FOURTH DIVISION
February 14, 2013

No. 1-10-2211

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. 08 CR 11337
	)	
DANIEL CASTILLO,	)	Honorable
	)	Garritt E. Howard,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not abuse its discretion in denying defendant's request for a jury instruction on the lesser included offense of battery. Defendant is entitled to a $5-per-day pre-sentence custody credit for the children's advocacy center assessment, but he is not entitled to such credit for DNA charge, which is a fee.

¶ 2 Following a jury trial, defendant Daniel Castillo was found guilty of one count of aggravated battery of a child and sentenced to nine years in prison. Defendant argues that the trial court committed reversible error by refusing to give the jury an instruction on simple battery. He also maintains that he is entitled to a $5-per-day pre-sentence custody credit against certain

monetary assessments.

¶ 3 On May 28, 2008, defendant was taking care of Matthew, the three-year-old child of his wife, Juana. Juana, defendant, and Matthew were living at Juana's parents' house in Des Plaines, Illinois, at the time. Juana testified that she received a call from defendant at work around 3:30 or 4 p.m. Defendant, who was alone with Matthew while Juana was at work, told her that Matthew had burned his hands playing with hot water in the kitchen sink. Defendant went to pick up Juana from work to return home. At home, she found Matthew with her mother, Rocio Angelito de Valencia, who was running cold water over Matthew's hands as he cried in pain. Juana thought that Matthew was "in a lot of pain" and "was very uncomfortable." His hands looked "really bad," with the skin "peeled off and pinkish and red."

¶ 4 Juana's mother, Rocio, testified that when she arrived home at around 3 or 4 p.m., she saw Matthew sitting on a chair in the kitchen. Defendant was standing with the phone in his hands, and he told her that he was going to call Juana. Defendant left to pick up Juana while Rocio stayed with Matthew, running cold water on his hands in an attempt to ease the pain.

¶ 5 On the way to the hospital, defendant told Juana that he "went to the bathroom and then when he come out, he found [Matthew] playing in the sink, in the kitchen sink." At the hospital, Juana testified that a doctor talked with defendant about what had happened, but she was not present for the conversation. The jury later heard testimony from Dr. Jagvir Singh, the attending physician who treated Matthew at the hospital, about his conversation with defendant. Defendant told Dr. Singh that "he stepped out for 5 minutes in the bathroom and he heard the child crying on and off. And when he came out of the room, he found the child in the kitchen." Defendant

stated that "he thought the child had cut on the hand. But he mentioned that he did not find any knife on the counter or anything, so he thought then he burned the hands." Defendant also told Dr. Singh "that the child climbed on the counter and turned the water faucet on and he suspected that that's how he burned his hands."

¶ 6 The doctors told Juana that Matthew had second-degree burns on both hands and that she should follow up with a plastic surgeon in two days. The doctors gave Matthew Tylenol with codeine for the pain. They cleaned the child's wounds, placed bandages on them, and told Juana to change the bandages twice a day and follow up with a plastic surgeon in two days. While Matthew ultimately did not require surgery, Juana testified that after the incident, Matthew had trouble eating on his own, holding a cup, or using the bathroom. He was also afraid of water and being around people and specifically had trouble when it came time to wash his hands. At the time of trial, Matthew had "very little" marks on his hands and some discoloration.

¶ 7 Juana testified that the next morning, defendant "came back from work and he was telling me that he's done bad things. And then I asked him what kind of bad things. And then I asked him if he was—if he did that to Matthew. And then he said yes and that he was sorry and that he didn't know what went through this [*sic*] mind and why he did it." She asked him "how he was able to hold Matthew's hands under water, hot water," and defendant said, "I know, I'm sorry." Defendant told her "he was making Matthew wash his hands and that Matthew was giving him a hard time about it."

¶ 8 Officer Richard Rozkuszka testified that, on the day after the incident, he and two detectives from the Des Plaines Police Department went to Juana's home to examine Matthew's

injuries and speak with the family. Rozkuszka testified that "[m]ultiple layers of the skin were off to the middle and tips of the fingers" on Matthew's left hand. The right hand was "blistered severely" with an immersion demarcation on the wrist indicating a sleeve mark. Matthew was frightened and did not want anyone to touch his hands.

¶ 9 After seeing Matthew's injuries, Rozkuszka and another detective spoke to defendant; the third detective spoke to Juana. After being read his Miranda rights, defendant first told Rozkuszka that "he had gone away" and Matthew climbed onto a stool and then onto the counter, where Matthew then turned the water on and burned his hands. Juana told the officers what defendant had told her about holding Matthew's hands under the water in the bathroom. When Rozkuszka confronted defendant with what Juana had told the other detectives, defendant "then said that he would tell the truth and how it happened." Defendant admitted that "he was washing his hands and Matthew was also in the bathroom and Matthew was going to wash his hands." Matthew then "[s]tarted playing in the water," so defendant "turned off the cold water and only the hot water was on. And at that point he held Matthew's hands in the water."

¶ 10 Rozkuszka testified that when he turned the water on "all the way to hot," he burned his hand in a second and he "couldn't take it." Rozkuszka explained that an evidence technician and a worker from the Department of Children and Family Services (DCFS) went to check the hot water heater and discovered that it was set "at the highest setting for a hot water tank." Rozkuszka did not know who set it at that level or how long it had been set at that level.

¶ 11 Elisa Corona of the DCFS testified that she went to the home with Rozkuszka and tested the temperature of the bathroom water. With just the hot water running in the bathroom, the

water reached 139.6 degrees in less than 30 seconds and 140.1 in less than 60 seconds. The water was steaming. When she tried to touch the hot water, Corona could only hold her hands under the water for "[l]ess than a second, two seconds." Corona went downstairs with the detectives and an evidence technician to examine the hot water heater. One of the detectives advised Rocio that the water heater was set much too high in a home where a child was in the house, and someone set the temperature lower.

¶ 12 Officer John Bueno testified that he helped with translation with two statements given by defendant at the police statement: a statement given to Officer Bueno and Officer Kulak and a statement given to Officer Bueno and transcribed by Assistant State's Attorney Jessica Bergeman. After being read his Miranda rights, defendant stated that he was with Matthew in the bathroom and was trying to teach Matthew how to use the bathroom and wash his hands. Defendant washed his hands with hot and cold water. He then turned off the cold water and put Matthew's hands under the hot water. Before he did that, defendant let the water run for "maybe a minute" and noticed that there was steam coming from the hot water. Defendant said that Matthew screamed 3 or 4 times and cried when defendant rubbed Matthew's hands together under the water. Defendant held his hands under the water for approximately 6 or 7 seconds.

¶ 13 Defendant then took Matthew to the kitchen and made something for himself to eat. Matthew was crying. Defendant turned on the television for Matthew to watch and gave him milk and cookies, but Matthew did not eat the cookies. Defendant stated that Matthew started to push his hands against his legs when some skin came off Matthew's hands. Defendant "thought Matthew cut himself, but he didn't see a knife." He then called his wife. Defendant felt "guilty

and cried about what happened"; he thought "this happened because he is under stress about money and woke up mad that day, but feels bad because Matthew is just a little baby and can't protect himself." Defendant told his wife that "he knows it was his fault and he feels he acted like an animal" and that "he was sorry and tried to apologize."

¶ 14 Dr. Singh testified about Matthew's injuries. He observed that the child had second degree burns on both hands, with more serious burns to the right hand. The right hand had skin peeled off and blisters, and the left hand had mostly blisters. Dr. Singh testified that these burns would be very painful, and he gave Matthew Tylenol with codeine. He cleaned the wounds and removed any peeling skin. Dr. Singh noted in his report that the victim had full range of motion but testified that the victim's mobility was limited due to the pain.

¶ 15 Dr. Singh testified that the injury would be consistent with a child having his hands put together and forced to stay under water that was 140 degrees for about 6 to 7 seconds. Based on his review of the medical literature and a review from social services, Dr. Singh testified that to sustain the type of burns the child received, an adult's hands would have to be held under water at 140 degrees for 5 to 6 seconds. Singh explained that a burn could occur faster on a child, who has thinner skin, and the injury to Matthew could have happened in less than 6 or 7 seconds.

¶ 16 Following the State's case, defense counsel requested that the jury be given an instruction on simple battery, as a lesser-included offense of aggravated battery to a child. The court denied the request: "On the evidence I've heard during the course of this trial, giving a lesser included instruction on misdemeanor battery would not be appropriate because no rational fact finder could find that the injuries incurred by the victim in this particular case did not result in great

bodily harm. So that will not be given."

¶ 17 The defense rested without calling any witnesses. During jury deliberations, the jury sent a note asking for a definition of great bodily harm, and if it "depend[ed] on permanent versus temporary damage." The court responded to the jury that "[t]here's no legal definition of great bodily harm. You have received all the applicable instructions. Please continue your deliberations." The jury found defendant guilty of aggravated battery.

¶ 18 Defendant filed a motion for a new trial, arguing that the jury should have received the lesser-included offense instruction. Defendant's argument focused solely on the degree of injury, noting that "the injuries were second-degree burns, *** there was no loss of range of motion, there was no contraction, there was no permanent injury that resulted to the child," and that the child "does not have any lasting injury except for slight discoloration on his hands." The court denied the motion. The court noted that he learned that the jurors had no issue with "whether or not there was great bodily harm inflicted," but rather as to "whether or not defendant had to have the specific intent to cause that much bodily harm at the time he committed the act." The court sentenced defendant to nine years in prison, giving him sentencing credit for 791 days. The court also imposed fees and fines, including the state DNA identification system and child advocacy center assessments. This appeal followed.

¶ 19 ANALYSIS

¶ 20 Defendant claims that the trial court committed reversible error by refusing to instruct the jury on battery, a lesser-included offense of aggravated battery of a child. Defendant was charged with aggravated battery of a child. A person commits aggravated battery of a child when

he, being 18 years of age or older, "intentionally or knowingly, and without legal justification and by any means, causes great bodily harm *** to any child under the age of 13 years." 720 ILCS 5/12-4.3(a) (West 2008) (now 720 ILCS 5/12-3.05(b)(1)). At trial, defense counsel requested an instruction on simple battery, which is committed where a person knowingly, without legal justification, causes bodily harm to another. 720 ILCS 5/12-3 (West 2008). Battery is a lesser included offense of aggravated battery. *E.g.*, *People v. Krone*, 98 Ill. App. 3d 619, 623 (1981); *People v. Kole*, 47 Ill. App. 3d 775, 780 (1977); see *People v. Kolton*, 219 Ill. 2d 353 (2006) (discussing lesser-included offenses).

¶ 21 Although generally a defendant cannot be convicted of an uncharged offense, a defendant is entitled, in certain circumstances, "to have the jury instructed on less serious offenses that are included in the charged offense." *People v. Ceja*, 204 Ill. 2d 332, 359 (2003). In order to receive a lesser-included instruction, the defendant must identify evidence at trial that would allow a jury to rationally find him guilty of the lesser offense, yet acquit him of the greater offense. *People v. Medina*, 221 Ill. 2d 394, 405 (2006). "The amount of evidence necessary to meet this factual requirement, *i.e.*, that tends to prove the lesser offense rather than the greater, has been described as 'any,' 'some,' 'slight,' or 'very slight.' " *People v. Novak*, 163 Ill. 2d 93, 108-09 (1994) (quoting *People v. Upton*, 230 Ill. App. 3d 365, 374 (1992) and *People v. Willis*, 50 Ill. App. 3d 487, 490-91 (1977)), abrogated on other grounds by *People v. Kolton*, 219 Ill. 2d 353 (2006). This court must determine whether there is any evidence that, if believed by the jury, would reduce the crime to a lesser-included offense. *People v. Carter*, 208 Ill. 2d 309, 323 (2003); *Upton*, 230 Ill. App. 3d at 374-75. We review the circuit court's decision not to give the instruction for an abuse

of discretion. *People v. DiVincenzo*, 183 Ill. 2d 239, 249 (1998); *People v. Jones*, 219 Ill. 2d 1, 31 (2006).

¶ 22 Defendant initially argues, in a single paragraph, that there was evidence by which the jury could find that Matthew did not suffer "great bodily harm." Although the term "great bodily harm" is "not susceptible of precise legal definition," this court has noted that it "requires a more serious or grave injury than 'bodily harm.' " *People v. Mimes*, 2011 IL App (1st) 082747, ¶ 29 (quoting People v. Figures, 216 Ill. App. 3d 398, 401 (1991)). Our supreme court has defined "bodily harm" as "some sort of physical pain or damage to the body, like lacerations, bruises, or abrasions, whether temporary or permanent." *People v. Mays*, 91 Ill. 2d 251, 256 (1982). Here, there is no question that the child suffered second degree burns, an injury which this court has found to constitute "great bodily harm." See, e.g., People v. Herr, 87 Ill. App. 3d 819, 822 (1980) (concluding that evidence was sufficient to sustain a conviction for aggravated battery of a child, where defendant placed two-year-old child in steaming water, causing second degree burns). Moreover, the jury heard testimony and viewed pictures showing that the injuries were so severe that the child's skin completely came off one of his hands. There was also severe blistering to the child's other hand, and he could no longer feed, go to the bathroom, or dress himself. The evidence presented at trial would not allow jury to find that the child suffered mere bodily harm as a result of defendant's actions.

¶ 23 Defendant maintains that a simple battery instruction was required because there was some evidence that he did not intentionally or knowingly cause great bodily harm. To find defendant guilty of aggravated battery of a child, the jury had to conclude not only that the child

suffered great bodily harm, but that defendant "intentionally or knowingly *** cause[d] great bodily harm." 720 ILCS 5/12-4.3(a) (West 2008). Our statutes define knowing and intentional conduct. See 720 ILCS 5/4-5 (West 2008) ("A person knows *** [t]he result of his or her conduct, described by the statute defining the offense, when he or she is consciously aware that that result is practically certain to be caused by his conduct."); 720 ILCS 5/4-4 (West 2008) ("A person intends, or acts intentionally or with intent, to accomplish a result or engage in conduct described by the statute defining the offense, when his conscious objective or purpose is to accomplish that result or engage in that conduct."). Thus, to find defendant guilty of aggravated battery, the jury had to conclude that his actions were at least knowingly committed, *i.e.*, that defendant was "consciously aware that his conduct [was] practically certain to cause great bodily harm." *People v. Psichalinos*, 229 Ill. App. 3d 1058, 1067 (1992); *People v. Lattimore*, 2011 IL App (1st) 093238, ¶ 43; People v. Cooper, 283 Ill. App. 3d 86, 93 (1996). A conviction for battery requires only that defendant was consciously aware that his conduct was practically certain to cause bodily harm. 720 ILCS 5/12-3 (West 2008). According to defendant, there was slight evidence that he was aware that bodily harm, not great bodily harm, was practically certain to result from his actions. Put another way, defendant argues that there was slight evidence that he was unaware that severe bodily harm was practically certain to result from his actions.

¶ 24 "Whether a person acted intentionally or knowingly with respect to bodily harm resulting from one's actions is, due to its very nature, often proved by circumstantial evidence, rather than by direct proof." *People v. Lattimore*, 2011 IL App (1st) 093238, ¶ 44; *People v. Williams*, 165 Ill. 2d 51, 64 (1995) ("Because intent is a state of mind, it can rarely be proved by direct

evidence."). Thus, "where intent is not admitted by the defendant, it can be shown by surrounding circumstances [citation], including the character of the assault and the nature of the seriousness of the injury [citation]." *People v. Williams*, 165 Ill. 2d 51, 64 (1995). Our cases considering aggravated battery have looked to defendant's conduct surrounding the act and the act itself as evidence of that defendant intentionally or knowingly caused a specific result. *Lattimore*, 2011 IL App (1st) 093238, ¶ 49 (collecting cases).

¶ 25 In assessing the defendant's mental state, we have also relied on the bedrock principle that "[t]he defendant is presumed to intend the natural and probable consequences of his acts." *People v. Foster*, 168 Ill. 2d 465, 484 (1995) (quoting *People v. Terrell*, 132 Ill. 2d 178, 204 (1989)). And we have emphasized that in order to show that defendant intended a "specific result," the State must show that defendant intended or knowingly caused a certain degree of harm (e.g., great bodily harm), not the specific injury that in fact occurred. Thus, "[i]t is not necessary that a defendant intended the particular injury or consequence that resulted from his conduct." Lattimore, 2011 IL App (1st) 093238, ¶ 44. At first blush, this statement, broadly construed, seems to negate the statutory requirement that defendant intentionally or knowingly cause great bodily harm. But Lattimore and similar cases stand for a more limited proposition: so long as the State shows that the defendant intentionally or knowingly caused a specific degree of harm (for aggravated battery, great bodily harm), it need not establish that he intended a specific form or manner of injury.

¶ 26 In People v. Isunza, for example, the defendant claimed that the evidence was insufficient to show that he knowingly cause great bodily harm to a car passenger, where he swung a baseball

bat three times at the passenger window of the car. People v. Isunza, 396 Ill. App. 3d 127, 132 (2009). In rejecting that argument, this court held that "it was not unreasonable for the trial court to have concluded that the defendant was consciously aware that his conduct was practically certain to cause a particular result, that being great bodily harm to [the passenger]. Even if the defendant did not intend for glass to fly into one of [the passenger's] eyes, [his] injury was a natural and probable consequence of the defendant's actions." Id. at 132-33. Where the State established that great bodily injury was a probable and natural consequence of swinging a bat three times at a car window, it did not need to show that defendant intended a specific injury (e.g., glass flying into eyes as opposed to the bat breaking the window and hitting the victim in the face).

¶ 27 With these principles at hand, we turn to the evidence in this case. When considering defendant's actions and his statements admitted at trial, there is no question that there was evidence that defendant was aware that he would cause severe bodily harm to the child. Defendant told his wife that he had made the child wash his hands after the child gave him a hard time about it; defendant was "under stress about money and woke up mad that day." Before placing the child's hands under the water, defendant let the hot water run for a full minute. He saw that the water was steaming. While the child screamed 3 or 4 times after being put under the steaming water—giving defendant a clear signal that he was causing severe pain to the child—defendant did not remove the child's hands. He held them under the water for 6 to 7 seconds, resulting in second degree burns so severe that Matthew's skin blistered and peeled off his hands. Reflecting on his actions, defendant told police that he "acted like an animal" and felt

"bad because Matthew is just a little baby and can't protect himself."

¶ 28 We cannot agree with defendant that there was evidence before the jury that defendant only knowingly caused bodily harm, as opposed to severe bodily harm. Defendant first claims that there was evidence that he was unaware that his actions would cause such a severe injury because the child, with thinner skin, sustained severe injury more easily than an adult. This argument reflects a misunderstanding of the evidence. Contrary to defendant's contention, Dr. Singh did not testify that the 140-degree water that burned the child would not "cause an identical injury to an adult's skin." Dr. Singh testified that an adult would receive the same severity of burns as the child did within six seconds of exposure to 140-degree water, and a young child could sustain that injury even more quickly. The water was so hot that DCFS specialist Corona testified that she had to immediately pull her hands out from the water. Officer Rozkuszka similarly testified that he could not hold his hands under the water for a second without being burned; the water so hot that he "couldn't take it."

¶ 29 Defendant also points to evidence that he gave him milk and cookies and turned on the TV for him after he placed the child's hands under the faucet. Defendant contends that his actions "are consistent with being unaware that his actions caused Matthew harm." Even if we accept that these actions, viewed in isolation, may be consistent with that state of mind, they alone cannot support an inference that defendant was unaware he caused harm to the child. An instruction on a lesser-included offense is not required where the evidence rationally precludes such an instruction. People v. Perry, 2011 IL App (1st) 081228, ¶ 28 (citing People v. Greer, 336 Ill. App. 3d 965, 976 (2003)). As noted above, defendant admitted that he forced the child to

put his hands under the water because the child was giving him a hard time; that he waited a minute while only the hot water ran before placing the child's hands in the water; and that when the child screamed out in pain 3 or 4 times, he kept the child's hands under the steaming water. Although defendant gave the child milk and cookies, defendant's own description of his conduct just moments earlier precludes an inference that defendant was unaware that he caused the child harm.

¶ 30 Defendant finally points to his statement to police that he thought Matthew had cut himself when he saw skin come off Matthew's hands. This statement, if believed by the jury, does not justify an instruction on simple battery. Even if defendant was not aware that the child's specific injury—second degree burns causing skin to peel from his hands—was practically certain to result from his conduct, severe bodily injury to the child was the natural and probable consequence of defendant's actions. See People v. Isunza, 396 Ill. App. 3d 127, 132 (2009); People v. Foster, 168 Ill. 2d 465, 484 (1995); *People v. Ward*, 101 Ill. 2d 443, 451-52 (1984) (finding that jury instruction on recklessness was not required, where "even if one would assume, *arguendo*, that the defendant's statement that he 'didn't mean to' kill Montez was to be considered evidence that he acted recklessly, we judge that the severity of the beating negates any suggestion that his conduct was only reckless"). A conclusion that defendant only meant to cause bodily harm, but not severe bodily harm, may not "fairly be inferred from the evidence presented." *People v. Garcia*, 188 Ill. 2d 265, 284 (1999). We therefore find no abuse of discretion in the

trial court's refusal to give an instruction on battery.[1]

¶ 31 Defendant next maintains, the State concedes, and we agree that he is entitled to a $5-per-day pre-sentence custody credit for the $30 children's advocacy center assessment (55 ILCS 5/5-1101(f-5) (West 2008)). Although this assessment is labeled a fee in section 1101 of the Counties Code (55 ILCS 5/5-1101(f-5) (West 2008)), it does not seek to compensate the State for any costs incurred as the result of prosecuting defendant, and, therefore, is a pecuniary punishment imposed for being convicted of a crime. *People v. Jones*, 397 Ill. App. 3d 651, 660 (2009). Accordingly, defendant is entitled to a $30 credit to offset the $30 fine where he spent 791 days in pre-sentence custody on a bailable offense. 725 ILCS 5/110-14(a) (West 2008).

¶ 32 Finally, defendant contends that he is entitled to a $5-per-day pre-sentence credit for the $200 DNA identification system analysis charge (DNA charge). Our supreme court recently resolved this issue finding that the $200 DNA charge is a fee, and, therefore, defendant is not entitled to a $5-per-day pre-sentence custody credit. *People v. Johnson*, 2011 IL 111817, ¶ 28.

---

[1] To support a claim that the jury was uncertain about whether defendant knowingly or intentionally caused great bodily harm, defendant references the jury note asking for a definition of great bodily harm and off-the-record, post-verdict comments from individual jurors to the judge regarding the mental state for aggravated battery of a child. The jury's questions regarding the instructions tell us little about their view of the evidence, and they do not detract from our conclusion that there was not even slight evidence on the record by which the jury could fairly infer that defendant knowingly or intentionally caused bodily harm, but not great bodily harm. We also consider it improper to rely on out-of-court comments made by a juror to a judge as evidence that the jury was "uncertain" as to the verdict reached, and a lesser-included instruction was therefore required. See generally *People v. Hobley*, 182 Ill. 2d 404, 457 (1998) ("As a general rule, a jury verdict may not be impeached by the testimony of the jurors. *** This rule prevents the admission of a juror's affidavit to show the 'motive, method or process by which the jury reached its verdict.' [Citation.]").

¶ 33 In light of the foregoing, we direct that the fines and fees order be modified to reflect a $30 credit against the children's advocacy center assessment, and affirm the judgment of the circuit court of Cook County in all other respects.

¶ 34 Affirmed as modified.