

NOTICE

Decision filed 02/17/12. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2012 IL App (5th) 100074-U

NO. 5-10-0074

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Jackson County.
	)	
v.	)	No. 09-CF-417
	)	
JOHNNY ORTIZ,	)	Honorable
	)	E. Dan Kimmel,
Defendant-Appellant.	)	Judge, presiding.

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PRESIDING JUSTICE DONOVAN delivered the judgment of the court.  
Justices Chapman and Stewart concurred in the judgment.

**ORDER**

- ¶ 1 *Held*: Trial court improperly instructed jury at defendant's trial for aggravated domestic battery by giving a nonpattern jury instruction erroneously defining great bodily harm, thereby entitling defendant to a new trial.
- ¶ 2 Johnny Ortiz, defendant, was found guilty after a jury trial in the circuit court of Jackson County of aggravated domestic battery (720 ILCS 5/12-3.2(a) (West 2008)) and was sentenced to 13 years' imprisonment. Defendant argues on appeal that he is entitled to a new trial because the court improperly gave the jury a nonpattern jury instruction erroneously defining great bodily harm. He further contends the court also erred in refusing to instruct the jury on the lesser-included offense of domestic battery and in allowing the prosecutor to impeach his credibility with prior convictions for aggravated domestic battery. We reverse and remand this cause for a new trial.
- ¶ 3 Defendant was charged with aggravated domestic battery in that he knowingly and without legal justification caused great bodily harm to the victim, Eunice Higgins, a family

or household member, in that he struck her about the body with pieces of furniture. The evidence at trial revealed that Higgins and defendant had a lengthy, but not peaceful, history. Both apparently were prone to drinking alcohol in excess and both were known for their violent outbreaks of anger. Higgins, in fact, had previously been incarcerated for attacking defendant. After her release from prison, she and defendant began dating again. In March of 2009, defendant moved into her house. According to defendant, on July 23, 2009, defendant was sleeping on the couch when he was awakened by Higgins cutting him on the shoulder with a single-edge blade. Defendant went to the police department to report the incident. Another call for service came in before the officer on duty could finish taking defendant's report, however. Defendant was asked to complete his written report and wait at the station for the officer to return. Defendant, who was not wearing a shirt at the time, chose instead to return to Higgins's house to pick up a shirt. Upon entering the house, according to defendant, Higgins "sicked" her dog on him. While the dog was trying to bite his legs, Higgins attempted to stab defendant with a butcher knife. He was able to get the knife away from her and ran to a neighbor's house to call the police. At trial, defendant claimed he only hit Higgins to disarm her and protect himself. Higgins denied attacking defendant or siccing her dog on him.

¶ 4 The officer on duty who first spoke to defendant testified he asked defendant to complete a written statement and remain at the department until he returned from the other call. While he did not have time at that point to photograph the cut on defendant's arm, he believed it to be more consistent with a scratch from a fingernail than a knife. On his way back from the other call, the officer received an emergency dispatch pertaining to a battery victim in need of medical care at the business next door to Higgins's residence. The battery victim was Higgins. The officer found her covered in blood practically from head to toe. After she was taken to the hospital, the police searched her residence and observed large

pools of blood in the living room and drops of blood throughout the kitchen. They also found numerous pieces of broken wood lying on the living room floor. They later located defendant several blocks away sitting under a truck drinking. No marks or wounds were spotted on defendant, and he did not complain of any injuries at that time.

¶ 5 Higgins testified that on the night of July 23, she and defendant argued and she asked defendant to leave her house. Instead of leaving, defendant shoved her, causing her to fall over a small table in the living room. Defendant then hit her repeatedly in the back of her head and on her forehead with wooden pieces from the table. She did not have a knife during the attack. When she was able to get off the floor she went outside through the kitchen to find help. At the hospital, she received 10 staples in the back of her head and 9 stitches in her forehead. As a result of the attack, she has a scar both on the back of her head as well as on her forehead.

¶ 6 The 9-1-1 dispatcher testified that at 7:29 that evening she received a call from someone identifying themselves as defendant. The caller requested an ambulance for Higgins's address to come get Higgins "before she drop dead." He further admitted to the dispatcher to having badly beaten her. The jury subsequently found defendant guilty of aggravated domestic battery.

¶ 7 Defendant first argues on appeal that the court improperly instructed the jury, over defense counsel's objection, with a non-Illinois pattern jury instruction tendered by the State. While the State concedes that the court erred in giving the jury instruction, the State believes the error was harmless. We agree with defendant that the error was not harmless in this instance.

¶ 8 It is the duty of the trial court to ensure that the jury is properly instructed on the elements of the offense charged. *People v. Williams*, 181 Ill. 2d 297, 318, 692 N.E.2d 1109, 1121 (1998). When an instruction error is in a definition essential to the jury's assessment

of a defendant's guilt or innocence it is reversible error and the defendant is entitled to a new trial under such circumstances. *People v. Stromblad*, 74 Ill. 2d 35, 41, 383 N.E.2d 969, 972 (1978). Here, in order to sustain the conviction for aggravated domestic battery, the State was required to prove that defendant knowingly caused great bodily harm to a family or household member without legal justification. See 720 ILCS 5/12-3.2(a)(1) (West 2008). The term "great bodily harm" is not susceptible of precise legal definition. *People v. Doran*, 256 Ill. App. 3d 131, 136, 628 N.E.2d 260, 263 (1993). Yet, the instruction tendered by the State here defined great bodily harm as injuries to a victim that require stitches. As defendant points out, such an instruction deprived the jury of its role as fact finder by directing a verdict of guilty of aggravated domestic battery. In other words, the court essentially instructed the jury that if Higgins received even just one stitch from an injury inflicted by defendant, then defendant was guilty of causing great bodily harm, and as a result, guilty of aggravated domestic battery. This was more than a mistake or a failure to instruct the jury. While the photos taken of Higgins shortly after her arrival at the hospital depict a badly beaten person, we agree with defendant that the instruction as tendered was reversible error. Whether a victim sustained great bodily harm is a question for the trier of fact and not of law. The instruction tendered here improperly defined great bodily harm by telling the jury what facts satisfied the statute, and as such, improperly directed a verdict. Accordingly, defendant's conviction for aggravated domestic battery must be reversed and his cause remanded for a new trial. We cannot say, as the State contends, that had the improper jury instruction not been given, the jury would have still clearly come to its conclusion that defendant committed aggravated domestic battery beyond a reasonable doubt.

¶ 9 We further agree that the court committed reversible error by refusing to instruct the jury on the lesser-included offense of domestic battery as well. A domestic battery is elevated to aggravated domestic battery when the defendant knowingly or intentionally

causes great bodily harm or permanent disability. While the evidence demonstrated that Higgins and defendant were involved in a physical altercation, defendant testified that Higgins attacked him first with a knife, forcing him to defend himself. The jury could have reasonably believed that defendant committed a domestic battery but did not knowingly or intentionally cause the injuries that arguably constituted great bodily harm. A defendant has the right to have the jury instructed on his theory of the case and on the law applicable to any state of facts which the jury might properly find to have been proved. *People v. Robinson*, 14 Ill. App. 3d 135, 140, 302 N.E.2d 228, 232 (1973). An instruction on a lesser offense must be given if the offense is an included offense of the charged offense and the evidence would permit a jury to rationally convict the defendant of the lesser offense while acquitting him of the greater offense. *People v. Hamilton*, 179 Ill. 2d 319, 324, 688 N.E.2d 1166, 1169 (1997). The trial court is not entitled to reject an instruction on the lesser-included offense based on its own weighing of the evidence, because it is the province of the jury, not the trial court, to decide whether a defendant is guilty of the greater or the lesser offense. *People v. Upton*, 230 Ill. App. 3d 365, 376-77, 595 N.E.2d 56, 63 (1992).

¶ 10 Defendant also argues on appeal that he was denied a fair trial by the court allowing the State to impeach his credibility with his prior convictions for domestic battery. Defendant contends the evidence was enormously prejudicial and far outweighed any probative value they may have had regarding his veracity. He also believes the prejudice was further enhanced on cross-examination by the prosecutor improperly eliciting details of his prior aggravated domestic battery conviction. Even though we are already reversing defendant's conviction, we address this contention to avoid any possible repeat of the error on remand.

¶ 11 Whether evidence of a prior conviction is admissible for impeachment purposes is reviewed for an abuse of discretion. *People v. Williams*, 173 Ill. 2d 48, 81, 670 N.E.2d 638,

654 (1996). The trial court is expected to balance the probative value of a prior conviction against the prejudicial impact of the conviction upon the jury. *People v. McKibbons*, 96 Ill. 2d 176, 187-88, 449 N.E.2d 821, 826 (1983). Where there is a significant similarity between the defendant's prior convictions and the offense charged, the court's admission of the prior convictions may indeed be highly prejudicial and constitute an abuse of that discretion. *People v. Williams*, 161 Ill. 2d 1, 39-41, 641 N.E.2d 296, 312-13 (1994). Here, evidence of defendant's prior convictions highlighted a history of violence without a significant relationship to credibility. Given the similarity of the offenses, the jury reasonably could have concluded that if defendant did it before, he probably did it again. See *People v. Adams*, 281 Ill. App. 3d 339, 344-45, 666 N.E.2d 769, 772-73 (1996). While prior convictions for similar violent crimes may be properly admissible under the trial court's discretion (see *People v. Blankenship*, 353 Ill. App. 3d 322, 326, 819 N.E.2d 49, 53 (2004)), it is quite possible that in this instance the jury was lured into drawing impermissible inferences from the evidence of defendant's prior convictions, especially when the case turned upon whether the jury believed defendant or Higgins. More importantly, the details of his prior convictions, particularly how the complainant in the prior aggravated domestic battery conviction was injured, were not admissible. See *People v. Dudley*, 217 Ill. App. 3d 230, 232, 576 N.E.2d 1110, 1112 (1991). It is the fact of the prior conviction, and not the details, which serves to impeach a witness. The details of the prior conviction were not probative of defendant's credibility but certainly were prejudicial to him as such details informed the jury that if defendant hit his former girlfriend with a hammer, he likely was just as guilty of hitting Higgins with a table leg. While we agree that the error was not preserved for appeal, waiver of an issue is a limitation on the parties, not on the courts. We are free to disregard such waiver in order to achieve a just result. See *Williams*, 161 Ill. 2d at 27, 641 N.E.2d at 306. Again, we point all of this out to avoid a repeat of any possible error on

remand.

¶ 12 The State counters that, under section 115-7.4 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7.4 (West 2010)), the specific details of defendant's prior conviction of aggravated domestic battery were properly admitted. Section 115-7.4 does provide that evidence of a defendant's commission of another offense of domestic violence is admissible in a criminal prosecution in which the defendant is accused of the offense of domestic battery and may be considered for its bearing on any matter to which it is relevant. 725 ILCS 5/115-7.4 (West 2010). Section 115-7.4 also requires the State in any case in which it intends to offer such evidence to disclose the evidence, including statements of witnesses or a summary of the substance of any testimony, at a reasonable time in advance of trial. This the State did not do. Instead, the State simply argued it intended to impeach defendant with his prior convictions and did not disclose that it intended to elicit details from defendant that his prior conviction involved hitting a former girlfriend with a hammer. The court therefore was not properly given the opportunity to weigh the probative value of the evidence against any undue prejudice to defendant.

¶ 13 For the foregoing reasons, we reverse the judgment of the circuit court of Jackson County and remand this cause for a new trial. Given that we are satisfied from our review of the record that the evidence was sufficient to prove defendant guilty beyond a reasonable doubt, we conclude that double jeopardy does not bar a retrial in this instance. See *People v. Junior*, 349 Ill. App. 3d 286, 293, 811 N.E.2d 1267, 1273 (2004).

¶ 14 Reversed and remanded.