2011 IL App (4th) 100212-U

Filed 9/2/11

NO. 4–10–0212

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	DeWitt County
MAURICE LaGRONE, JR.,	)	No. 03CF101
Defendant-Appellant.	)	
	)	Honorable
	)	Garry W. Bryan,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Turner and Pope concurred in the judgment.

ORDER

¶ 1 *Held:* Even though, under the charging-instrument approach, child endangerment (720 ILCS 5/12–21.6(a) (West 2002)) is a lesser included offense of first-degree murder (720 ILCS 5/9–1(a)(2) (West 2002)), the record is devoid of any evidence to support a jury instruction on child endangerment as a lesser included offense, and hence defense counsel did not render ineffective assistance by omitting to tender such an instruction to the trial court.

¶ 2 Defendant, Maurice LaGrone, Jr., who is serving a sentence of life imprisonment for first-degree murder (720 ILCS 5/9–1(a)(2) (West 2002)), appeals from the second-stage dismissal of his petition for postconviction relief. He contends that, contrary to the trial court's finding, his petition and accompanying documentation make a substantial showing of a constitutional violation in that his trial counsel rendered ineffective assistance by failing to tender a jury instruction on the lesser included offense of child endangerment (720 ILCS 5/12–21.6(a) (West 2002)). See *People v. Edwards*, 197 Ill. 2d 239, 245-46 (2001).

¶ 3 In our *de novo* review (see *People v. Whitfield*, 217 Ill. 2d 177, 182 (2005)), we affirm the trial court's judgment because we find no evidence in the record, not even slight evidence, that defendant committed the lesser included offense of child endangerment instead of first-degree murder. Because defense counsel had no duty to tender an instruction that lacked any evidentiary support, defense counsel could not have rendered ineffective assistance by omitting to tender an instruction on child endangerment. See *People v. Parker*, 288 Ill. App. 3d 417, 422 (1997).

¶ 4 I. BACKGROUND

¶ 5 A. The Charges

¶ 6 An indictment, consisting of nine counts, charged defendant with the first-degree murder of three children: Christopher L. Hamm, six years old; Austin M. Brown, three years old; and Kyleigh E. Hamm, one year old (the indictment specified the age of each child). As to each child, there were three counts, a count corresponding to each of the three possible mental states a person could have in committing first-degree murder.

¶ 7 Counts I, IV, and VII of the indictment accused defendant of intending to kill the children. See 720 ILCS 5/9–1(a)(1) (West 2002). Those counts alleged as follows:

> "[D]efendant, with the intent to kill [the named child] while driving or in actual physical control of a 1997 Oldsmobile Cutlass automobile at the West Access boat ramp area of Clinton Lake, caused said automobile to enter Clinton Lake and become submerged in the lake with [the child] in the back seat of said automobile, thereby causing the death of [the child] by drowning."

¶ 8 Counts II, V, and VIII accused defendant of acting with the knowledge that his actions

would result in the children's death. See 720 ILCS 5/9–1(a)(1) (West 2002). Those counts alleged as follows:

> "[D]efendant drove or was in actual physical control of a 1997 Oldsmobile Cutlass automobile, causing it to go off a boat ramp into Clinton Lake at the West Access boat ramp area with [the child] in the back seat of said automobile, knowing said act would cause the death of [the child] by drowning."

¶ 9 The remaining three counts of the indictment, counts III, VI, and IX, accused defendant of acting with knowledge that "such acts create[d] a strong probability of death or great bodily harm." 720 ILCS 5/9–1(a)(2) (West 2002). Those counts alleged as follows:

> "[D]efendant drove or was in actual physical control of a 1997 Oldsmobile Cutlass automobile, causing it to go off a boat ramp into Clinton Lake at the West Access boat ramp area with [the child] in the back seat of said automobile, knowing said act created a strong probability of death or great bodily harm to [the child], thereby causing the death of [the child] by drowning."

¶ 10 B. The Trial

¶ 11 We need not recount all the evidence in the trial. Instead, we will confine our discussion mostly to the evidence which, in defendant's view, merited an instruction on the lesser included offense of child endangerment (720 ILCS 5/12–21.6(a) (West 2002)).

¶ 12 Shortly after 7 p.m. on September 2, 2003, Pam Weikle and her daughter were parked near the west boat ramp of Clinton Lake, watching for deer, when an Oldsmobile Cutlass

approached at a high speed and stopped three to four feet away. Weikle saw a black man in a white T-shirt at the steering wheel and a small boy in the backseat. When Weikle drove away a few minutes later, she saw the car pull onto the boat ramp and stop three to four feet from the water's edge.

¶ 13 Approximately 40 minutes later, a 9-1-1 operator received a call from a public telephone near the west ramp. It was Amanda Hamm, and she was hysterical. She stated her children were trapped inside a car submerged in the lake.

¶ 14 The car had gone down the ramp and into the water. Hamm and her boyfriend, defendant, had escaped from the front seat, but Hamm's three children, strapped into the backseat, had drowned. Rescuers found the car submerged headfirst in dark, murky water, with the ignition switch in the on position, the front passenger window down, and the reverse lights shining beneath the surface. The car's trunk, which was about 26 feet beyond the water line, was in approximately 4 1/2 feet of water, and the front of the car was in 7 feet of water. The front passenger side of the car, which had slipped off the ramp, was in deeper water.

¶ 15 Defendant testified he had pulled onto the boat ramp with the intention of teasing the children by pretending he was going to drive into the water. He parked only a few feet from the water's edge, but he did not think he would have any problem backing up, considering that cars could pull boats up the ramp. Everyone got out of the car, and Hamm and defendant played with the children for a while. Then they all got back in the car and prepared to leave. Defendant remarked at the time, " 'It would be fucked up if this car went in the water.' " Hamm advised him to simultaneously keep one foot on the gas and one foot on the brake when backing up. Insulted by this advice, defendant decided to "do it [his] way." He decided to operate the pedals with only one foot,

moving his right foot from the brake pedal to the gas pedal after shifting the car into reverse.

¶ 16 According to defendant, the car rolled forward more than he had expected when he took his foot off the brake pedal and placed it on the gas pedal, and as he applied more pressure to the gas pedal, the tires of the car began spinning as if on gravel. He panicked, failing to put his foot back on the brake pedal as the car moved forward into the water. The car began floating. He rolled his window down part of the way, unlocked the electric door locks, and turned toward the backseat. As he reached for Kyleigh, he felt the front of the car begin to sink. In a fright, he forced open his driver's side door. His foot caught in the door as he tried to get out, but he eventually freed himself. Hamm appeared behind him, and the two swam or waded out of the lake and went to a nearby pay phone. Hamm called 9-1-1. She screamed at defendant to save the children. He returned to the car but was unable to open the back door or to reach the children through the car window.

¶ 17 At trial, defendant denied driving the car into the lake intentionally or as a prank. When asked by the prosecutor if he was "aware of the enormous risk [he] had put the car in," he answered, "At the time I wasn't."

¶ 18 Rescuers pulled the three children from the car and rushed them to the hospital, but the children could not be revived. A deputy sheriff drove Hamm and defendant to the hospital, and en route, defendant said, " 'Sweet Jesus, let these kids be [all right].' " At the hospital, he was heard to lament the deaths of the children, remarking over and over again that " 'they were only babies' " or words to that effect. Witnesses testified he was weeping and distraught.

¶ 19 A board-certified forensic psychologist, Mark Cunningham, opined that defendant would have been a poor responder in emergency situations, given his "profoundly dysfunctional childhood," his genetic predisposition to psychological disorders, his unstable personal life, his

history of irresponsibility and passivity, his rather low IQ, and his substance-abuse problem. Cunningham concluded that, given defendant's psychological makeup, killing the children to serve his own needs would have been "a very dramatic departure for [him]."

¶ 20 Within days after it was towed out of the lake, Hamm's car was rendered mostly operable and was taken to the west boat ramp for testing. During this testing, the front-wheel-drive car did indeed roll forward on the ramp after it was put in reverse and the driver took his foot off the brake. Nevertheless, when the driver put his foot back on the brake, the car ceased going forward, and the driver had no difficulty backing the car up the ramp, even when the front tires were in a few inches of water. The driver could not get the tires to spin.

¶ 21 The defense hired an accident reconstructionist, Michael Varat, who performed tests with an exemplar car on a similar ramp. Consistent with the owner's manual for Hamm's model of car, the doors of the exemplar car automatically locked when the ignition switch was in the "on" position, the car was in reverse, and the driver's side door was closed. Varat found, as had the State, that the car rolled forward on a 12% slope when the brake was released, even when the car was in reverse.

¶ 22 Varat found that when the front bumper of the exemplar car was placed 3 feet from the water line and the brake was released while the car was in reverse and running, it took 2 seconds for the car to hit the water and another 2.2 seconds for the front wheels to lift off the ramp and spin when the accelerator was pressed. When the front bumper was placed 10 feet from the water's edge, it took 3 seconds for the car to hit the water and another 2.2 seconds for the front wheels to lift off the ramp. At 16 feet, it took 3.4 seconds for the car to hit the water and another 2.2 seconds for the front wheels to lift off the ramp. Varat opined that because the actual ramp at Clinton Lake sloped

more steeply beyond the water's edge than the ramp on which he had conducted his tests, the front wheels of Hamm's car would have lifted off the ramp somewhat sooner.

¶ 23 Defense counsel tendered an instruction on involuntary manslaughter (720 ILCS 5/9–3(a) (West 2002)) as a lesser included offense, but the trial court declined to give the instruction. The defense tendered no instruction on any other lesser included offense.

¶ 24 After 3 1/2 days of deliberation, the jury found defendant guilty of three counts of first-degree murder. After the guilty verdicts, the State urged the jury to find him eligible for the death penalty on either of two statutory theories: (1) the "deaths resulted from 'exceptionally brutal and heinous behavior indicative of wanton cruelty,' " or (2) "defendant ha[d] been convicted of murdering two or more persons [and] the deaths were the result of the intent to kill more than one person." The jury did not unanimously find defendant eligible for the death penalty, and the trial court sentenced him to life imprisonment without any possibility of release.

¶ 25 Defendant raised a variety of issues on direct appeal, including a claim that his attorney had rendered ineffective assistance by failing to tender jury instructions on the lesser included offense of child endangerment. We declined to reach that issue, holding that it was best reserved for postconviction proceedings, in which a complete record could be made. We affirmed the conviction and sentence. *People v. LaGrone*, No. 4–06–0672, slip order at 39 (January 28, 2008) (unpublished order pursuant to Supreme Court Rule 23). On May 28, 2008, the supreme court denied leave to appeal. *People v. LaGrone*, 228 Ill. 2d 543 (2008) (No. 106291).

¶ 26 On November 17, 2008, defendant filed a postconviction petition raising a single claim: that trial counsel had rendered ineffective assistance by failing to tender jury instructions on the lesser included offense of child endangerment. Attached to the petition was an affidavit by one

of defendant's trial attorneys, Jeff Justice. In his affidavit, Justice stated that he had been the attorney primarily responsible for tendering instructions at trial and that in the fall of 2005, he and co-counsel "concluded that child endangerment was not an appropriate instruction because Maurice was not the parent or custodian of the children and he was not responsible for their care." Thereafter, defendant and his attorneys chose the strategy of submitting instructions on lesser included offenses. Because defendant's attorneys had concluded, however, that child endangerment was an inapplicable offense, the only lesser included offense on which the defense tendered an instruction was involuntary manslaughter.

¶ 27 The trial court docketed the postconviction petition for further consideration and appointed defense counsel, who stood on the original petition and filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984). The State filed a motion to dismiss the petition, arguing that Justice's stated reason for not tendering an instruction on child endangerment was irrelevant and that a competent defense attorney could have proceeded with an all-or-nothing defense.

¶ 28 The trial court granted the State's motion for dismissal. In so ruling, the court accepted as true Justice's assertion that the failure to tender instructions on child endangerment constituted "an omission as opposed to a trial strategy." The court concluded, however, that child endangerment was not a lesser included offense of first-degree murder as charged in the indictment and that, besides, even if child endangerment were a lesser included offense, no reasonable jury could have convicted defendant of child endangerment and acquitted him of first-degree murder. Therefore, on February 26, 2010, the court granted the State's motion to dismiss the postconviction petition.

¶ 29 This appeal followed.

¶ 30 II. ANALYSIS

¶ 31 A. The Two Conditions to Giving an Instruction on a Lesser Included Offense

¶ 32 1. *The Lesser Offense Must Be a Lesser Included Offense Under the Charging-Instrument Approach*

¶ 33 In his postconviction petition, defendant alleges his attorneys rendered ineffective assistance by failing to tender to the trial court an instruction on child endangerment (720 ILCS 5/12–21.6(a) (West 2002)), which, defendant contends, is a lesser included offense of first-degree murder (720 ILCS 5/9–1(a)(2) (West 2002)). The State responds, however, that even if defendant's attorneys had tendered an instruction on child endangerment, the legally correct thing for the court to do would have been to reject the proposed instruction. Therefore, the State concludes, defense counsel could not have rendered ineffective assistance by omitting this instruction.

¶ 34 Of course, the trial court could not have rightfully instructed the jury on child endangerment unless it were legally permissible for the jury to convict defendant of child endangerment–an offense with which he had not been charged. Generally, it is impermissible to convict a defendant of an uncharged offense. *People v. Hamilton*, 179 Ill. 2d 319, 323 (1997).

¶ 35 There is, however, an exception to this rule: on certain conditions, the defendant may have the jury instructed on an offense less serious than the offense with which the defendant is charged, in order to give the jury a third option: an option in addition to acquittal on the one hand or conviction of the charged offense on the other. *Hamilton*, 179 Ill. 2d at 323-24. This third option is important because the jury might be uncertain that the State has proved all the elements of the charged offense beyond a reasonable doubt, but at the same time the jury might be convinced that

the defendant is guilty of *something*. Because the jury is convinced that defendant has done something criminally wrong, it might be unwilling to acquit the defendant outright. Given the choice between an outright acquittal and finding the defendant guilty of the charged offense, the jury might choose the latter, despite its ambivalence on whether the State has proved all the elements of the charged offense beyond a reasonable doubt. *Id.* That outcome would be a denial of due process, which strives to assure that convictions are based on nothing less than proof beyond a reasonable doubt. Consequently, if the evidence warrants an instruction on a lesser included offense, refusing to give the instruction is a denial of due process (*People v. Enoch*, 122 Ill. 2d 176, 200 (1988)), because withholding this procedural safeguard enhances the risk of an unwarranted conviction (*Beck v. Alabama*, 447 U.S. 625, 637 (1980)).

¶ 36 Thus, instructing the jury on a lesser included offense is a safeguard against compromising the standard of proof. *Beck*, 447 U.S. at 633. This safeguard becomes necessary, however, only on two conditions, and both of these conditions must exist. First, the lesser offense that is the subject of the proposed instruction must truly be a lesser included offense, *i.e.*, a less serious offense "that is composed of some, but not all, of the elements of the greater offense and which does not have any element not included in the greater offense." *People v. Nunez*, 236 Ill. 2d 488, 496 (2010). See also *People v. Novak*, 163 Ill. 2d 93, 108 (1994), abrogated by *People v. Kolton*, 219 Ill. 2d 353 (2006). ("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."). We use the charging-instrument approach to determine whether an offense is a lesser included offense for purposes of jury instructions. *Hamilton*, 179 Ill. 2d at 324. Under the charging-instrument approach, we look at the charging instrument to see if it

sets forth the main outline of the lesser offense (*People v. Jones*, 175 Ill. 2d 126, 135 (1997)), and initially, at this point, we disregard the evidence adduced at trial (*People v. Baldwin*, 199 Ill. 2d 1, 7 (2002)). The charging-instrument approach does not require that the charging instrument expressly allege all the elements of the lesser offense; the elements of the lesser offense can be implicit in the allegations of the charging instrument. *Hamilton*, 179 Ill. 2d at 325. Nor is it necessary that the lesser offense "be a theoretical or practical necessity of the greater [offense]." *Id.* Instead, the lesser offense need relate to the greater only to the extent that the greater describes the lesser. *Baldwin*, 199 Ill. 2d at 7.

¶ 37 2. *There Has To Be Some Evidence To Support an Instruction on the Lesser Included Offense*

¶ 38 If we find that the charging instrument at least broadly describes the lesser offense, we then proceed to the second condition of giving an instruction on a lesser included offense, and unlike the first condition, the second condition requires an examination of the evidence. There has to be some evidence, adduced at trial, to support the instruction on the lesser included offense. *Sansone v. United States*, 380 U.S. 343, 350 (1965). The supreme court explains: "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. Upton* (1992), 230 Ill. App. 3d 365, 374 (and cases cited therein); *People v. Willis* (1977), 50 Ill. App. 3d 487, 490-91." *Novak*, 163 Ill. 2d at 108-09. Cf. *People v. Everette*, 141 Ill. 2d 147, 157 (1991) ("This court has held that 'very slight evidence upon a given theory of a case will justify the giving of an instruction,' but we must be wary so as not to permit a defendant to demand unlimited instructions based upon the merest factual reference or witness' comment.").

¶ 39 Indeed, cases hold that a defendant is entitled to an instruction on a lesser included offense even if the evidence supporting the instruction conflicts with the defendant's own testimony. The supreme court has held: "This evidentiary requirement is usually satisfied by the presentation of conflicting testimony on the element that distinguishes the greater offense from the lesser offense. However, where the testimony is not conflicting, this requirement may be satisfied if the conclusion as to the lesser offense may fairly be inferred from the evidence presented." *Novak*, 163 Ill. 2d at 108.

¶ 40 B. Are the Two Conditions Fulfilled in the Present Case?

¶ 41 1. *Under the Charging-Instrument Approach, Is Child Endangerment a Lesser Included Offense of First-Degree Murder?*

¶ 42 Again, the first condition of giving an instruction on a lesser included offense is that the lesser offense is truly a lesser included offense under the charging-instrument approach. *Jones*, 175 Ill. 2d at 135. For purposes of this first condition, we look only at the charging instrument. *Baldwin*, 199 Ill. 2d at 7. The initial question is whether any of the counts of first-degree murder sets forth the main outline of the lesser offense of child endangerment. Section 12–21.6(a) of the Criminal Code of 1961 (720 ILCS 5/12–21.6(a) (West 2002)) defines child endangerment as follows: "It is unlawful for any person to willfully cause or permit the life or health of a child under the age of 18 to be endangered or to willfully cause or permit a child to be placed in circumstances that endanger the child's life or health ***."

¶ 43 According to defendant, the language the indictment uses to describe first-degree murder also squarely describes child endangerment. He argues:

"The language used in the charges against LaGrone–'causing

> [Hamm's car] to go off a boat ramp into Clinton Lake *** with Christopher L. Hamm, age 6, [Austin M. Brown, age 3; Kyleigh E. Hamm, age 1] in the back seat"–roughly parallels the language of the child endangerment elements of 'caus[ing] *** the life *** of a child under the age of 18 to be endangered.' [Citations to record.] Indeed, the only difference between child endangerment which results in the death of a child and first degree murder as charged in this case is the defendant's degree of culpability in causing the car to enter the lake. First degree murder instructions ask: when LaGrone caused the car to enter the lake, did he intend to kill the children, did he know he would kill them, or was he aware of a strong probability that they would die or suffer great bodily harm? The child endangerment statute contains none of the foregoing mental states. Instead, it contains a less culpable mental state, which requires that the defendant only be aware of some 'potential or possibility of injury.' "
>
> See [*People v. Jordan*, 218 Ill. 2d 255, 270 (2006)].

This requirement of awareness is inherent in the adverb "willfully," as used in the statute defining child endangerment. See 720 ILCS 5/12–21.6(a) (West 2002). The supreme court has held that willful conduct is synonymous with knowing conduct. *Jordan*, 218 Ill. 2d at 270 (citing 720 ILCS 5/4–5(b) (West 2002)). In committing child endangerment, the defendant *knows* he or she is "caus[ing] or permit[ting] the life or health of a child under the age of 18 to be endangered or *** caus[ing] or permit[ting] a child to be placed in circumstances that endanger the child's life or

health." 720 ILCS 5/12–21.6(a) (West 2002).

¶ 44 Knowledge also can serve as the *mens rea*, the guilty state of mind, for first-degree murder (720 ILCS 5/9–1(a)(1), (a)(2) (West 2002)). But the proposition that the defendant knows when committing first-degree murder is slightly different from the proposition that the defendant knows when committing child endangerment. The difference lies in the degree of risk of which the defendant is aware. When committing first-degree murder, the minimal *mens rea* the defendant has is the knowledge that his or her act "create[s] a strong probability of death or great bodily harm to [the victim] or another." 720 ILCS 5/9–1(a)(2) (West 2002). When committing child endangerment, by contrast, the defendant knows only that his or her act creates "a potential or possibility of injury"–not necessarily a great risk of great harm. (Internal quotation marks omitted.) *Jordan*, 218 Ill. 2d at 270; 720 ILCS 5/12–21.6(a) (West 2002).

¶ 45 Therefore, the charged greater offense, first-degree murder, requires the jury to find a disputed factual element that is not required for the lesser included offense of child endangerment: knowledge of a substantial probability of great bodily harm. See *Novak*, 163 Ill. 2d at 108. Under the charging-instrument approach, the lesser offense of child endangerment consists of some, but not all, of the elements of the greater offense of first-degree murder, and child endangerment does not have any element that first-degree murder lacks. See *Nunez*, 236 Ill. 2d at 496. First-degree murder encompasses child endangerment this way: if, for purposes of first-degree murder, defendant knew that by causing the car to go into the lake with the three children in the backseat, he created a strong probability of death or great bodily harm to the children, then, by corollary, for purposes of child endangerment, he knew he thereby created a possibility of injury to the children. Nevertheless, while encompassing child endangerment, first-degree murder does not merely duplicate the elements of

child endangerment; and, again, the difference lies in precisely what the defendant knew when committing the *actus reus*, or the physical act: a substantial probability of great bodily harm as opposed to a mere possibility of injury. See *Novak*, 163 Ill. 2d at 108. It follows that child endangerment is a lesser included offense of first-degree murder as charged in the indictment.

¶ 46 2. *Does the Record Contain Any Evidence To Support an Instruction on Child Endangerment?*

¶ 47 Even though, under the charging-instrument approach, child endangerment is a lesser included offense of first-degree murder as charged in the indictment in this case, defendant would have been entitled to an instruction on child endangerment (if his trial counsel had requested such an instruction) only if there were some evidence that he committed child endangerment instead of first-degree murder. See *Novak*, 163 Ill. 2d at 108-09. Defendant insists there was such evidence. He argues:

> "There was sufficient evidence introduced at LaGrone's trial to support jury instructions on the offense of child endangerment, and a reasonable jury could have convicted him of that offense while acquitting him of murder. Specifically, the jury could have found that LaGrone knew his actions endangered the lives of the children for purposes of child endangerment, but also found that he was not guilty of knowing or intentional murder, and that his mental state did not rise to the level of knowing that there was a strong probability of killing the children. There was ample evidence introduced at trial to rebut the charges of knowing or intentional murder. LaGrone

testified that he did not intend to kill the children, and he claimed that the drownings resulted from his poor judgment in parking too close to the water and his subsequent panic when the car entered the lake. [Citations to record.] In addition, LaGrone testified that he tried to open the rear driver-side door of the car to reach the children, but it would not open. [Citations to record.] That testimony was consistent with evidence that Hamm's car doors would automatically lock if the car was in reverse and the driver's door was closed. [Citation to record.] Furthermore, an expert in forensic psychology testified that LaGrone's poor initial reaction and his failure to do more to save the children was consistent with his psychological makeup and not necessarily because he wanted them to die. [Citation to record.] In addition, numerous witnesses testified that LaGrone appeared to love Hamm's children and was distraught and crying at the ramp, at the hospital, or days afterward. [Citations to record.] The notion that a reasonable jury could have acquitted LaGrone of knowing or intentional murder is bolstered by the jury's subsequent rejection of the death penalty based on the State's failure to prove beyond a reasonable doubt that LaGrone intended to kill more than one victim. [Citations to record.]"

¶ 48 In the text quoted above, defendant identifies two acts or omissions that, in his view, could serve as the *actus reus* of child endangerment: (1) "his poor judgment in parking too close to

the water" and (2) "his failure to do more to save the children" after the car entered the lake. As for item (1), the State objects that defendant is switching the *actus reus* from causing the automobile to go into the lake, with the children in the backseat, to a different act–an incidental, less dangerous act, *i.e.*, parking too close to the water. The State cites cases holding that if two physical acts could be the bases of two separate offenses, one offense is not a lesser included offense of the other. *People v. Trotter*, 299 Ill. App. 3d 535, 539 (1998); *People v. Chandler*, 278 Ill. App. 3d 212, 217 (1996); *People v. Rivera*, 262 Ill. App. 3d 16, 26 (1994). The State argues that even if it were child endangerment to park a car on a downward-sloping ramp, at the water's edge, with children strapped into the backseat, parking the car there did not cause the car to go into the water; this act of parking close to the water preceded the actual murders and was incidental to them.

¶ 49 In his reply brief, defendant contends, to the contrary, that "knowingly parking too close to the water and not taking sufficient care when backing up could be characterized as the 'cause' of the car 'enter[ing] Clinton Lake' or 'go[ing] off a boat ramp' as charged." See Black's Law Dictionary 212 (7th ed. 1999) (defining "contributing cause" as "[a] factor that–though not the primary cause–plays a part in producing a result"); Merriam-Webster's Collegiate Dictionary 182 (10th ed. 2000) (defining the verb form of "cause" as "to serve as *a* cause or occasion of" (emphasis added)).

¶ 50 We agree with the State that for purposes of the lesser included offense of child endangerment, the *actus reus* must be causing the car to go into the lake, with the children in the backseat. That is the *actus reus* alleged in the indictment. Also, that is the *actus reus* to which defendant refers in his application of the charging-instrument approach. Parking at the water's edge is not the *actus reus*, because that conduct did not cause the car to go into the lake; the car would

have remained on the ramp indefinitely unless defendant did something further. Parking on the ramp, in other words, was merely incidental conduct, preparatory conduct, like the conduct of climbing into the car in the first place and driving to the lake. As the State rightly observes, one cannot fashion a lesser included offense out of "conduct which is merely incidental to that with which [the defendant] is charged." *Rivera*, 262 Ill. App. 3d at 23.

¶ 51 It is true that in addition to the preliminary act of parking close to the water's edge, defendant faults himself for "his failure to do more to save the children," and, if we understand him correctly, he also faults himself for his disregard of Hamm's advice about backing up: he notes, in his argument, that "Hamm warned him to keep his foot on the brake as he attempted to back up the ramp" and that he ignored her warning. Granted, these acts or omissions are different from the parking of the car in that they are considerably closer to the *actus reus* of causing the car to go into the lake. Nevertheless, there appears to be no evidentiary basis for inferring that defendant committed these acts or omission with knowledge merely of "a potential or possibility of injury" (internal quotation marks omitted) (*Jordan*, 218 Ill. 2d at 270) as opposed to knowledge of a substantial probability of great bodily harm (720 ILCS 5/9–1(a)(2) (West 2002)). In failing to pull the children out of the submerged car, defendant would have been aware of more than a potential of injury to the children. He would have known that if he left them in the submerged car, they almost certainly would die.

¶ 52 As for the other act or omission, *i.e.*, disregarding Hamm's advice to put his foot on the brake, either defendant was, as he testified, so panic-stricken as the car began moving down toward the water that he lacked the presence of mind to put his foot on the brake, in which case his failure to brake was unintentional, or, alternatively, his failure to brake was intentional, in which case

he had to be aware of more than a possibility of injury. If his failure to brake was unintentional, he did not commit child endangerment. The *mens rea* of child endangerment is not negligence (720 ILCS 5/4–7 (West 2002)) but knowledge (720 ILCS 5/4–5 (West 2002); *Jordan*, 218 Ill. 2d at 270): the defendant deliberately and consciously does something that he or she knows "could or might result in harm" to the child (without necessarily specifically intending to inflict such harm on the child) (internal quotation marks omitted) (*Jordan*, 218 Ill. 2d at 270). See *United States v. United States Gypsum Co.*, 438 U.S. 422, 445 (1978) ("In either circumstance, [regardless of whether the defendants desire or merely know of the practical certainty of the results,] the defendants are consciously behaving in a way the law prohibits, and such conduct is a fitting object of criminal punishment."); *People v. Arnold*, 3 Ill. App. 3d 678, 682 (1972) (" 'Intentionally' and 'knowingly' imply that the act was performed consciously and intelligently, with actual knowledge of the facts and the law's requirements."). Under a theory of child endangerment, defendant would have consciously chosen not to apply the brakes, and he would have made that choice with the knowledge that he thereby created a potential of harm. In other words, he deliberately and consciously chose to continue spinning the tires in reverse, and to keep his foot off the brake pedal, as the car went down toward the water, knowing that he thereby subjected the children to "a potential or possibility of injury." (Internal quotation marks omitted.) *Jordan*, 218 Ill. 2d at 270.

¶ 53 But that would be an understatement of both the risk and the magnitude of the potential harm. As the State argues, the record is devoid of any evidence from which one might infer that defendant's knowledge was merely of a possibility of harm (see 720 ILCS 5/12–21.6(a) (West 2002)) as opposed to a strong probability of death or great bodily harm (see 720 ILCS 5/9–1(a)(2) (West 2002)). The State argues:

> "Every rational jury must conclude that willfully rolling the vehicle down the ramp into the lake, with three young children strapped in the back seat, knowingly endangered them at least to the degree of creating a strong probability of great bodily harm or death. In other words, no evidence would rationally permit a finding that only some lesser risk of willful endangerment had been presented. Death by drowning in the submerged car would have been so overwhelmingly inescapable under the circumstances that the question of 'strong probability' was well outside the scope of legitimate dispute."

¶ 54 We do not understand defendant to dispute this particular point, namely, that anyone, including himself, would know that strapping three young children into the backseat of a car and then allowing the car to coast down a boat ramp and into a lake would create nothing less than a strong probability that the children would drown. Instead of contesting that point, the State observes, "defendant searches for willful child endangerment in some other, uncharged act less dangerous than causing the occupied car to enter the lake," *i.e.*, parking the car on the boat ramp. As we have explained, however, this was incidental conduct that occurred before the charged offense was committed, and therefore it cannot serve as the basis of a lesser included offense, any more than in *Trotter*, the defendant's punching the victim at a gas station could serve as a lesser included offense of the murder that occurred, moments later, when the angry crowd, of which the defendant was a member, chased the victim from the gas station to a nearby police station and there beat him to death (see *Trotter*, 299 Ill. App. 3d at 539). If parking the car on the ramp was child endangerment, it was

an offense separate from causing the car to go down the ramp, into the lake. See *id.* And we agree with the State that there is no evidence, not even slight evidence, that in causing the car to go into the lake, defendant was aware of only the possibility of harm as opposed to a strong probability of death or great bodily harm.

¶ 55 III. CONCLUSION

¶ 56 For the foregoing reasons, we affirm the trial court's judgment. We award the State $50 in costs against defendant.

¶ 57 Affirmed.