

No. 1-11-0669

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).

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 16712
)	
LEONARD JOHNSON,)	Honorable
)	Evelyn B. Clay,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Epstein concurred in the judgment.

ORDER

¶ 1 *Held:* Where victim testified that defendant placed chainsaw or similar machine on his arm and struggle ensued in which victim was cut in the neck, requiring 30 stitches, trial court did not abuse its discretion by rejecting defendant's requested jury instruction on reckless conduct; defendant's conviction and sentence were affirmed.

¶ 2 Following a jury trial, defendant Leonard Johnson was convicted of aggravated battery and was sentenced to five years in prison. On appeal, defendant contends the trial court erred in refusing the defense's request for a jury instruction on reckless conduct as a lesser-included

offense of aggravated battery, asserting that some evidence existed to support a finding that his conduct was reckless, as opposed to intentional or knowing. We affirm.

¶ 3 Defendant was charged with one count of the attempted murder of Keith Thigpen and four counts of aggravated battery of Thigpen based on the events of May 31, 2008. At trial, Thigpen testified he had known defendant and his family for about 20 years and that they grew up in the same neighborhood.

¶ 4 Thigpen testified he walked through an alley near 5800 South Wabash in Chicago to meet and speak to a friend, Sherman Simmons. Thigpen noticed defendant and two other people, whom Thigpen identified by name, drinking in the alley; however, he did not speak with them. As Thigpen and Simmons talked in Simmons' garage, defendant walked up to Thigpen and stared at him. Thigpen testified he "turned around and looked at" defendant, who turned and walked away. No words were exchanged, and Thigpen did not see where defendant went.

¶ 5 Shortly after Thigpen and Simmons began talking again, Thigpen heard a machine start up "very close" to him, and he heard noise coming from the same direction as defendant previously approached him. Thigpen said the noise "[w]as moving pretty fast." Thigpen described the sound as similar to a chain saw. When Thigpen turned toward the sound, he "felt something on me," specifically on his arm, and said the machine "just ripped into my arm." He looked up to see defendant holding the machine.

¶ 6 Thigpen said he reached for the machine, and as he did so, defendant "came across and cut my throat with it." When asked what defendant used, Thigpen said it was either a hand-held "weed wacker" with a chain or a chainsaw. Thigpen held his neck and ran to a fire station across the street for aid. Thigpen was taken to the trauma unit at Stroger Hospital, where he had surgery on his arm and neck. A paramedic who treated Thigpen testified his neck wound was at least 12 inches long and open to the extent that Thigpen's bone and carotid arteries and jugular vein were

visible. Thigpen testified he needed 30 stitches to close the wound. Photographs depicting the scene of the attack and Thigpen's injuries were entered into evidence.

¶ 7 On cross-examination, Thigpen said he had had one or two beers. Thigpen told the staff at the fire house he had been cut with a weed wacker because it "looked like something you might cut weeds with." Thigpen acknowledged he used crack cocaine weekly during that period but said he had not used it on the day he was injured.

¶ 8 Simmons testified that during the day in question, he had seen defendant use a chainsaw to help a neighbor remove a tree stump. Simmons was "moving around in the garage and my backyard," playing chess and socializing, at one point standing with the group in the alley. Someone had purchased alcohol to make drinks.

¶ 9 Simmons said Thigpen came to his property before 6 p.m. but did not see if Thigpen conversed with anyone in the alley. Simmons said he was in his backyard when he heard a loud noise "like a tool running" and saw defendant "going one way" and Thigpen going another. Simmons admitted he was "kind of tipsy" but testified he "thought [defendant] was going to cut the tree down again." Simmons saw defendant running in the alley carrying a chainsaw. Defendant got into his vehicle and backed it out of the alley, striking a pole before he drove away.

¶ 10 Simmons said he had known defendant for 5 or 10 years and they were friends; he had known Thigpen his whole life and said they were not friendly. On cross-examination, Simmons said he was not standing near Thigpen talking to him when the incident occurred.

¶ 11 At the close of evidence, defense counsel asked that the jury be instructed on the lesser-included offense of reckless conduct, arguing that no evidence was offered as to defendant's intent and the jury could infer that Thigpen had been injured accidentally when defendant came too close to him with a chainsaw. Counsel also argued a battery instruction was warranted

because the finder of fact could conclude that defendant made knowing contact with Thigpen's arm but did not make intentional contact with his chest. The State argued that intent was rarely established by direct evidence but could be determined from the weapon used and the victim's injuries.

¶ 12 In ruling that the jury would be instructed only as to the charged offenses of attempted murder and aggravated battery, the court stated:

"To believe the defense position on this, you have to believe that the defendant mistook the victim for a tree stump and there was an accident here. I don't agree with that at all.

I do not believe there's any reasonable inference that could be inferred from the evidence put forth in the trial that there was a reckless act here, [that] it was an accidental conduct, it was a reckless act."

¶ 13 After deliberating, the jury found defendant guilty of aggravated battery and not guilty of attempted murder.

¶ 14 On appeal, defendant contends that because some evidence supported the giving of a jury instruction on reckless conduct, as a lesser-included offense of aggravated battery, the court erred in refusing defense counsel's request for that instruction. Defendant argues his conviction should be reversed and this case remanded for a new trial with a reckless conduct instruction because a rational jury could have found that he acted recklessly, rather than intentionally, in harming Thigpen.

¶ 15 The parties initially disagree as to the standard of review to be applied on appeal. Defendant argues that whether sufficient evidence exists in the record to support the giving of a

jury instruction is subject to *de novo* review. The State responds that the court's decision on a lesser-included instruction should be reversed only in light of an abuse of discretion.

¶ 16 As set out in the numerous cases cited by the State, a trial court's decision not to issue an instruction on a lesser-included offense will not be reversed absent an abuse of the court's discretion. See, e.g., *People v. Castillo*, 2012 IL App (1st) 110668 (trial court did not abuse discretion in denying defendant's request for instruction on involuntary manslaughter as lesser offense of first degree murder); *People v. Rebecca*, 2012 IL App (2d) 091259 (trial court did not abuse discretion in refusing to instruct jury on aggravated criminal sexual abuse as lesser included offense of criminal sexual assault); *People v. Perry*, 2011 IL App (1st) 081228 (no abuse of discretion in refusal of involuntary manslaughter instruction for defendant when defendant was charged with first degree murder); *People v. Smith*, 402 Ill. App. 3d 538, 545 (2010) (court abused discretion in refusing to instruct jury on lesser-included offense of reckless conduct where defendant charged with attempted murder; court "usurped jury's function of weighing the evidence" to decide if the prosecution proved that the defendant acted recklessly or with specific intent). See also *People v. Walker*, 2012 IL App (2d) 110288 (*de novo* standard is used when issue involves whether jury instructions accurately convey the law, while question of whether evidence supports giving of an instruction is reviewed for abuse of trial court's discretion).

¶ 17 A person commits aggravated battery when he, in committing a battery, intentionally or knowingly causes great bodily harm or permanent disability or disfigurement. 720 ILCS 5/12-4(a) (West 2008). The offense of reckless conduct, which involves the conscious disregard of a risk, may be a lesser-included offense of aggravated battery. *People v. Roberts*, 265 Ill. App. 3d 400, 402 (1994); see also generally *People v. Love*, 177 Ill. 2d 550, 552 (1997). A person commits reckless conduct if he causes bodily harm to or endangers the bodily safety of an

individual by any means and performs recklessly the lawful or unlawful acts which cause the harm or endanger safety. 720 ILCS 5/12-5(a) (West 2008). A defendant acts recklessly when he is aware his conduct might result in death or great bodily harm, although that result is not substantially certain to occur. *People v. Hayes*, 409 Ill. App. 3d 612, 621 (2011).

¶ 18 Defendant argues the evidence was sufficient to warrant an instruction on reckless conduct because Thigpen testified only that the machine was operating near him and did not state that defendant intended to harm him, and because Simmons testified he saw defendant using the tool for a legitimate purpose prior to Thigpen's injury. In the alternative, defendant argues the jury could have found he approached Thigpen with the operating machinery only to frighten Thigpen, which would constitute reckless behavior, and Thigpen sustained his injury when he turned toward the machine after hearing the noise. Defendant, in his briefs to this court, refers to the tool as a chainsaw.

¶ 19 It is proper to instruct the jury on a lesser offense where there is some credible evidence to support that instruction. *People v. Jones*, 219 Ill. 2d 1, 31 (2006); see also *People v. Castillo*, 2012 IL App (1st) 110668, ¶ 51. More precisely, an instruction defining a lesser offense should be given if there is any evidence in the record that, if it were to be believed by the jury, would support a finding on the lesser offense. *Castillo*, 2012 IL App (1st) 110668, ¶ 51, citing *People v. Carter*, 208 Ill. 2d 309, 323 (2003). The relevant inquiry, thus, is not the trial court's assessment of the credibility of the evidence but rather, the effect of a jury's belief of the evidence. *Id.*

¶ 20 In the instant case, the record reflects that the trial court determined a jury could not make a reasonable inference that defendant acted recklessly based on the evidence. Thigpen offered the only account of the events that led to his injury. He testified he and defendant knew each other and defendant approached and looked at him in Simmons' garage but they did not speak.

Thigpen heard a noise near him and felt a machine tearing into his arm, at which point Thigpen reached for the chainsaw, and defendant "came across" and cut Thigpen's throat with it.

¶ 21 Although defendant contends Thigpen failed to testify that defendant intended to harm him, the requisite mental state may be inferred from the character of the defendant's acts and the circumstances surrounding the commission of the offense. See *People v. Weeks*, 2012 IL App (1st) 102613, ¶ 35 (absence of recklessness may be shown by the nature of the attack). In considering whether one acted knowingly or recklessly, relevant factors include the disparity in size and strength between the defendant and the victim, the brutality and duration of the beating, the severity of the victim's injuries, and whether the defendant used a weapon or only his hands. *Id.*, citing *People v. DiVincenzo*, 183 Ill. 2d 239, 251 (1998). Although those factors set out in *DiVincenzo* were applied in that case to a hand-to-hand exchange between the victim and the defendant, the latter two factors are useful here and, as a whole, the factors weigh against a conclusion that defendant acted with a reckless mental state. No evidence was offered as to the relative size of both men, and although the duration of the incident was short, its outcome was severe, with Thigpen sustaining life-threatening injuries caused by a chainsaw held by defendant.

¶ 22 Defendant's criticisms of Thigpen's testimony are disingenuous. Defendant argues that Thigpen was "unable to provide any description" of defendant's actions before he felt the chainsaw cutting his arm. However, Thigpen stated he was not looking in the direction of the chainsaw until he heard the machine's noise, so it stands to reason he was not observing defendant prior to the attack.

¶ 23 Defendant also argues that Thigpen did not testify as to any motive he would have for his actions. Thigpen testified that he had known defendant for 20 years and that shortly before the attack, defendant walked up to him, stared and walked away without speaking. The State was not required to prove defendant's motive for harming Thigpen. See *People v. Agnew-Downs*, 404

1-11-0669

Ill. App. 3d 218, 228 (2010) (motive is not an essential element of a crime). Moreover, even given Simmons' testimony that defendant was seen helping a neighbor with a tree stump earlier in the day, his prior legitimate purpose for using the chainsaw does not negate Thigpen's account.

¶ 24 Accordingly, the judgment of the trial court is affirmed.

¶ 25 Affirmed.