2014 IL App (1st) 130836-U

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).

FOURTH DIVISION
November 20, 2014

No. 1-13-0836

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the Circuit Court
Plaintiff-Appellee,	)	of Cook County, Illinois,
	)	Criminal Division.
v.	)	
	)	No. 09 CR 2787 (05)
TIMOTHY SMITH,	)	
	)	The Honorable
Defendant-Appellant.	)	Timothy Joseph Joyce,
	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Howse and Taylor concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court erred in denying the defendant's request to have the jury instructed on the uncharged lesser included offense of aggravated battery.

¶ 2 Following a bench trial in the circuit court of Cook county, the defendant, Timothy Smith, was found guilty of degree murder and sentenced to 24 years' imprisonment. On appeal, the defendant contends that the trial court erred when it refused his request to instruct the jury on the uncharged, lesser offenses of aggravated battery. The defendant asserts that he was entitled to such an instruction because the State introduced the evidence of the uncharged offense and then

used it to argue that the defendant was guilty of murder based upon accountability. For the reasons that follow, we reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 The record before us reveals the following facts and procedural history. The defendant, who was 19-years-old at the time of the incident, was charged with several codefendants, including Felix Padilla, Rafael Padilla, Jose Estrella, Marquis Ollie and Jordan Rivera, with two counts of murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2010)) for his involvement in the beating death of the 31-year-old victim, Juan Reyes (hereinafter the victim). The indictment charged the defendant with: (1) "intentionally or knowingly str[iking] and ki[cking]" the victim "about the body" and "killing him;" and (2) "knowing that such acts created a strong probability of death or great bodily harm."

¶ 5 The defendant proceeded with a jury trial. Ermelida Luera (hereinafter Luera), who works as a certified nursing assistant, testified that at about 1 p.m., on July 23, 2007, she was at an Applebee's restaurant with a couple of friends, including, Denisha Towns (hereinafter Towns) having lunch. After they finished their food, the women proceeded to the bar area where they met Kenneth Holowka (hereinafter Holowka) and the victim. After having a few drinks, the group decided to go to a nearby bar, called Fagan's, to play pool. Several hours later, they decided to go to Humboldt Park. Luera drove her own car and Towns rode with her. They met Holowka and the victim in Humboldt Park.

¶ 6 Luera testified that once at Humboldt Park she parked her car about five cars ahead of Holowka's. Luera averred that the "whole block was out, kids, families everywhere." The victim introduced Luera and Towns to several people on the block, and then they just "hung out,"

drinking from a bottle of Hennessey whiskey that Holowka had with him. According to Luera, at this point, the victim was already drunk; he was slurring his words and "kind of tipsy."

¶ 7 Luera testified that after a while, she asked the victim where she could find a restroom, and he told her to wait while he "walked down the block" to find one. When about five minutes later, he did not return, one of the women on the block told Luera that there was a gas station around the corner and that she could use the restroom there. Luera and Towns followed the woman to the gas station.

¶ 8 Luera testified that when they returned, she saw the victim walking toward her, with an African-American woman following behind him, yelling and cursing him. Luera testified that the victim then told the woman to "shut up," and that she responded by telling him that he "did not know who she was" and that he was "going to get it." When the victim told her that he did not care "who she was or who she knew," the woman walked away.

¶ 9 Luera averred that a few minutes later a van and a truck pulled up in the middle of the street, about six or seven houses away from where they stood. Two large men jumped out and went over to the woman who had just been arguing with the victim. Luera watched as the men talked to the woman, while she repeatedly pointed in the victim's direction. When Luera asked the victim if everything was alright, he did not respond.

¶ 10 Luera testified that she then told Holowka that they should leave and take the victim home. She explained that she "did not feel comfortable" and feared that "something was going to happen." According to Luera, Holowka then got into his car and told the victim, "Let's go." Luera was still standing on the curb as the victim attempted to get into the front passenger seat of Holowka's car, when a young man came up to him and told him he could not leave because they were going to give him a "mouth shot." On cross-examination, Luera acknowledged that in

"gang language" this meant that the victim was going to get punched in the face. She explained that this was a type of gang violation (or punishment) reserved for members "getting mouthy."

¶ 11 According to Luera, a few second later, three Hispanic teenagers ran up as the victim was attempting to get into Holowka's car, pulled him out and dragged him to a nearby tree. More teenagers appeared and they all started hitting the victim, who fell to the ground. The teenagers continued to stomp, kick and swing at the victim. Luera, who was standing only a few feet away, yelled at them to stop and to leave the victim alone. She stated that the beating lasted about a minute and that, during that minute, no one hit the victim just once and ran away. Luera identified the defendant in court as one of the teenagers who was beating the victim with his hands and feet.

¶ 12 Luera averred that after the beating, the teenagers dispersed, and she and Towns ran up to the victim to see how he was doing. The victim was gasping for air and "not breathing right." Luera leaned down to check his pulse but could barely find it. At that point, a teenager came up on a bicycle and told her that "it was okay," and to "just leave [the victim] alone [because] he [wa]s just drunk." The teenager on the bicycle then threw some liquid from a cup he had in his hand in the victim's face and rode off.

¶ 13 When the police arrived at the scene, they asked Luera to step away from the victim. Luera waited until she knew the victim was in the ambulance and then left with Towns. Luera testified that a few days later she read a newspaper article about the incident, and she and Towns decided to call Holowka and find out how the victim was doing. Towns proceeded to telephone Holowka upon which they found out that the victim was dead. That very day, on July 29, 2007, Luera called the police.

¶ 14 Luera first spoke to Detective Roberto Garcia in her home. The next day, she proceeded to

the police station where she told police what she had witnessed. Luera was shown several photo arrays, and identified the defendant from one of them, as a participant in the victim's beating.

¶ 15 Luera admitted on cross-examination that she had been drinking before witnessing the entire incident. She further admitted that at the time of the beating, it was dark outside.

¶ 16 Denisha Towns next testified consistently with Luera. She averred that she and Luera met Holowka and the victim at an Applebee's restaurant on July 23, 2007, and that together with them they proceeded initially to Fagan's bar and then to Humboldt Park. Towns testified that at some point in the night she and Luera needed to use the restroom, and the victim offered to find one for them. According to Towns, the victim walked up the street to find a bathroom and Towns and Luera followed him. The victim then began to talk to an African American "lady" who started yelling at him and "saying some really nasty stuff." Towns averred that the African American woman told the victim that he should not be "questioning her son about [any]thing," and then asked him if he knew who her son was. The woman then proceeded to tell the victim "to wait one minute; He fitting to be pulling up."

¶ 17 Towns testified that, at this point, she and Luera headed back down the street to use a restroom at a nearby gas station. When they returned, she observed a black truck parked in the middle of the street and the man in it talking to the African American woman, who had been arguing with the victim before. According to Towns, after the woman pointed in the direction of the victim, the man in the truck stepped outside of his vehicle to talk to several other men standing on the corner.

¶ 18 Towns testified that at that point, Holowka "must have known that something was going to happen because he put the victim in his car." According to Towns, however, one of the young men who had just been spoken to approached Holowka's car and pulled the victim out from the

front passenger side seat and dragged him to the sidewalk. The young man told the victim that he "could not go anywhere now" and that "it was already done." According to Towns, a mob then surrounded the victim; one individual hit the victim first and the victim fell to the ground. Towns stated that in a matter of seconds, five or six other men, including the defendant, jumped on the victim and started punching him. According to Towns, the beating lasted about two or three minutes before the group dispersed.

¶ 19 Towns identified the defendant in open court as a participant in the beating. She testified that she saw him stomping on the victim. Although Towns averred that she saw the defendant when the beating began, she stated that she did not see him when it ended.

¶ 20 Towns further testified that together with Luera, she stayed with the victim until the ambulance arrived. She stated that the victim's breathing was abnormal. Towns acknowledged that she did not speak to police that day. Rather, a few days later, when she learned that the victim had died, she called the police and spoke to Detective Garcia. Towns stated that she went to the police station on July 30, 2007, and viewed photographs. During that photo array, she saw a photograph of the defendant and said that he "looked familiar" but that she would need to see him closer to be sure. In November 2007, Towns went to the police station again and viewed a lineup from which she identified the defendant as one of the participants in the beating.

¶ 21 On cross-examination, Towns admitted that before she witnessed the beating of the victim, she had been drinking both in the Applebee's restaurant and in Fagan's bar. She also admitted that it was dark outside, when she viewed the incident.

¶ 22 Kenneth Holowka next testified consistently with Towns and Luera. He added that he knew the victim well because the two of them grew up together. Holowka testified that after spending the afternoon at Applebee's restaurant and Fagan's bar, at about 8:35 p.m., he and the victim met

up with Luera and Towns on Haddon Avenue, in Humboldt Park. The four of them "hung out" for about "five to ten minutes" when an African American woman came down the street yelling at the victim, who just stood there listening. Holowka averred that the victim started walking back towards the group but the woman followed behind him, yelling that she was going to call her brother or someone on the block. Holowka stated that he, Luera, Towns and the victim continued to "hang out" for a while before a black pickup truck pulled up. A man exited the truck and called the victim over to him. After speaking with that individual, the victim returned to the group and asked Holowka to drive him to his girlfriend's house.

¶ 23 Holowka testified that he entered his car, and watched as the victim attempted to get into the passenger front seat, when about ten to fifteen teenagers surrounded the car. The teenagers pulled the victim out, saying to him that "he f****d up." Holowka tried to grab his cell phone but someone from the group told him "it did not concern him." Holowka then got out of the car, and watched as the group dragged the victim to the grass and proceeded to beat him. Holowka testified that the "the group all rushed" the victim at once and that the victim fell to the ground. He stated that the beating was "constant, with no breaks," and that he did not see anyone walk up and punch the victim once and then walk away.

¶ 24 Holowka stated that he got into his car and left to call 911. When he returned, the victim was on the ground, sweating profusely, breathing heavily, and with a shoe mark on the side of his face. Holowka testified that he waited for the ambulance to arrive. He spoke to the police both at the scene of the crime, and in the police station the next day. Although Holowka later identified some of the men involved in the beating from a lineup, he did not identify the defendant either from a lineup, or in open court as a participant.

¶ 25 The State next called codefendant Jordan Rivera, who testified that he previously pleaded

guilty to the victim's murder in exchange for a sentence of 20 years. Rivera testified that he, the defendant, and the victim were all members of the Spanish Cobra gang. Rivera explained that his rank in the gang was chief enforcer, and that his duties included making sure that other members abided by the gang's rules and regulations. This meant ensuring that anyone who disobeyed the rules received a violation, *i.e.*, a beating that was to last for a certain period of time, depending upon the infraction committed by a member.

¶ 26 Rivera testified that on July, 23, 2007, he was on the 2700 block of West Haddon Avenue in Humboldt Park, which is Spanish Cobra territory, with the defendant, and codefendants, Felix Padilla (hereinafter Felix), Raphael Padilla (hereinafter Raphael), Marquis Ollie (hereinafter Ollie), and Jose Estrella (hereinafter Estrella). According to Rivera, the victim had an altercation with a female family member of a higher ranking Spanish Cobra. Accordingly, the higher ranking gang member ordered a violation on the victim. Rivera testified that after he received a telephone call from the higher ranking gang member, ordering the violation, he rode his bicycle to the 2700 block of Haddon. On the way there, he called Felix and Ollie because they had to witness the violation. Rivera explained that he was supposed to conduct the violation and Felix and Ollie were supposed to help. After Rivera met up with Felix and Ollie at Haddon Avenue, they were joined there by Estrella, Raphael, and the defendant.

¶ 27 Rivera testified that once there, he also spoke to the same higher ranking Spanish Cobra member that had telephoned him earlier, ordering a violation on the victim. At that point, Rivera was told to give the victim a "mouth shot." He explained that in gang vernacular, a "mouth shot" meant a single punch in the mouth.

¶ 28 According to Rivera, the defendant, who was only a foot soldier in the gang, was ordered to

do the "mouth shot." After the defendant punched the victim, however, the other gang members that were present, including Rivera, did not believe that the defendant had hit the victim hard enough. Rivera explained that after a "mouth shot" you need to see blood, but that when the defendant hit the victim under the chin, there was no blood. Rivera averred that as a result of his poor performance, the defendant was told to cross the street and stand there because "he had something coming next," *i.e.*, he would be punished because he was "playing favoritism." Rivera averred that after the defendant crossed the street he and the other gang members proceeded to beat the victim. He stated that throughout the beating, the defendant stood on the other side of the street and did not participate any further.

¶ 29 The State next called codefendant Felix Padilla (hereinafter Felix) who testified consistently with Rivera. Felix admitted that he too pleaded guilty to his involvement in the murder of the victim in exchange for a 20-year sentence. Felix testified that on July 23, 2007, he met several other Spanish Cobra gang members, including the defendant, Ollie, Raphael, Estrella and Rivera, near Haddon and California Avenues in the Humboldt Park neighborhood of Chicago. Once there, he learned that a violation had been ordered on the victim for disrespect. Felix testified that the defendant gave the victim a "mouth shot" and then walked across the street. Felix, Rivera and Ollie then looked at each other and knew, without saying anything, that the "mouth shot" was improper, and "favoritism." As a result, they took it upon themselves to beat the victim for about two minutes. Felix testified that they started punching the victim about 90 seconds after the defendant walked to the other side of the street. To Felix's knowledge, no one told the defendant to cross the street; he did so only because he had performed his part of the violation.

¶ 30 Detective Roberto Garcia (hereinafter Detective Garcia) next testified that on July 23, 2007,

he was assigned to investigate the incident that occurred at 2748 West Haddon. He arrived at the crime scene around 10:45 p.m., along with his partner Detective Rogelio Lara. Detective Garcia averred that although it was night time, the street was well lit with streetlights. Detective Garcia stated that he was familiar with the area and knew that it was Spanish Cobra gang territory.

¶ 31 When Detective Garcia arrived on the scene, he learned the victim had already been transported to the hospital. Accordingly, he canvassed the area for potential witnesses and interviewed several individuals at the scene, including Holowka.

¶ 32 At about 9:30 p.m., on July 24, 2007, Detective Garcia received a telephone call from the victim's girlfriend, Leslie, Randazzo. After that conversation, he began looking for the following Spanish Cobra gang members: codefendants Felix, Raphael, Rivera, Estrella, and their chief, Ray Jackson. Detective Garcia testified that on that same day, he spoke with Jose Plaza, who had come to the station on an unrelated matter. Based on his conversation with Plaza, Detective Garcia was also looking for a Spanish Cobra gang member with the nickname "Gangero." That evening, the defendant learned from other sources that "Gangero" was the defendant's nickname.

¶ 33 Detective Garcia further averred that several days later, on the evening of July 29, 2007, he received a telephone call from Luera and met with her to speak about the incident. Luera came to the police station with Towns and he interviewed both of them separately, as well as showed them photo arrays. According to Detective Garcia, Luera identified the defendant and codefendants Felix, Jordan, and Estrella (as well as an individual named Eddie Mae Benom) as participants in the beating. Towns, on the other hand, only made tentative identifications and did not want to identify anyone without seeing them in a lineup. According to Detective Garcia, Towns specifically picked up a photo of the defendant and said that he looked like one of the men who participated in the beating, but that she would need to see a physical lineup to be sure.

¶ 34 Detective Garcia further testified that on November 13, 2007, the police arrested codefendants Felix, Rafael, Ollie, and Estrella, and that on the following day, November 14, 2007, they also arrested the defendant. Detective Garcia conducted lineups on November 14, 2007, with Holowka, Towns and Luera. He testified that Towns and Luera positively identified the defendant in a lineup as a participated in the victim's beating. Holowka did not.

¶ 35 Forensic investigator Brian Smith (hereinafter Smith) next testified that at about 11:20 p.m. on July 23, 2007, he proceeded to the scene at the 2700 block of Haddon Avenue, in the Humboldt Park neighborhood of Chicago. Once there, Smith photographed, recovered and inventoried several items, including, clothing, beer bottles, cups and cans. Smith also testified photographed and processed the front and rear passenger sides of Holowka's vehicle for latent fingerprints. Smith was able to recover several latent fingerprints, including: (1) a print from the front passenger door frame; (2) a print from the front passenger door; and (3) prints from the rear passenger door window.

¶ 36 The parties next stipulated that, if called to testify, forensic scientist Moira McEldowney, would state that the latent prints were sent to the Illinois State Police crime lab, where they were received by Moira McEldowney, an expert in fingerprints and fingerprint identification. McEldowney was able to match the single fingerprint lifted from the rear passenger window of Holowka's car to that of codefendant Estrella. She also matched two fingerprints taken from a plastic bag found at the scene of the crime to those of the victim. None of the fingerprints collected at the crime scene, however, matched those of the defendant.

¶ 37 The parties further stipulated that if called to testify, forensic scientist and forensic biology expert, Ryan Paulsen, would aver that no DNA matching either the defendant or any of the codefendants was found on any of the evidence retrieved from the crime scene.

¶ 38 Former Deputy Chief Medical Examiner for Cook County, Dr. Mitra Kalelkar, next testified that on July 24, 2007, she performed an autopsy on the victim. She testified that the victim had dirt in his right eye and mouth and 18 different injuries to his head and torso, including several abrasions. The victim also had significant internal injuries. In addition, an x-ray revealed that the victim's cervical vertebra was broken. Dr. Kalelkar opined that the multiple injuries to the victim, were all caused by blunt force trauma, and resulted in his death. Dr. Kalelkar explained that if she needed to narrow down the cause of death, she would have to state that it was the spinal cord injury which fractured the victim's neck, but that it was her opinion that all the injuries combined contributed to his death.

¶ 39 Dr. Kalelkar also testified that the toxicology report revealed that victim's blood alcohol level was almost .3, so that he must have been "pretty intoxicated" at the time of the incident. She stated that the toxicology report revealed that he had likely been drinking for quite a while.

¶ 40 After the State rested, the defendant moved for a directed finding, which was denied. The defendant presented no evidence on his own behalf, and the case proceeded to a jury instruction conference.

¶ 41 During the jury instruction conference, defense counsel asked for additional instructions for a charge of aggravated battery (battery on a public way), including the definitions of battery and aggravated battery, and the proposition for what must be proven for aggravated battery. Defense counsel argued that, based on the testimony of two of the State's witnesses (Padilla and Rivera), the defendant was ordered to and gave the victim a "mouth shot," but then withdrew, either voluntarily or involuntarily upon the order of the codefendants, before the remainder of the group decided, on the spur of the moment, that the victim should be beaten. The State responded that aggravated battery was not an appropriate lesser included instruction, based on: (1) the

charges; and (2) the law of accountability. The circuit court denied defense counsel's request, reasoning that aggravated battery was not a lesser included offense of murder and that the State had the sole authority to decide what charges would be brought against the defendant. Since the State chose not to charge the defendant with aggravated battery, the defendant was not entitled to the instruction. As the court explained its reasoning:

> "In this particular instance *** [i]f you believe or if some rational trier of fact wanted to believe or credit some aspect of Mr. Rivera and Mr. [Felix] Padilla's testimony, they could conclude that in point of fact [the defendant] was guilty of the offense of aggravated battery.
>
> The difficulty, though, is that that's (*sic*) not a lesser included offense. That's an offense that would be separate from what thereafter occurred to [the victim] after [the defendant] had apparently withdrawn voluntarily or involuntarily form this event.
>
> So in that sense, the murder of [the victim] would be separate and apart from the single punch that [the defendant] purportedly gave to [the victim], as claimed by Mr. Rivera and Mr. *** Felix Padilla.
>
> Consequently, because their testimony, if believed by anybody, if believed by some rational trier of fact, wouldn't support that it is a lesser included offense of the murder of [the victim], but would support the determination that it is a separate offense, separate and apart from the murder of [the victim].
>
> The State certainly had the authority to have charged [the defendant] with aggravated battery, with that aggravated battery against [the victim] but in the exercise of their authority and discretion they decided not to.

> Consequently, the court concludes that there is no obvious charge of aggravated battery against [the defendant] relating to [the victim,] and the court concludes that this purported aggravated battery is not a lesser included offense because it was committed separate and apart, if [Felix] Padilla and Rivera are believed, from the murder of [the victim.]"

¶ 42 During closing arguments, the State initially argued that the jury should believe the State's witnesses who testified that the defendant was part of the group that beat the victim. The State then briefly argued that if the jury were to believe the two State' witnesses that testified that the defendant voluntarily or involuntarily removed himself from the group after he punched the victim, they should nevertheless find the defendant guilty of first degree murder based on principles of accountability. Specifically, in that regard, the State made the following statement: "From the time that the violation was ordered until that violation was completed, every person that took part in that violation and laid their hands and feet upon [the victim] is accountable for first degree murder."

¶ 43 During its closing argument, the defense argued that the defendant did not participate in the beating, but just hit the victim once and then crossed the street before the beating began and also that his conduct did not make him accountable.

¶ 44 In rebuttal, the State once again argued that "whether it was the way that ** Towns, *** Luera, and *** Holowka told you that it happened, or whether it was the way that ***[Felix Padilla] and ***Rivera, his fellow Spanish Cobras told you that it went down, [the defendant] is responsible just like they were."

¶ 45 During deliberations, the jury sent out a note note, asking: "Do we still have to stay strictly

with first degree murder, or can we go with a lesser charge?" Defense counsel renewed his earlier request for an instruction on the lesser included offense of aggravated battery, but the trial court denied that request, and instructed the jury as follows: "You have your instructions. Continue to deliberate."

¶ 46 The jury subsequently found the defendant guilty of first degree murder. During polling, when asked whether this was his verdict, one juror replied "yes," but then stated that he wanted to "make a comment." After confirming that the guilty verdict was the juror's, the trial court, however, did not allow the juror to make his comment.

¶ 47 The defendant filed a motion for a new trial, arguing, *inter alia*, that the trial court erroneously refused to instruct the jury with an aggravated battery instruction. In support, the defendant cited the jury question as evidence that such an instruction was warranted. The trial court denied the defendant's motion and subsequently sentenced him to 24 years' imprisonment. The defendant now appeals.

¶ 48 II. ANALYSIS

¶ 49 On appeal, the defendant contends that the trial court erred when it refused to instruct the jury on the uncharged offense of aggravated battery. The defendant concedes that generally a jury can only be instructed on an uncharged offense if that uncharged offense is a lesser included offense of the charged offense, but notes that the trial court here explicitly found that aggravated battery was not a lesser included offense of murder. The defendant, nevertheless asserts, that in spite of the trial court's ruling, we should nevertheless find that that the instruction was proper because his case presents a special set of circumstances, namely: (1) that the State itself presented evidence of the uncharged offense (aggravated battery); (2) that the State took the position that the defendant's commission of that offense made him accountable for the charged

offense (murder); and (3) that the defense requested an instruction on the uncharged offense (aggravated battery) because its theory, based on the State's evidence, was that the defendant was only guilty of that uncharged offense. Accordingly, the defendant seeks that we carve out a legal exception applicable only to this particular set of circumstances, even if the trial court deemed the uncharged offense not a lesser included offense of murder. As shall be explained in detail below, however, we need not address, let alone, carve out such an exception, since we preliminarily find that the trial court below erred when it found that aggravated battery was not a lesser included offense of murder, warranting a jury instruction.

¶ 50 In doing so, we being by noting that we need not address the State's argument regarding wavier, since it is premised on the fact that the defendant's argument on appeal is different from the argument he raised below. Below the defendant argued that he was entitled to the lesser included offense instruction both before the trial court at the jury instruction conference, and then again during deliberations after the jury asked whether they could find the defendant guilty of anything but murder. In addition, in his posttrial motion, the defendant explicitly argued that the court's refusal to instruct the jury on the lesser included offense was reversible error. On appeal, the defendant argues that even if the trial court was correct that aggravated battery was not a lesser included offense of murder, we should carve out an exception in his particular set of circumstances to prevent the State from unfairly benefiting by using its own evidence to argue in the alternative that the defendant was guilty of the greater offense on the basis of accountability without the risk of having the jury convict the defendant only of the uncharged lesser offense. Since we do not address the merits of the defendant's argument regarding creating a legal exception to the general rules regarding instructions on lesser included uncharged offenses, but rather address the propriety of the denial of the lesser included instruction requested in this

particular case under the law as it stands today, we conclude that that issue was properly preserved below and waiver does not apply. See *People v. Bennette*, 376 Ill. App. 3d 554, 567 (2007) ("To preserve an issue for review, defendant must object both at trial and in a written posttrial motion") (citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)); see also *People v. Castillo*, 372 Ill. App. 3d 11, 16 (2007) ("The purpose of the waiver rule is to ensure that the circuit court was given the opportunity to correct any errors before they are raised on appeal."). Even if we were, however, to somehow agree with the State's position that the defendant's argument is waived, we would nevertheless find review proper under the plain error doctrine, since there can be no question that the evidence at trial, particularly in light of the jury note, was closely balanced. See *People v. Spencer*, 2014 IL App (1st) 130020, ¶ 29 (Under the "plain error doctrine, a reviewing court may consider a forfeited claim when ' "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence ." ') (quoting *People v. Johnson*, 238 Ill. 2d 478, 484 (2010) (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (citing *People v. Herron*, 215 Ill. 2d 167, 186–87 (2005))).

¶ 51 Turning to the merits, we begin by noting that a defendant in a criminal prosecution has a fundamental due-process right to notice of the charges brought against him. *People v. Kolton*, 219 Ill. 2d 353, 359 (2006). For this reason, the general rule is that a defendant may not be convicted of an offense he has not been charged with committing. *Kolton*, 219 Ill. 2d at 359. In an appropriate case, however, a defendant is entitled to have the judge or jury consider offense

that are "included" in the charged offense. *Kolton*, 219 Ill. 2d at 359. Such a practice provides "an important third option to a jury which, believing that the defendant is guilty of something but uncertain whether the charged offense has been proved, might otherwise convict rather than acquit the defendant of the greater offense. [Citation.]" *People v. Meor*, 233 Ill. 2d 465, 469 (2009) (quoting *People v. Hamilton*, 179 Ill. 2d 319, 323 (1997)); see also *People v. Novak*, 163 Ill. 2d 93, 105 (1994), abrogated on other grounds by *Kolton*, 219 Ill. 2d at 364.

¶ 52 The purpose of a jury instruction is to guide the jury in its deliberations and to help it reach a proper verdict through the application of legal principles as applied to the evidence and the law. See *People v. Hopp*, 209 Ill. 2d 1, 8 (2004)); see also *People v. Pinkney*, 322 Ill. App. 3d 707, 719 (2000); *People v. Hester*, 131 Ill. 2d 91, 98 (1989). In order to be entitled to an instruction on an uncharged offense: (1) the uncharged offense must be a lesser-included offense of any of the offenses charged in the indictment; and (2) there must be enough evidence adduced at trial to rationally support a conviction on the lesser-included offense and an acquittal on the greater offense. See *Kolton*, 219 Ill. 2d at 360 (citing *Novak*, 163 Ill. 2d at 108); *People v. Davis*, 213 Ill. 2d 459, 476 (2004); *People v. Ceja*, 204 Ill. 2d 332, 360-61 (2003).

¶ 53 An "included offense" is defined by statute as an offense which "is established by proof of the same or less than all of the facts or a less culpable mental state (or both), than that which is required to establish the commission of the offense *** charged." 720 ILCS 5/2-9(a) (West 2006). According to our supreme court "this definition offers little guidance because it does not specify the factors to be considered when deciding whether an uncharged offense is lesser included." *Kolton*, 219 Ill. 2d at 360 (citing *Novak*, 163 Ill. 2d at 105-06). For this reason, historically, Illinois courts have employed various approaches for determining whether a particular offense is a lesser-included offense of a charged crime, including: (1) the "abstract

elements" approach; (2) the "charging instrument" approach; and (3) the "factual or evidence" approach. *Kolton*, 219 Ill. 2d at 360. However, in determining whether an uncharged offense is a lesser-included offense of a charged crime, our supreme court has adopted the charging-instrument approach, concluding that that method best serves the purpose of the lesser-included offense doctrine. See *Meor*, 233 Ill. 2d at 470; *Kolton*, 219 Ill. 2d at 360-61; *Davis*, 213 Ill. 2d at 475-76; *Hamilton*, 179 Ill. 2d at 327. As our supreme court in *Novak* explained:

> "This approach tempers harsh mechanical theory with the facts of a particular case. The charging instrument approach results in a broad range of possible lesser included offenses, based on the allegations in the charging instrument. This supports the goal of more accurately conforming punishment to the crime actually committed. Further, since the charging instrument provides to the parties a closed set of facts, both sides have notice of all possible lesser included offenses, and can plan their trial strategies accordingly." *Novak*, 163 Ill. 2d at 112-13, abrogated on other grounds by *Kolton*, 219 Ill. 2d at 364.

See also *People v. Miller*, 238 Ill. 2d 161, 173 (2010) (noting "[t]he justifications for using the charging instrument approach with respect to uncharged offenses" as "the importance of providing notice to the parties of what offenses a defendant may be convicted of based on the particular acts of the crime and what instructions may be sought.")

¶ 54 Under the charging instrument approach, the court looks to the allegations in the charging instrument to see whether the description of the greater offense contains a "broad foundation" or "main outline" of the lesser offense. See *Davis*, 213 Ill. 2d at 476; *Ceja*, 204 Ill. 2d at 360-61. In other words:

> "a lesser offense will be 'included' in the charged offense if the factual description of the charged offense describes, in a broad way, the conduct necessary for the commission of the

lesser offense and any elements not explicitly set forth in the indictment can reasonably be inferred." *Kolton*, 219 Ill. 2d at 367.

Whether a particular offense is "lesser included" is a decision which must be made on a case-by case basis. *Kolton*, 219 Ill. 2d at 367.

¶ 55 Once a determination has been made that the uncharged offense is a lesser included offense, the court must next examine the evidence presented to determine whether it would permit a jury to rationally find the defendant guilty of the lesser-included offense, but acquit the defendant of the greater offense. See *Ceja*, 204 Ill. 2d at 360. That evidentiary requirement is " 'usually satisfied by the presentation of conflicting testimony on the element that distinguishes the greater offense form the lesser offense." See *Ceja*, 204 Ill. 2d at 360; *Novak*, 163 Ill. 2d at 108 ("A lesser included offense instruction is proper only where the charged greater offense requires the jury to find a disputed factual element that is not required for conviction of the lesser included offense."), abrogated on other grounds by *Kolton*, 219 Ill. 2d at 364. However, even where the testimony is not conflicting, this requirement " 'may be satisfied if the conclusion as to the lesser offense may be fairly inferred from the evidence presented.' " See *People v. Garcia*, 188 Ill. 2d 265, 284 (1999) (quoting *Novak*, 163 Ill. 2d at 108, abrogated on other grounds by *Kolton*, 219 Ill. 2d at 364). In fact, our supreme court has explained that " '[t]he 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.' " *Garcia*, 188 Ill. 2d at 284 (quoting *Novak*, 163 Ill. 2d at 108-09, abrogated on other grounds by *Kolton*, 219 Ill. 2d at 364). Accordingly, a defendant is entitled to an instruction on a lesser-included offense where the evidence, even if slight supports the defendant's theory of the case and tends to establish the

commission of the lesser offense, rather than the greater one. See *People v. Scott*, 256 Ill. App. 3d 844, 850 (1993); see also *People v. Cardamone*, 381 Ill. App. 3d 462, 508 (2008).

¶ 56 While a trial court's refusal to allow a proposed jury instruction is not to be reversed absent an abuse of discretion, the question of whether a defendant has met the evidentiary threshold for a certain jury instruction on a lesser offense is reviewed *de novo*. *People v. Tijerina*, 381 Ill. App. 3d 1024, 2010 (2008).

¶ 57 In the present case, for the reasons articulated below, after a review of the record we are compelled to find that the trial court erred when it denied the defendant's request to instruct the jury on the uncharged offense of aggravated battery (720 ILCS 5/12-3.05(c) (West 2010)).

¶ 58 First, under the charging instrument approach, there can be no doubt that here aggravated battery was a lesser included offense of murder. The indictment explicitly referred to physical contact, *i.e.*, the defendant's striking the victim when it explained the defendant's involvement in the victim's murder. Specifically, the indictment charged the defendant with killing the victim by (1) "intentionally or knowingly str[iking] and kick[ing]" him "about the body" and/or (2) by "knowing that such acts created a strong probability of death or great bodily harm." Considering the aforementioned allegations in the indictment, it is apparent that the description of the greater offense (intentional or reckless murder) contains a "broad foundation" or "main outline" of the lesser included offense (aggravated battery), so as to warrant an instruction on that lesser included offense. See 720 ILCS 5/12-3 (West 2010) (explaining that a person commits *battery* "(a)*** if he or she knowingly without legal justification by any means (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual"); 720 ILCS 5/12-3.05(c) (West 2010) (explaining that at a person commits *aggravated battery* on the basis of the location of the conduct, "when in committing a battery,

other than by the discharge of a firearm, he or she is or the person battered is on or about a public way, public property, a public place of accommodation or amusement, a sports venue, or a domestic violence shelter."); see also *Kolton*, 219 Ill. 2d at 367 ("a lesser offense will be 'included' in the charged offense if the factual description of the charged offense describes, in a broad way, the conduct necessary for the commission of the lesser offense and any elements not explicitly set forth in the indictment can reasonably be inferred."); see also *Davis*, 213 Ill. 2d at 476; *Ceja*, 204 Ill. 2d at 360-61.

¶ 59 The next step in the analysis, however, is determining whether a rational jury could have found the defendant guilty of the lesser included offense (aggravated battery), but still acquitted him of the greater offense (murder). See *Ceja*, 204 Ill. 2d at 360 ("A court must examine the evidence presented and determine whether the evidence would permit a jury to rationally find the defendant guilty of the lesser-included offense, but acquit the defendant of the greater offense"); see also *Novak*, 163 Ill. 2d at 108 ("A lesser included offense instruction is proper only where the charged greater offense requires the jury to find a disputed factual element that is not required for conviction of the lesser included offense."), abrogated on other grounds by *Kolton*, 219 Ill. 2d at 364. As already noted above that evidentiary requirement is "usually satisfied by the presentation of conflicting testimony, on the element that distinguishes the greater offense form the lesser" one. *Ceja*, 204 Ill. 2d at 360. What is more, the amount of evidence necessary is "very slight." *Garcia*, 188 Ill. 2d at 284.

¶ 60 In the present case, the record establishes that the evidence presented at trial was sufficient to warrant a lesser included instruction on aggravated battery. At trial, the jury was presented with conflicting testimony regarding the defendant's involvement in the crime. Several witnesses testified that he participated in the beating of the victim from the inception of the mob attack to

the end. On the other hand, two of the State's own witnesses testified that the defendant only struck the victim once and then removed himself from the group entirely before the beating that caused the victim's death began (either voluntarily or upon orders from higher ranking gang members, who believed that he had botched the single blow he was to ordered to administer to the victim in the first place). The State argued in closing argument that if the jury did not believe the witnesses who had testified that the defendant continued to strike and kick the victim even after he fell, they should nevertheless find him guilty of murder under accountability principles.[1]

¶ 61 However, contrary to the State's position, and the position of the trial court, if the jury believed, as it appears they did from the note that they sent out during their deliberations, that the defendant entirely withdrew from the criminal enterprise (by wholly depriving the group of the effectiveness of his prior efforts in furtherance of the crime) then the jury could have reasonably found that the defendant was guilty of aggravated battery, but not guilty of murder. See *People*

[1] We note that a person is legally accountable for the criminal conduct of another if "[e]ither before or during the commission of an offense, and with the intent to promote or facilitate such commission, he [or she] solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 2008). In order to prove that a defendant possessed the intent to promote or facilitate the crime of his codefendants, the State may present evidence that either (1) the defendant shared the criminal intent of the principal, or (2) there was a common criminal design. See *People v. Fernandez,* 2014 IL 115527, ¶13. Under the common-design rule, if "two or more persons engage in a common criminal design or agreement, any acts in the furtherance of that common design committed by one party are considered to be the acts of all parties to the design or agreement and all are equally responsible for the consequences of the further acts.'" *People v. Fernandez,* 2014 IL 115527, ¶13.

v. Jones, 376 Ill. App. 3d 372, 386 (2007) (explaining that in order to effectively withdraw from a criminal enterprise, a defendant must detach himself from the criminal enterprise and communicate his intent to withdraw: "(1) by wholly depriving the group of the effectiveness of his prior efforts in furtherance of the crime; (2) giving timely warning to the proper law enforcement authorities; or (3) otherwise making proper efforts to prevent the commission of the crime." (citing 720 ILCS 5/5-2(c)(3)(West 2010)).

¶ 62 In that respect, we reiterate that our supreme court has repeatedly advised that "[i]n deciding whether to instruct on a certain theory, the court's role is to determine whether there is some evidence supporting that theory; it is *not* the court's role to weigh the evidence. [Citation.]" (Emphasis added.) *People v. Jones*, 175 Ill. 2d 126, 132 (1997). The jury here was entitled to weigh the evidence and determine whether the defendant withdrew from the criminal enterprise, so as to be culpable only for the uncharged lesser included offense of aggravated battery.

¶ 63 For these reasons, we find that the trial court abused its discretion in denying the defendant's request that the jury be instructed on the lesser included offense of aggravated battery. See *Jones*, 175 Ill. 2d at 131-32 ("A defendant is entitled to an instruction on his theory of the case if there is some foundation for the instruction in the evidence, and if there is such evidence, it is an abuse of discretion for the trial court to refuse to so instruct the jury. [Citation]. Very slight evidence upon a given theory of a case will justify the giving of an instruction. [Citations.]").

¶ 64 III. CONCLUSION

¶ 65 For all of the aforementioned reasons, we reverse the judgment of the circuit court and remand for a new trial.

¶ 66 Reversed and remanded.