

¶ 4

I. BACKGROUND

¶ 5 The State charged defendant with first degree murder in the death of Lucas Alberts. On September 12, 2011, a jury trial began and the following facts were presented. On August 22, 2009, defendant spent the evening babysitting the victim, two-year-old Lucas Alberts, while his mother, Jody Alberts, attended a concert with some friends. Defendant was in a dating relationship with Jody and had taken care of Lucas on prior occasions. Defendant was 40 years old at the time and was the divorced father of three children. He lived within a block of his ex-wife and children and took care of the children on a daily basis after he got off work and before his ex-wife returned home from work.

¶ 6 Jody worked part of the day on August 22, and during that time Lucas was cared for by Jody's grandmother. At approximately 4:45 p.m., defendant arrived at Jody's home to watch Lucas. After Jody left for the concert, defendant took Lucas to his apartment. Jody testified she called defendant several times during the evening to check on Lucas. Defendant told her about a fall over rat cages but assured her Lucas was all right. Jody stated she heard Lucas tell her good night during one phone call.

¶ 7 Jody returned to her apartment at approximately 12:30 a.m. on August 23, 2009. She checked on Lucas, who appeared to her to be sleeping soundly in his bed. She noticed bruises on his face. Defendant was asleep in her bed, so Jody went to sleep on the couch in the living room. At about 5:30 a.m., Jody woke and heard Lucas breathing "funny." She went to check on him and noticed something coming from his nose.

¶ 8 Jody attempted to wake Lucas by calling out his name but he did not respond. Jody called for defendant to help her wake Lucas. Defendant could not rouse the boy either.

Jody started getting her things together to take Lucas to the hospital. When defendant told her she was overreacting, Jody told defendant to get his things and get out of her house.

¶ 9 Jody took Lucas to Abraham Lincoln hospital in Lincoln. Photographs were taken of Lucas at the hospital. Jody identified bruises and marks on his body she had not noticed prior to that time. Lucas was flown to St. Francis Hospital in Peoria for more specialized care. He died there the next day, August 24, 2009.

¶ 10 Bruce Demont, an emergency room physician at Abraham Lincoln hospital, testified Lucas was limp, not crying, very pale, and looked to be in critical condition when he arrived at the hospital. The results of a computerized axial tomography (CAT) scan indicated Lucas was suffering from a severe brain injury. He was stabilized and transferred to a trauma center.

¶ 11 Dr. John Denton testified he performed an autopsy on Lucas's body. Lucas had a bruise on the back of his head and two parallel areas of bruising on the left side of his cheek, consistent with fingers pushing against his cheek but not consistent with the wire pattern on the rat cage. Dr. Denton also noted the tissue connecting Lucas's lip to the gums was torn and there had been trauma to the left side of his neck. Lucas had several bruises on his chest which were not recent, but were days old, as well as several other bruises on his abdomen, the right side of his chest, his lower leg, and his buttocks. Lucas also had two very close parallel linear lacerations on his foot, which could have been consistent with an impact with the rat cages.

¶ 12 Dr. Denton identified the injury to the back of Lucas's head as recent and the result of moderate to severe blunt force trauma. His brain swelled as a result of the injury. Dr. Denton also noted Lucas suffered bilateral retinal and optic nerve hemorrhages likely caused by

the head injury.

¶ 13 Dr. Denton also testified the determination of whether a head injury is accidental has always been problematic for clinicians and pathologists. Specialists involved in the care of abused children believe all children who die of a head injury must have been severely disabled and usually comatose from the moment of the injury.

¶ 14 Dr. Channing Petrak, a child abuse expert, testified she was a pediatrician and saw Lucas during the morning hours of August 23, 2009. According to Dr. Petrak, Lucas suffered a subdural hematoma causing his brain to shift to the left. She also identified areas of swelling throughout Lucas's brain. Dr. Petrak concluded his injuries were the result of "non-accidental trauma or inflicted trauma." She did not believe Lucas's injuries could be the result of him falling over defendant's rat cages. Dr. Petrak believed, given the severity of Lucas's injuries, he would have been symptomatic immediately and unconscious soon after the injury.

¶ 15 Dr. Petrak believed, despite the absence of a skull fracture or a laceration to Lucas's scalp, his injury was caused when his head hit a hard object. Despite the severity of the injury, Dr. Petrak admitted a layperson would not have been able to see the subgaleal hematoma Lucas suffered.

¶ 16 David Gleason testified for the State and stated he was a friend of both defendant and Jody. He testified he received several text messages from defendant during the evening of August 22, 2009, and on August 23, 2009. At 7:06 p.m., Gleason received a text message from defendant stating: "I got a tired 'lil red-headed boy over here that just fell over my rat cages and landed on his f***in' face. Oh, my god." He received another text message from defendant at 9:35 p.m. stating: "F***, dude. What you doin'? Lil f***er is out but I am worried." The

following morning, Gleason received an additional text message saying: "I don't know what the f*** happened. I am gonna shoot myself. He was fine when I put him down." Gleason testified defendant was a good friend of his and he used otherwise inappropriate language because they were close friends.

¶ 17 Defendant presented the testimony of Dr. Mark Shuman, associate medical examiner with the Miami-Dade County Medical Examiner's department. Dr. Shuman was asked whether parallel marks on Lucas's left cheek and lower ear could have been the result of defendant striking Lucas with an open hand. Defendant provided Dr. Shuman with photographs of his hand and the rat cage. Dr. Shuman scaled the images so he could lay them on the image of the injury to Lucas's face. Dr. Shuman concluded defendant's fingers were wider than the areas between the parallel lines on Lucas's face. He could not eliminate defendant's hand as the cause of the injury to Lucas's face but he stated the injury could have been caused by the wire rat cage. Dr. Shuman also stated the injury to Lucas's throat could have been caused by intubation at the hospital, but he did not believe the injury to Lucas's toe could have been caused by the rat cage. Dr. Shuman agreed with Dr. Denton that the cause of death was blunt force trauma to the head.

¶ 18 Defendant testified on his own behalf. He stated he and Jody spent time together every day since they started dating a couple of months before Lucas's death, and he spent time with Lucas also. He volunteered to babysit for Lucas on August 22, 2009. Prior to that day, he had picked up Lucas at day care several times and babysat him until Jody was done with work.

¶ 19 Defendant stated he took Lucas to his apartment on August 22. Lucas watched a movie while defendant cleaned the cages for his pet rats. With his back turned to Lucas, defendant stated he heard Lucas crash into the cages. He immediately went to Lucas, who had a

bloody lip. He was lying on the floor next to the cages at the right end of a coffee table. In addition to his lip, Lucas had some lines on his face. Defendant took Lucas to the kitchen, where he blotted his lip with a paper towel. Lucas calmed down and told defendant he was hungry. Lucas ate some frozen pancakes and then went outside to play. Defendant testified Lucas was acting normally and did not vomit or complain about his head hurting.

¶ 20 Defendant stated he was not angry when Lucas ran into the cages. Jody called defendant shortly after Lucas's injury and defendant told her Lucas crashed into the cages. Jody did not seem too concerned and simply told defendant "children fall." Defendant gave Lucas a bath before leaving for Jody's apartment. He noticed a bruise under Lucas's left arm but did not see any other bruises he considered significant. Defendant left his home shortly before 8 p.m. He and Lucas took a drive to look for deer and turkey.

¶ 21 Defendant and Lucas arrived at Jody's home around 9 p.m. Defendant put Lucas to bed and when Jody called to check in at 9:15 p.m., Lucas told her "night, night." When defendant put Lucas to bed, he noticed the mark on his face was getting worse. He was worried about what Jody would think of the mark. Defendant went to bed about an hour and a half after Lucas. Defendant awoke the next morning to the sound of Jody yelling Lucas's name and yelling for defendant. Defendant met Jody in the living room, where she was holding an unresponsive Lucas. Jody handed Lucas to defendant while she got dressed. She took Lucas back from defendant and asked him "what happened" and "what did you do?"

¶ 22 Defendant did not go to the hospital with Jody as he did not think he was welcome. After Jody left with Lucas, defendant drank some alcohol and then drove home. Defendant stated he parked his truck at his apartment and walked to Walgreens. He returned

home, took a shower, and lay down in bed. Defendant later heard police enter his apartment. Defendant denied striking or abusing Lucas.

¶ 23 Two of defendant's apartment neighbors testified they saw defendant outside his apartment in the early morning hours of August 23, 2009. Two workers from the day care Lucas attended testified in the days leading up to August 22, 2009, they did not see bruises on Lucas's body. Jody also testified there were no bruises on Lucas's body prior to August 22, 2009.

¶ 24 During the jury instruction conference, defendant argued he should be permitted to submit a jury instruction on child endangerment as an alternative to first degree murder. Defendant contended his failure to obtain medical treatment for Lucas after his injuries caused or permitted his life and/or health to be endangered. The State objected and the trial court took the matter under advisement. The court later found child endangerment was not a lesser included offense of murder as set forth in the indictment as it required the extra act of failure to obtain medical treatment not required under a murder charge, and the proposed jury instruction was not allowed. The jury returned a verdict of guilty of first degree murder.

¶ 25 On September 30, 2011, defendant filed a posttrial motion. One of the grounds he asserted for a new trial was the trial court erred in failing to instruct jurors on the offense of child endangerment. On January 5, 2012, the trial court denied the motion and sentenced defendant to a 30-year prison term. This appeal followed.

¶ 26 II. ANALYSIS

¶ 27 On appeal, defendant argues the trial court erred in rejecting his proposed jury instructions on the offense of child endangerment. He contends child endangerment is a lesser included offense of murder and, thus, an instruction on child endangerment should have been

given to the jury as the act of allegedly striking Lucas was enough to warrant a child endangerment instruction as a lesser included offense of murder. He further argued his trial counsel was ineffective for arguing to the trial court failure on defendant's part to obtain medical treatment for Lucas warranted the child endangerment instruction and not arguing the act of allegedly striking the child was enough to warrant the child endangerment instruction since it put his health and life in danger. The State contends defendant forfeited his argument in support of a child endangerment instruction based on striking the child because he did not raise this issue in the trial court. Further, his argument of ineffective assistance of counsel for failure to raise this issue in the trial court would more properly be raised in a postconviction petition. We agree with the State on both arguments.

¶ 28 Defendant was charged by indictment with first degree murder in that he:

"at the time of the commission of this offense had attained the age of 17 years or more and without lawful justification, struck L.A., a minor under 12 years of age, on the head and body, knowing such act created a strong probability of great bodily harm to L.A., a minor, thereby causing the death of L.A., a minor."

¶ 29 The child endangerment statute provides:

"It is unlawful for any person to willfully cause or permit the life or health of a child under the age of 18 to be endangered or to willfully cause or permit a child to be placed in circumstances that endanger the child's life or health ***." 720 ILCS 5/12-21.6(a) (West 2010).

¶ 30

Defendant's tendered instructions stated:

"A person commits the offense of endangering the life or health of a child when he has the care or custody of a child and wilfully causes or permits the life of that child to be endangered or willfully causes or permits that child to be placed in such a situation that the child's life or health may be endangered."

See Illinois Pattern Jury Instructions, Criminal, No. 11.29 (4th ed. 2000) (modified).

"To sustain the charge of endangering the life or health of a child, the State must prove the following propositions:

First: That the defendant had the care or custody of Lucas Alberts; and

Second: That the defendant willfully caused or permitted the life of Lucas Alberts to be endangered or willfully caused or permitted Lucas Alberts to be placed in such a situation that endangered the life or health of Lucas Alberts.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty."

See Illinois Pattern Jury Instructions, Criminal, No. 11.30 (4th ed. 2000) (modified).

¶ 31 While it is a matter of law whether a defendant has met the evidentiary minimum standard entitling him to a lesser included offense instruction (*People v. Tijerina*, 381 Ill. App. 3d 1024, 1030, 886 N.E.2d 1090, 1097 (2008)), a trial court's refusal to issue a specific jury instruction is reviewed for abuse of discretion. *People v. Couch*, 387 Ill. App. 3d 437, 444, 899 N.E.2d 618, 624 (2008). Defendant argues the court erred in refusing his tendered child endangerment instructions. Thus, he must show the court's ruling was an abuse of discretion.

¶ 32 Where a jury's choice is between a finding of guilt or innocence on the charged offense, an instruction for a lesser included offense provides an important third option to a jury believing a defendant is guilty of something but uncertain whether the charged offense has been proved. See *People v. Bryant*, 113 Ill. 2d 497, 502, 499 N.E.2d 413, 415 (1986). Such an instruction should be given at the defendant's request if (1) the lesser offense is encompassed within the greater charged offense using the "charging instrument approach," and (2) the evidence at trial would permit a rational jury to find the defendant guilty of the lesser offense and not guilty of the greater offense. *People v. Hamilton*, 179 Ill. 2d 319, 324, 688 N.E.2d 1166, 1169 (1997).

¶ 33 Defendant argued his tendered child endangerment instructions did not have any element first degree murder lacks. In support of this position, defendant argued because he was the sole caregiver to Lucas and he did not take him to the hospital, he placed Lucas's health in danger. He also agreed with the trial court there would have to be circumstantial evidence defendant struck the fatal blow to Lucas as well as circumstantial evidence of defendant's awareness the blow caused a substantial risk to Lucas's health, putting defendant in a position of having to obtain prompt medical attention for the boy.

¶ 34 Under this theory, the jury would have to find two acts: one, defendant struck Lucas and two, he willfully omitted to perform an act which he should have known needed to be performed, *i.e.*, failure to summon medical help. This second element was not contained in the greater offense of first degree murder as charged. Defendant based his request for a lesser included offense instruction on conduct separate and distinct from that with which he was charged. The trial court did not abuse its discretion in denying defendant's request to give his tendered child endangerment instructions.

¶ 35 In his posttrial motion, defendant again argued his child endangerment instructions should have been given to the jury because the jury could have reached two potential conclusions: either Lucas suffered an injury to his head that was eventually fatal and defendant permitted his health to be endangered by not taking him to the hospital or defendant struck Lucas, causing the injuries ultimately leading to his death, and permitted Lucas's health to be endangered by not rendering him aid.

¶ 36 On appeal, defendant argues, in addition to the reasons raised in the trial court, the court erred in refusing to give his tendered child endangerment instructions, which would have given the jury the option of finding defendant endangered Lucas's life by causing his head injury, knowing by striking the boy he created a strong probability of great bodily harm to Lucas. Defendant has forfeited this argument. He failed to argue at trial the instruction was warranted on this ground. *People v. Macri*, 185 Ill. 2d 1, 75, 705 N.E.2d 772, 807 (1998).

¶ 37 Finally, as for defendant's argument the failure to make this argument in the trial court is ineffective assistance of counsel, defendant cannot establish ineffectiveness on this record and the issue should be left for defendant to raise, if he chooses, in postconviction

proceedings. Defendant cannot show the trial court would have given the instructions had counsel argued for them based on defendant admitting the evidence supports a finding he struck Lucas. Further, defense counsel could have made the strategic decision not to argue for the instruction on that ground which effectively admitted he struck Lucas. The claim is better pursued under the Post-Conviction Hearing Act (725 ILCS 122-1 through 122-7 (West 2012)). See *People v. Pelo*, 404 Ill. App. 3d 839, 870-71, 942 N.E.2d 463, 490 (2010).

¶ 38

III. CONCLUSION

¶ 39 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 40 Affirmed.