SIXTH DIVISION
March 11, 2011

No. 1-09-2962

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

URBAN WEST BYRON, L.P.,	)	Appeal from
	)	the Circuit Court
Plaintiff-Appellee,	)	of Cook County
v.	)	
	)	
PETER PESKOFF,	)	No. 08 M1 709493
	)	
Defendant-Appellant	)	
	)	
(Any and All Unknown Occupants,	)	Honorable
	)	Sheldon C. Garber,
Additional Defendants).	)	Judge Presiding.

JUSTICE CAHILL delivered the judgment of the court.
Presiding Justice Garcia and Justice R.E. Gordon concurred in the judgment.

O R D E R

Held: Judgment in favor of plaintiff in forcible entry and detainer action is affirmed.

Plaintiff, Urban West Byron, L.P., filed a forcible entry and detainer action against defendant, Peter Peskoff, for possession of the premises located at 2815 West Byron Street, Unit 218, in Chicago. A jury found in favor of plaintiff, and the trial court entered judgment on the

verdict. Defendant appeals. We affirm.

On April 18, 2008, plaintiff filed an action to recover possession of the apartment defendant was renting from plaintiff. The parties had entered into a lease agreement providing:

> "(I) The Landlord may terminate this Agreement for the following reasons:
>
> * * *
>
> (4) criminal activity by a tenant, any member of the tenant's household, a guest or another person under the tenant's control:
>
> (a) that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents (including property management staff residing on the premises); or
>
> (b) that threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises;
>
> * * *
>
> (8) if the Landlord determines that the tenant *** has engaged in criminal activity, regardless of whether the tenant *** has been arrested or convicted for such activity."

The bystander's report shows Kathleen Gubitz, the building manager, testified that on March 18, 2008, she received a call from the maintenance man who was in the office at the time. Gubitz returned to the office and saw defendant "yelling, screaming, cursing and foaming at the mouth." She was afraid how defendant would react and called the police. When the police

arrived, she went up to defendant's unit with them. Defendant was screaming, yelling and threatening to kill her, the maintenance man and other residents of the building. After that day Gubitz gave defendant a 10-day notice of termination. She did not witness defendant swing, hit or otherwise make contact with anyone.

Timothy Krupp, the maintenance man for the building, received a work order to fix a leaky sink in defendant's apartment. Defendant told him the sink was still not fixed, so Krupp fixed it again in January 2008. On March 18, 2008, defendant came into the building office where Krupp was doing paper work. Defendant was screaming and foaming at the mouth. When defendant kept yelling, Krupp told him he was going to close the office door. Krupp felt threatened because defendant was "right in my face" before he closed the office door. After Krupp closed the door defendant kicked it and continued to scream. Krupp felt "very scared and threatened" by defendant. Defendant did not swing at him or make physical contact during the incident but did "run several feet toward me to get into my face." He called Gubitz, who told him to call the police. When the police arrived, he told them defendant threatened him, came screaming and yelling in his face and was foaming at the mouth. Krupp went upstairs with the police and saw defendant yelling, screaming and threatening to kill management, Krupp and other residents in the building.

Sergeant George testified that he responded to Krupp's call. When he arrived he went upstairs with building staff. Defendant went into his apartment, slammed the door and screamed threats and curses. George knocked on defendant's apartment door and asked defendant to let him in. Defendant became out of control, started screaming, cursing and making threats that he

was going to kill management, staff and other residents in the building. George felt the building residents were in danger, so he decided to take defendant to the hospital for an evaluation. Defendant was not arrested, and George did not witness defendant attempt to harm himself or others.

Defendant testified that he had received social security disability benefits since he was 18, was in special education classes throughout school and had to make a complaint to the Department of Housing and Urban Development to get an apartment in the building.

In January 2008, defendant complained about a leaky sink in his apartment and someone from the building came up to fix it. He noticed the sink was still leaky, so he went to the office to report it the next day. He knocked on the office door and, while talking with Krupp, remained a few feet away. He felt hurt the sink wasn't fixed and said it was the building management's fault that the sink was not fixed. Defendant was not mad but was "upset and shocked" and felt hurt because of the way he was treated. He said he admits he got upset, but doesn't hurt people. When the police knocked on his apartment door, he opened the door and allowed them to come in. The police took him to Swedish Covenant mental ward and involuntarily committed him.

At the close of evidence defendant tendered a jury instruction that provided:

> "The existence of a mistake of fact or law is a defense to a charge that defendant committed an assault. You must therefore take into account defendant's mental capacity when determining whether he had the required intent."

Plaintiff objected, and the court amended the instruction to read:

> "The existence of a mistake of fact or law may be a defense to a charge that defendant committed an assault. You may therefore take into account defendant's mental capacity when determining whether he had the required knowledge."

The jury entered it's verdict in favor of plaintiff, and the trial court entered judgment on the jury's verdict.

On appeal, defendant first contends that plaintiff failed to prove defendant committed assault.

"A person commits an assault when, without lawful authority, he engages in conduct which places another in reasonable apprehension of receiving a battery." 720 ILCS 5/12-1(a) (West 2008). In a forcible entry and detainer action a plaintiff is entitled to judgment of possession of the premises if the allegations in the complaint are proven by a preponderance of the evidence. 735 ILCS 5/9-109.5 (West 2006).

Here, Timothy Krupp testified that defendant came to the building office, "screaming and foaming at the mouth," and ran "several feet toward [him] to get into [his] face." Krupp was placed in reasonable apprehension of receiving a battery: he said he was "very scared" and "felt threatened because [defendant] was right in my face." Defendant "threatened to kill [him], the property manager and other residents of the building." A reasonable jury could find that plaintiff proved by a preponderance of the evidence that defendant committed assault. The court properly denied defendant's motion for judgment notwithstanding the jury's verdict.

Defendant also argues that the court's jury instruction allowed the jury to disregard his

mental impairment, which prevented him from knowing his conduct would place a person in reasonable apprehension of receiving a battery.

Where a trial court gives a faulty jury instruction, a reviewing court will not reverse unless the instruction clearly misled the jury and prejudice resulted. *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260, 274, 775 N.E.2d 964 (2002); *Napcor Corporation v. JP Morgan Chase Bank, NA*, _ Ill. App. 3d _, 938 N.E.2d 1181, 1191 (2010).

The record does not reveal the colloquy that led the trial court to amend defendant's proposed instruction to read "may" rather than "must" and to substitute the word "knowledge" for the word "intent" in the instruction tendered to the jury. Absent a record of the jury instruction conference, we would only be guessing what led to the trial judge's decision to tender the amended instruction. The jury is entitled to an instruction if there is some evidence to support it. *Ono v. Chicago Park District*, 235 Ill. App. 3d 383, 601 N.E.2d 1172 (1992). But defendant has not presented us with evidence from the record that shows his version of the instruction more accurately reflected the evidence than the amended version. Given this record, we cannot say the trial court abused its discretion or that the jury was misled.

A forcible entry and detainer action is civil in nature and not intended to punish the defendant. *U.S. Residential Management and Development, LLC v. Head*, 397 Ill. App. 3d 156, 160, 922 N.E.2d 1 (2009). It is a limited proceeding with the central purpose of determining only who should be in rightful possession of real property. *Head*, 397 Ill. App. 3d at 160. A plaintiff is entitled to judgment of possession of the premises if the allegations in the complaint are proven by a preponderance of the evidence. 735 ILCS 5/9-109.5 (West 2008).

Here, plaintiff established by a preponderance of the evidence that defendant engaged in criminal activity in violation of the lease, entitling plaintiff to rightful possession of the property. We cannot say that defendant was prejudiced by the court's alleged misstatement of law to the jury on the mistake of fact defense. *Tierney v. Community Memorial General Hospital*, 268 Ill. App. 3d 1050, 1054, 645 N.E.2d 284 (1994).

Defendant next contends that he was entitled to a directed verdict because he had a right to cure the lease violation stemming from the assault. By failing to raise this argument in his post-trial motion, defendant has waived this issue for consideration on appeal. *Southwest Bank of St. Louis v. Poulokefalos*, 401 Ill. App. 3d 884, 891, 931 N.E.2d 285 (2010).

Finally, defendant contends he should have been permitted to argue that plaintiff failed to accommodate his disability in violation of state and federal law. Defendant argues that the trial court's ruling on plaintiff's motion *in limine* to exclude this defense was error. Here, the trial record does not show the basis for the trial court's ruling. Accordingly, we will presume the trial court's ruling was in conformity with the law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392, 459 N.E.2d 958 (1984).

Affirmed.