

FIRST DIVISION
November 9, 2015

No. 1-13-3745

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 11 CR 3280
)	
DAVID JENKINS,)	Honorable
)	Evelyn B. Clay,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

O R D E R

¶1 *Held:* Defendant's conviction for aggravated domestic battery is affirmed where the evidence demonstrated the victim sustained injuries amounting to great bodily harm; the trial court did not err in refusing the defense jury instruction for the lesser-included offense of domestic battery.

¶2 Following a jury trial, defendant was found guilty of aggravated domestic battery and sentenced to a prison term of five years. On appeal, he contends the State did not prove beyond a reasonable doubt that the victim suffered great bodily harm, and that the trial court erred in

refusing to tender a jury instruction of the lesser-included offense of domestic battery. We affirm.

¶ 3 Defendant was charged with attempted first-degree murder of Joannie Rivera, his ex-wife, and aggravated domestic battery in that he intentionally or knowingly caused her great bodily harm. Joannie testified that on January 20, 2010, when she and defendant were married, the couple had an argument during which defendant became violent and struck her in the face. They were divorced or engaged in procuring a divorce in the summer of 2010, and defendant moved out of their home. While the divorce was pending, Joannie met Carmen Rivera. The women began a relationship and Carmen moved into the home with Joannie. In October 2010, defendant phoned Joannie. Carmen was in the room with her at the time, and Joannie put the phone call on the speakerphone. They heard defendant tell them that he was going to kill both of them.

¶ 4 Joannie owned a Chevy Uplander van, which defendant took without permission on December 17, 2010. Two days later, defendant phoned Joannie and told her that if she wanted her van back, she was "to come and get it" at Bloomingdale and Kedzie in Chicago. Defendant was then living in a two-story apartment building at 1812 North Kedzie near that intersection. After receiving the phone call, Joannie phoned her parents. Then she went to the location and found the van. Her parents also went to that location. Joannie was unable to start the van, so she phoned Carmen and asked her to bring gas to the van. Carmen called her brother, Noel David Davila ("David"), and asked for his assistance because she was afraid of defendant. Carmen drove to the location with some gas for the van. David also came in his own truck, which he parked across the street from Joannie's van. Joannie poured the gas into the van's tank, and she

and her father tried to start the van. When it still would not start, they called a tow truck. Joannie sat in the van waiting for the tow truck and Joannie's parents were in their car parked about four vehicles in front of the van. Carmen left her truck, which was parked on the same side of Kedzie as the van, and climbed into her brother's truck across the street on Kedzie to wait for the tow truck.

¶ 5 Defendant came up to the van and he and Joannie began to argue. He repeatedly called her a bitch. He told Joannie to take some clothing belonging to him from the van to his apartment. Joannie got out of the van with the clothing and began walking up the stairs of the building. Defendant followed her, grabbed her pony-tail with his left hand, and punched her in the back of her head with his right hand. Joannie lost consciousness and remembered nothing that happened after that.

¶ 6 From their position across the street in David's truck, Carmen and David saw defendant continue to hold Joannie by her hair and punch her in the face. He kept punching her and then he tossed her down. She balled herself up into a fetal position. Defendant began kicking Joannie in her back, arms, and legs. Carmen testified that defendant was "stepping on her like she was garbage." He punched Joannie at least 30 or 40 times. David drove his truck over to the opposite side of the street, maneuvering around a raised street median, and he and Carmen got out of the truck. David yelled at defendant, who looked at them and ran upstairs to his apartment. Carmen and David reached Joannie who was still lying in a fetal position. Joannie's clothes were torn and she was bleeding from her nose, mouth, and eye. Joannie's mother came running to the scene and wrapped her daughter's bleeding face. They placed her inside her parents' vehicle to wait for an ambulance.

¶ 7 After defendant's first blow landed on Joannie, she was unaware of what happened until she awoke in the hospital. She had a shattered nose, requiring surgery which she had not yet been able to have as of the trial. She had a "busted" lip that required stitches and left a scar still visible at trial. She had black eyes and missing teeth. She was bruised on her neck, back, and arms. She had problems with her neck and was in a neck brace when brought to the hospital. The police came to the hospital and took photographs of her which were introduced at trial. As a result of the beating, Joannie was still on medications at the time of trial for depression and anxiety. Her memory had been good before the beating but was impaired afterward.

¶ 8 At the time of trial in 2013, Joannie was in custody at the jail, charged with armed robbery with a firearm. The prosecution knew about her pending charge, but she was not expecting leniency and had not received a plea offer from the State. On the day defendant attacked and beat Joannie, she was five feet eight inches tall and weighed about 165 pounds. The parties stipulated that on December 19, 2010, defendant was six feet three inches tall and weighed 250 pounds. After the State rested, defendant waived his right to testify and rested without presenting evidence.

¶ 9 During the jury instruction conference, the defense objected to the State-tendered instructions on aggravated domestic battery and requested a jury instruction on domestic battery¹, arguing that there had been no medical testimony and contending that the trier of fact should have the option of making a finding other than great bodily harm. The court ruled that the evidence demonstrated great bodily harm; photos of the injuries had been presented; and medical

¹ The charging instrument originally had contained several additional counts, including one count of domestic battery; an order of *nolle prosequi* was granted prior to trial on those counts.

evidence was not needed where the victim displayed a facial scar resulting from the beating. The court denied the request for the domestic battery instruction after concluding: "There must be some support for a lesser charge that I don't believe is in this record."

¶ 10 During jury deliberations, the jurors sent a note to the trial judge, asking: "Can we get a better definition of the aggravated domestic battery charge and/or a definition of great bodily harm?" The judge sent a written response to the jury: "You have all the evidence and instructions of law. Continue your deliberations." Defense counsel agreed with the judge's response. The jury acquitted defendant of attempted first-degree murder but convicted him of aggravated domestic battery. Defendant filed a posttrial motion, arguing, *inter alia*, that the State had not proved defendant's guilt of aggravated domestic battery beyond a reasonable doubt and that the court erred in denying defendant's request for a jury instruction on domestic battery. The trial court denied defendant's motion and sentenced him to five years in prison.

¶ 11 On appeal, defendant first contends that he was not proved guilty of aggravated domestic battery beyond a reasonable doubt. Defendant does not deny administering the beating resulting in injury to Joannie nor does he challenge the sufficiency of the evidence as to the requisite mental state. He contends only that the evidence failed to establish beyond a reasonable doubt that Joannie's injuries constituted great bodily harm.

¶ 12 When considering a challenge to a criminal conviction based upon the sufficiency of the evidence, our inquiry is limited to "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); accord *People v. Rowell*, 229 Ill. 2d 82, 98 (2008). Under this standard, a reviewing

court will not substitute its judgment for that of the trier of fact on issues of the weight of the evidence or the credibility of witnesses. *People v. Cooper*, 194 Ill. 2d 419, 431 (2000). A reviewing court must allow all reasonable inferences from the record in favor of the prosecution and will not overturn the decision of the trier of fact unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011).

¶ 13 To sustain the conviction for aggravated domestic battery, the State was required to prove that defendant knowingly caused great bodily harm to a family or household member without legal justification. 720 ILCS 5/12-3.3(a) (West 2010). A "family or household member" includes a former spouse. 725 ILCS 5/112A-3(3) (West 2010). Whether an injury constitutes great bodily harm is a question for the trier of fact. *Cisneros*, 2013 IL App (3d) 110851, ¶ 12; *People v. Figures*, 216 Ill. App. 3d 398, 401 (1991). The term "great bodily harm" is not susceptible of precise legal definition. *People v. Doran*, 256 Ill. App. 3d 131, 136 (1993). It requires an injury of a greater and more serious character than an ordinary battery. *Figures*, 216 Ill. App. 3d at 401.

¶ 14 After having considered the evidence presented at trial in the light most favorable to the State, we conclude that the injuries Joannie received from the beating administered by defendant constituted great bodily harm. The evidence established that Joannie was taken by ambulance to the hospital where she was admitted and received treatment for her injuries. She was unconscious from the first blow defendant administered to her head until sometime after her hospital admission. Joannie testified that as a result of the beating by defendant, her nose was shattered and that surgery would be required to repair it. The beating also resulted in the loss of several of her teeth as well as a split upper lip requiring sutures. At the time of trial, Joannie was

still taking medications for depression and anxiety due to the beating. Her memory was good before the beating, but poor afterward. The State's photographic exhibits of Joannie's injuries show that Joannie bled profusely from the wounds inflicted by defendant's fists. One photo is a close-up view of her face and neck, with a brace around her neck; her right eye is black and swollen shut; her left eye is swollen shut and she appears to be bleeding from it. Most of her face is covered with dried blood, with a large amount of it appearing to have come from her nostrils. Another photo shows contusions or scrapes on one side of her torso. A photo portraying the right side of her face and neck shows multiple scrapes and abrasions. Another close-up photo of her lower face shows the sutures on her split upper lip; the resulting scar was still visible at trial, nearly three years after the attack. The evidence sufficiently established the jury's finding that defendant's attack caused great bodily harm to Joannie.

¶ 15 In contending that Joannie's injuries did not qualify as great bodily harm, defendant notes that in *People v. Mays*, 91 Ill. 2d 251, 256 (1982), our supreme court defined bodily harm as lacerations, bruises or abrasions. He then cites *Figures*, which held: "Because great bodily harm requires an injury of a graver and more serious character than an ordinary battery, simple logic dictates that the injury must be more than that set out in the *Mays* definition." *Figures*, 216 Ill. App. 3d at 401. Defendant concludes that "great bodily harm" is more serious than lacerations, bruises or abrasions such as those he asserts were suffered by Joannie. Defendant's logic is faulty because it fails to account for the fact that the broad categories of injuries the *Mays* court mentioned can cause varying degrees of harm. For example, there is a significant difference between a laceration in the form of a paper cut and the laceration suffered by Joannie when defendant split her lip, resulting in sutures and a permanent scar. *Mays* does not stand for the

proposition that lacerations, bruises or abrasions may never be considered great bodily harm, for *Mays* was concerned only with the definition of "bodily harm" and did not attempt to set out a definition of "great bodily harm." Rather than finding that lacerations, bruises or abrasions are types of injuries strictly considered mere "bodily harm," this court consistently has found that the trier of fact makes the determination of what constitutes great bodily harm based on injuries the victim actually received. Thus, "the element of 'great bodily harm' turns squarely upon the *extent* of the harm inflicted." (Emphasis in original.) *People v. Willett*, 2015 IL App (4th) 130702, ¶ 53.

¶ 16 Defendant cites three cases in which he claims that injuries similar to those sustained by Joannie have been held not to constitute great bodily harm. All of the cases cited, however, are distinguishable. In *In re Vuk R.*, 2013 IL App (1st) 132506, ¶4, the respondent struck the victim several times with his fists, breaking his nose and injuring a cheek bone and eye socket, and causing him to lose consciousness. Photographs showed swelling and discoloration, although the photographs were not included in the record on appeal. We concluded the State failed to present sufficient evidence of great bodily harm where no evidence was presented as to any pain suffered by the victim, the details of his treatment, or how long after the incident he suffered the effects of the injuries. *Id.* at ¶ 9. In contrast, Joannie received medical treatment for her injuries, which included sutures to close her split lip. At trial, she displayed the lip scar, which was still evident nearly three years after the beating. Lack of testimony about the pain Joannie experienced at the time of the beating is explained by the fact she was unconscious from the time defendant administered the first blow to her head until an indeterminate time later when she regained consciousness in the hospital.

¶ 17 *In re J.A.*, 336 Ill. App. 3d 814 (2003) is likewise distinguishable. There, the respondent stabbed the victim once in the left shoulder, which the victim described as feeling like somebody pinched him. *Id.* at 815. Although the victim was advised to have the wound stitched, there was no evidence regarding how many stitches would have been needed or who gave that advice. *Id.* at 818-19. This court reduced the respondent's conviction from aggravated battery to simple battery where the record reflected "no evidence of the nature and extent of the injury" beyond those facts. *Id.* In *In re T.G.*, 285 Ill. App. 3d 838 (1996), also cited by defendant, the victim was stabbed three times by the respondent, but no evidence was presented regarding the nature and extent of the victim's injuries. The victim described the first stab as similar to being poked with a pen or pencil, but there was no evidence that he felt the other two stabs. The victim did not even realize he had been stabbed until after he noticed his shirt had been cut. *Id.* at 846. Consequently, the respondent's conviction for aggravated battery was reversed where great bodily harm was not proved beyond a reasonable doubt. *Id.*

¶ 18 The instant case is more similar to *Cisneros*, 2013 IL App (3d) 110851, where the evidence established that the victim had five lacerations to his body resulting from his altercation with the defendant and that the blood from the cuts completely soaked the victim's shirt. Photographs showed four of the lacerations, and the victim received medical treatment that included stitches to two of the lacerations. The jury viewed the victim's scars from all of the lacerations. *Id.* at ¶ 20. On appeal from the defendant's conviction for aggravated battery, after viewing the evidence in the light most favorable to the State, this court concluded that a rational jury could have found the victim suffered great bodily harm. *Id.* at ¶ 21. In *Doran*, 256 Ill. App. 3d at 136, sufficient evidence to support great bodily harm was found where the record contained

photographs to demonstrate the victim's injuries, including bruises, lacerations that required sutures, and at trial the victim displayed a scar on his forehead. Here, as in *Cisneros* and *Doran*, the serious nature of Joannie's injuries included evidence of her need for medical treatment, photographic evidence, and a visual display of her scar.

¶ 19 In *People v. Newton*, 7 Ill. App. 3d 445, 447 (1972), this court held that a rational trier of fact could conclude that the victim suffered great bodily harm or permanent disfigurement where he went to a doctor's office and received six stitches for a wound in his head, and the wound left a scar that still remained five months later at trial. Sufficient evidence of great bodily harm was also found where the defendant struck the victim twice, resulting in a lump in her mouth, a scar on her face, and bruises under her chin. *People v. Smith*, 6 Ill. App. 3d 259, 264 (1972). Photos depicting a victim with bruises under her eyes, back, and one arm, and scratches or cuts on her throat and on one leg have been sufficient corroboration to uphold a finding of great bodily harm. *People v. Milligan*, 327 Ill. App. 3d 264, 267 (2002).

¶ 20 The State asserts that *People v. Matthews*, 126 Ill. App. 3d 710 (1984) is instructive where a conviction for aggravated battery was affirmed on the basis that a victim had sustained great bodily harm. The victim testified that the defendant struck her in the head with a gun and struck her on the head and arms with a baseball bat, but she suffered only a bruise on her head and there was no evidence the victim's injuries required medical attention. The State also refers us to *People v. Olmos*, 67 Ill. App. 3d 281 (1978), where the victim sustained welts on his back after the defendant struck him with a chain. The victim testified that the welts were not "real bad" and he did not seek medical attention. Nevertheless, the jury found the defendant guilty of aggravated battery causing great bodily harm, and the appellate court affirmed his conviction.

¶ 21 Defendant attempts to distinguish these cases on the basis that he used only his hands in causing Joannie's injuries, whereas in the State's cases the defendant used a weapon, such as the gun and baseball bat used in *Matthews*, a chain in *Olmos*, and a box cutter or knife in *Cisneros*. Defendant notes that in other cases cited by the State, weapons used to cause great bodily harm included guns, knives, a blackjack, a nightstick, and a lead pipe. However, the use of a weapon is not determinative of whether a battery victim has sustained injuries amounting to great bodily harm, as the presence or use of a weapon is not an element of aggravated battery causing great bodily harm. *People v. Cherry*, 2014 IL App (5th) 130085, ¶ 17; *People v. Renehan*, 226 Ill. App. 3d 453, 464 (1992). Rather, the element of great bodily harm turns upon the extent of the harm inflicted. *Willett*, 2015 IL App (4th) 130702, ¶ 53.

¶ 22 Defendant also argues that there was no medical testimony to show that Joannie's memory impairment, depression and anxiety were caused by the battery. Joannie testified that she was still taking medications at the time of trial to treat anxiety and depression that resulted from the beating. She also testified that her memory was good before the battery but poor afterward. Arguing that the State failed to prove causation as to those conditions, defendant refers us to *People v. Steele*, 2014 IL App (1st) 121452. There, the victim in an aggravated battery prosecution testified that he had torn ligaments in both knees and in his right shoulder and needed surgery to remove bone fragments from his shoulder. The victim was taken to a hospital for treatment and discharged a few hours later; the hospital medical report showed that he was treated only for knee abrasions; and the State's trial evidence showed only that he had sustained leg and arm abrasions. On appeal, this court reduced the defendant's aggravated battery conviction to simple battery, holding that "where the question of causation is beyond the general

understanding of the public, the prosecution must present expert evidence" to show that the injuries complained of were caused by the defendant. *Steele*, 2014 IL App (1st) 121452, ¶ 31. *Steele* is distinguishable where evidence other than that requiring expert testimony was insufficient to establish great bodily harm. Defendant also relies on *People v. Anderson*, 95 Ill. App. 3d 143 (1981). There, the appellate court held that it was error to allow one witness to testify that the loss of the victim's left eye could have caused paralysis on the victim's right side where such causation testimony was not within the realm of common understanding. However, the appellate court held that, while evidence as to the cause of the victim's paralysis was lacking without expert testimony, other evidence as to the loss of the victim's eye was sufficient to sustain the defendant's aggravated battery conviction.

¶ 23 Here, the extent of Joannie's physical injuries, corroborated by the photographs, hospitalization and medical treatment (sutures), and scar, was well documented and sufficient to establish great bodily harm even without medical testimony establishing that her impaired memory, anxiety or depression were caused by the battery. Joannie's memory loss, anxiety and depression were not a significant part of the State's argument at trial that Joannie suffered great bodily harm. In their closing arguments, the prosecutors did not even mention Joannie's anxiety or depression. We conclude that the State provided adequate evidence to support the jury's factual determination that the injuries which defendant inflicted on Joannie constituted great bodily harm.

¶ 24 As his second point of contention, defendant argues that the trial court erred in rejecting defense counsel's request for a jury instruction on the lesser-included offense of domestic battery.

¶ 25 The core analysis involving lesser-included offenses has been described as follows:

"[T]he trial court should instruct the jury on a lesser-included offense if the evidence adduced at trial was such that the jury could rationally find the defendant guilty of the lesser offense and acquit him of the greater offense." *Willett*, 2015 IL App (4th) 130702, ¶ 68. In *People v. Jones*, 175 Ill. 2d 126, 131-32 (1997), our supreme court held: "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 the case will justify the giving of an instruction. [Citations.]" In such an instance, the trial 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. *Id.* at 132.

¶ 26 However, the case law has not clearly described the amount of deference, if any, that a reviewing court should lend to the trial court's determination under that analysis. *Willett*, 2015 IL App (4th) 130702, ¶ 71. It has been held that the trial court is not entitled to reject a lesser-included instruction based on its own weighing of the evidence because it is the province of the jury, not the trial court, to decide whether the defendant is guilty of the greater or the lesser offense. *People v. Upton*, 230 Ill. App. 3d 365, 376-77 (1992). Our supreme court repeatedly has characterized the giving of jury instructions on a lesser-included offense as a matter resting within the sound discretion of the trial court. See, e.g., *People v. Davis*, 213 Ill. 2d 459, 475 (2004); *People v. Castillo*, 188 Ill. 2d 536, 540 (1999). The *Willett* court noted:

"The term 'sound discretion' usually implies that the court has some limited flexibility to choose the course of action it deems most appropriate based upon the evidence presented.

We caution, however, that for all practical purposes, the court has no flexibility when it

comes to determining whether 'some evidence' exists that would allow the jury to rationally find the defendant guilty of the lesser offense and not guilty of the greater offense. Either some evidence supports the lesser offense, or none does. If any such evidence exists, a tendered instruction on the lesser-included offense should be submitted to the jury, regardless of the relative weight or credibility of that evidence." *Willett*, 2015 IL App (4th) 130702, ¶ 93.

¶ 27 Based on the facts presented at trial in the instant case, there was not even "some evidence" to support the lesser offense of bodily harm so as to require the giving of an instruction on that offense. The evidence in the instant case was sufficient beyond a reasonable doubt to support the jury's conclusion that Joannie suffered great bodily harm.

¶ 28 Defendant directs our attention to the fact that during its deliberations, the jury sent a note to the court asking: "Can we get a better definition of the aggravated domestic battery charge and/or a definition of great bodily harm?" Defendant argues that the jury's query suggests the jury was struggling to decide whether Joannie suffered great bodily harm. The State responds that defendant's conclusion, that the jury's note reflected its uncertainty as to whether the injuries constituted great bodily harm, is speculative. The query tell us little, if anything, about the jury's view of the evidence and does not detract from our conclusion that there was not even slight evidence to support an inference that defendant caused bodily harm but not great bodily harm.

¶ 29 We conclude that the trial judge did not usurp the function of the jury by deciding whether or not there was "some evidence" to show that Joannie's injuries did not amount to great bodily harm. Rather, the trial court properly made the threshold determination that the record did not show even "some support for a lesser charge." As there was not even some evidence that

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would allow the jury to rationally find defendant guilty of the lesser offense and not guilty of the greater offense, we conclude that the trial court did not err in refusing to tender a jury instruction on the lesser-included offense of domestic battery.

¶ 30 For the reasons stated above, we affirm the judgment of the trial court.

¶ 31 Affirmed.