced his actions on the day of the incident or that counsel was aware of possible negative effects. Citing *Massaro v. United States*, 123 S. Ct. 1690 (2003), our supreme court has determined that when the record on appeal is insufficient to support a claim of ineffective assistance of counsel, such claims are preferably brought in a collateral proceeding where both parties will have the

opportunity to present evidence on the issue. *People v. Bew*, 228 Ill. 2d 122, 134 (2008); see also *People v. Durgan*, 346 Ill. App. 3d 1121, 1141-42 (2004) (since record is devoid of factual findings pertinent to defendant's claim that counsel was ineffective for failing to file a motion to suppress, ineffective assistance claim is better made in a petition for postconviction relief); *People v. Evans*, 2015 IL App (1st) 130991, ¶ 33 ("where a defendant's claim of ineffective assistance of counsel requires consideration of matters outside of the record, such a claim is more appropriately addressed on collateral review"). Since we find the record insufficient to address whether a motion to suppress defendant's statements would have been granted, we decline to consider the issue on direct appeal. However, defendant may raise this issue in a post-conviction petition.

¶ 54 Defendant's final contention is that the trial court violated his due process rights when it did not order a fitness evaluation to determine whether he was fit to stand trial. Defendant acknowledges that this issue was not preserved for review. However, the failure to order a fitness hearing affects a substantial right and is therefore reviewable as plain error. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 51. However, first we must determine whether any error occurred at all. *People v. Walker*, 392 Ill. App. 3d 277, 294 (2009).

¶ 55 The criminal prosecution of a defendant who is not competent to stand trial violates due process. *People v. Sandham*, 174 Ill. 2d 379, 382 (1996). One is not fit to stand trial if he is unable to understand the nature and purpose of the proceedings against him or is unable to assist counsel in presenting a defense. *People v. Hanson*, 212 Ill. 2d 212, 218 (2004). Fitness refers to defendant's ability to function at trial and not to his competency in other areas. *People v. Eddmonds*, 143 Ill. 2d 501, 519-20 (1991). The trial court has a duty to order a fitness hearing *sua sponte* once facts are brought to its attention that raise a *bona fide* doubt as to defendant's

fitness to stand trial. *People v. McCallister*, 193 Ill. 2d 63, 110-11 (2000). Courts consider three factors in determining whether a *bona fide* doubt exists: (1) defendant's behavior and demeanor at trial; (2) counsel's statements regarding defendant's competence; and (3) prior medical opinions on the fitness issue. *Hanson*, 212 Ill. 2d at 223. The trial court's determination of whether a *bona fide* doubt exists as to defendant's fitness is reviewed for abuse of discretion. *Sandham*, 174 Ill. 2d at 382.

¶ 56 Defendant argues that the trial court violated his due process rights when it "acquiesced to forensic clinical services' refusal to evaluate [him] for fitness." At a hearing on June 12, 2011, defense counsel requested forensic clinical examination. However, no fitness hearing had been set. At a subsequent hearing, the parties determined that prior reports existed containing opinions on defendant's ability understand *Miranda*, his sanity, and his fitness to stand trial. The trial court entered an order to produce all reports generated between August 2, 2012 and October 18, 2012. The State informed the court that defendant "hasn't ever been found unfit."

¶ 57 At a hearing on March 20, 2013, a new judge presided over the case and ordered the parties to determine whether there was a request for a fitness evaluation, whether one had been done, and whether defendant had been found fit to stand trial. At the following hearing, defense counsel informed the court that she had requested a fitness hearing because defendant had been on medication but was not on medication at the time. However, she stated that after talking with defendant, she did not "have an issue with fitness at this point." The trial court responded, "[l]et's just do a fitness evaluation and then if he's fit, that's fabulous. We can go forward from there. So let's just do another fitness hearing just to be safe."

¶ 58 At a hearing on May 23, 2013, the trial court informed the parties that the director of forensic clinical services sent a letter stating that defendant was evaluated on August 2, 2012, and September 10, 2012, and both times he was found fit to stand trial, legally sane, and capable of understanding *Miranda*. Also, there was no diagnosis of mental illness. The director stated that they would not reevaluate defendant because no *bona fide* doubt as to his fitness exists, and to conduct another fitness evaluation would be an abuse of their services. The trial court concluded that no evidence has been presented to rebut the presumption that defendant was fit to stand trial. Defense counsel agreed, responding that she "didn't ask for the evaluation on the last court date."

¶ 59 The record shows that the trial court never found that a *bona fide* doubt existed as to defendant's fitness to stand trial. Rather, it ordered the fitness evaluation "just to be safe." Defense counsel stated that she had no issue with defendant's fitness, and reiterated at the last hearing addressing the issue that she did not ask for another evaluation. Two prior reports found defendant fit to stand trial. Nothing in the record shows that defendant's demeanor or conduct during the proceedings should have raised a *bona fide* doubt of fitness in the trial court's mind.

¶ 60 Defendant, however, disagrees. As support for his contention that the trial court should have ordered a fitness evaluation, he points to evidence that at the time of his arrest he was "not in a healthy state of mind, evidence[d] by alcohol abuse, drug abuse, and request for the police officers to kill him." First, evidence of the defendant's drug and alcohol consumption at the time of his arrest is not necessarily an indication of his fitness to stand trial. The relevant issue is whether defendant understands the nature and purpose of the proceedings against him and can assist counsel in presenting a defense. *Hanson*, 212 Ill. 2d at 218. Furthermore, even if

defendant suffers from mental illness or requires psychiatric treatment, that fact does not necessarily raise a *bona fide* doubt as to his fitness to stand trial. *People v. Walker*, 262 Ill. App. 3d 796, 803 (1994). Also, a history of suicide attempts does not in itself demonstrate unfitness. *People v. Sanchez*, 169 Ill. 2d 472, 483 (1996).

¶ 61 *People v. Harris*, 113 Ill. App. 3d 663 (1983), which defendant cites as support, is distinguishable. There, defense counsel requested an examination because of the defendant's recent suicide attempts, and although an evaluation was performed its conclusion was limited to whether the defendant was fit to participate in the sentencing hearing. *Id*. at 666. As the court in *Harris* noted, "[n]othing in the record discloses the onset, diagnosis, prognosis or effect of defendant's mental condition or its possible relevance to his fitness to stand trial." *Harris* is inapposite. In the case before us, defendant's demeanor and conduct did not raise a *bona fide* doubt as to his fitness. Also, the two evaluations that were conducted both found defendant fit to stand trial and defense counsel saw no need to request another evaluation. Accordingly, we find that the trial court here did not abuse its discretion in failing to order another fitness evaluation.

¶ 62 Defendant contends that in following the director's decision not to perform a third evaluation of defendant, the trial court improperly sanctioned the non-compliance of section 104-15 of the Code (725 ILCS 104-15 (West 2015)). He argues that because the trial court ordered a fitness evaluation "just to be safe," forensic clinical services had a duty to conduct the examination and issue a report. In construing a statute, this court's primary objective is to ascertain and give effect to legislative intent. *People v. Robinson*, 172 Ill. 2d 452, 457 (1996). The most reliable indication of that intent is the plain meaning of the statute's terms. *Id*. If the statutory language is clear and unambiguous, we must apply its terms without using further aids of

statutory construction. *Id*. Statutory construction is a question of law which we review *de novo*. *Id*.

¶ 63 Section 104-15(a) states that "[t]he person or persons conducting an examination or the defendant *** shall submit a written report to the court, the State, and the defense within 30 days of the date of the order." 725 ILCS 5/104-15(a) (West 2015). This section, however, merely sets forth the requirements of a report created and submitted after an examination has been performed. To determine whether the trial court's order required that an examination be performed and a report issued, we look to section 104-11(a) of the Code. This section allows the trial court to raise the issue of fitness on its own, and provides that if a bona fide doubt of fitness is raised, "the court shall order a determination of the issue before proceeding further." 725 ILCS 5/104-11(a) (West 2015). The statute does not state that a fitness examination must be performed, only that the court shall determine the issue before proceeding further. Although the trial court here ordered an evaluation "just to be safe," it accepted the conclusions of the director and determined that no *bona fide* doubt existed as to defendant's fitness to stand trial.

¶ 64 Section 104-11(b) is the only subsection that refers specifically to an examination, providing that the trial court may, in its discretion, order an appropriate examination "[u]pon request of the defendant ***." 725 ILCS 5/104-11(b) (West 2015). It also provides that "[a]n expert so appointed shall examine the defendant and make a report as provided in Section 104-15." *Id*. Since defense counsel here did not request another examination, subsection (b) does not apply.

¶ 65 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 66 Affirmed.