2018 IL App (2d) 151290-U
No. 2-15-1290
Order filed June 7, 2018

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 14-CF-2075
	)	
ANTHONY M. WEBER,	)	Honorable
	)	Daniel B. Shanes,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: Defense counsel was not ineffective for failing to request a jury instruction on reckless conduct as a lesser included offense of aggravated battery with a firearm: as the evidence established that defendant repeatedly shot in the direction of a group of people, his conduct could not have been deemed merely reckless as opposed to knowing.

¶ 2 Following a jury trial, defendant, Anthony M. Weber, was convicted of aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2014)) and sentenced to 16 years' imprisonment. On appeal, he argues that his attorney was ineffective for failing to request a jury

instruction on reckless conduct as a lesser included offense of aggravated battery with a firearm. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with many offenses. Specifically, he was indicted for, as relevant here, four counts of attempted first-degree murder (*id.* §§ 8-4(a), 9-1(a)(1)); one count of aggravated battery with a firearm; and four counts of aggravated discharge of a firearm (*id.* § 24-1.2(a)(2)). The count of aggravated battery with a firearm of which defendant was convicted provided:

> "[D]efendant, on or about July 28, 2014, **** committed the offense of AGGRAVTED BATTERY WITH A FIREARM, in that the said defendant, in committing a battery *** knowingly and by means of the discharge of a firearm, caused injury to Carl Pierre, in that the said defendant shot Carl Pierre about the body while discharging a firearm."

¶ 5 Evidence presented at trial revealed that Carl was riding his bike with his younger brother, Christopher, and two high-school friends on July 28, 2014, at around 8 p.m. The group passed by defendant's house, which was on top of a hill, and Travale Brassel, one of the boys, saw his sister, Daisy, walking down defendant's driveway. Defendant and Daisy were arguing. Travale ordered defendant to leave his sister alone. The boys continued riding their bikes, defendant went into his home, and a short while later defendant exited his house with a gun. Carl, who had been told by his friends that he had better be "clear" by the time defendant exited his home, began riding his bike faster.

¶ 6 As Carl was pedaling, he heard "pop, pop, pop." Christopher, who also heard the shots fired, stated that he felt some of the shots go past his head. Carl turned around and saw defendant jogging down the hill, pointing the gun straight at them. Carl testified that defendant's

right arm was stretched out in front of him at shoulder height and roughly level to the ground. Carl turned back around, began pedaling again, and fell off his bike when he felt something hit the upper part of his left leg. Defendant continued to run toward the boys, but he stopped about 25 feet away from them and continued firing the gun about four more times.

¶ 7 As Carl remained on the ground, some of the boys came to his rescue. They left Carl's bike in the street and hid in a nearby yard.

¶ 8 Carl was asked whether defendant was firing in the general direction of the boys, who were about 13 feet away from each other, or at anyone in particular. In reply, Carl stated, "I think [defendant] was just trying to get one of us." Carl continued that "he was pointing the gun at all of us" and "just shooting." Carl later asserted, "[H]e was just pointing, aiming at all of us" and "was trying to hit one of us." Similarly, Christopher asserted that "it looked like [defendant] was just shooting everywhere to hit at least one person."

¶ 9 When Carl and Christopher got home, Carl discovered that he had been shot in the very upper part of his left leg. An emergency room doctor removed the bullet and gave it to the police.

¶ 10 In the following days, Christopher and his father found a bullet in the tire of Christopher's bike. That bullet, like the one removed from Carl's leg, was turned over to the police.

¶ 11 The police eventually located defendant in Janesville, Wisconsin, and after defendant was taken into custody, he was questioned about what transpired the night of the shooting. When defendant was asked whether he was trying to scare the boys by firing a gun at them, defendant replied, " '[Y]eah.' "

¶ 12 After all of the evidence was presented, defense counsel asked the court to give the jury an instruction on reckless discharge of a firearm (see *id*. § 24-1.5(a)). The court did so as to all of the charges except aggravated battery with a firearm, as the court determined that pointing a gun at a person and shooting that person cannot be considered a reckless act. On the attempted first-degree murder counts, the jury found defendant guilty of four counts of reckless discharge of a firearm. As to aggravated discharge of a firearm, the jury found defendant guilty of those four counts in addition to four counts of reckless discharge of a firearm. The jury also returned a guilty verdict for aggravated battery with a firearm. After the parties discussed how to proceed, the Stated nol-prossed all of the counts except the count charging defendant with aggravated battery with a firearm. This timely appeal followed.

¶ 13 II. ANALYSIS

¶ 14 At issue in this appeal is whether defense counsel was ineffective for failing to ask that the jury be given an instruction on reckless conduct as a lesser included offense of aggravated battery with a firearm. To succeed on a claim of ineffective assistance of counsel, a defendant must establish that (1) counsel's performance was objectively unreasonable and (2) it is reasonably probable that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). Under the first prong, the defendant must overcome the strong presumption that counsel's conduct was reasonable. *People v. Rhodes*, 386 Ill. App. 3d 649, 653 (2008). Under the second prong, a reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. Failure to satisfy either prong of the *Strickland* test defeats a claim of ineffective assistance. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). We review *de novo* defendant's claim that counsel was ineffective for failing to ask for an instruction on a lesser

included offense. See *People v. Lofton*, 2015 IL App (2d) 130135, ¶ 24 (ineffective-assistance claims not considered in the trial court are reviewed *de novo*).

¶ 15 Section 2-9(a) of the Criminal Code of 2012 (720 ILCS 5/2-9(a) (West 2014)) defines a lesser included offense as one that "[i]s 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." A defendant is entitled to an instruction on a lesser included offense if there is "slight" evidence presented to support the lesser offense. *People v. Green*, 2016 IL App (1st) 134011, ¶ 31. Whether to give a jury instruction is a matter within the sound discretion of the trial court, and such a decision will not be disturbed absent an abuse of that discretion. *People v. Eason*, 326 Ill. App. 3d 197, 205 (2001). A trial court abuses its discretion when its ruling is arbitrary, fanciful, or unreasonable or where no reasonable person would take the view the trial court adopted. *People v. Hicks*, 2015 IL App (1st) 120035, ¶ 38.

¶ 16 The basic difference between the two offenses at issue here is the mental state. The charge of aggravated battery with a firearm provided that defendant, in committing a battery, "knowingly and by means of the discharge of a firearm, caused an injury to Carl Pierre, in that *** defendant shot Carl Pierre about the body while discharging a firearm." A person acts knowingly when he "is consciously aware that that result is practically certain to be caused by his conduct." 720 ILCS 5/4-5(b) (West 2014). In contrast, a person commits reckless conduct when he, by any means lawful or unlawful, recklessly performs an act or acts that (1) cause bodily harm to or endanger the safety of another person or (2) cause great bodily harm or permanent disability or disfigurement to another person. *Id.* § 12-5. A person acts recklessly when he consciously disregards a substantial risk that a result will occur. *Id.* § 4-6. "Reckless conduct generally involves a lesser degree of risk than conduct that creates a strong probability

of death or great bodily harm." *People v. DiVincenzo*, 183 Ill. 2d 239, 250 (1998), *abrogated on other grounds by People v. McDonald*, 2016 IL 118882.

¶ 17 A defendant is entitled to an instruction on reckless conduct when charged with aggravated battery with a firearm if (1) the charging instrument describes reckless conduct and (2) the evidence presented at trial would permit a jury to find the defendant guilty of reckless conduct but not guilty of aggravated battery with a firearm. See *People v. Ceja*, 204 Ill. 2d 332, 359-60 (2003). Whether a reckless-conduct instruction is warranted is based on the facts and circumstances of each case. See *DiVincenzo*, 183 Ill. 2d at 250-51.

¶ 18 Here, although courts have found that reckless conduct is a lesser included offense of aggravated battery with a firearm (see, *e.g.*, *People v. Roberts*, 265 Ill. App. 3d 400, 402 (1994)), we cannot conclude that counsel was ineffective for failing to ask for a reckless-conduct instruction in this case. Specifically, the evidence revealed that defendant was arguing with Daisy, Brassel's sister, when Brassel and three other boys rode their bikes by defendant's house. Nothing presented at trial indicated that any of the boys was armed. Brassel stopped and demanded simply that defendant leave his sister alone. At that point, defendant went into his house and retrieved a gun. When he exited the house, the boys were quickly riding away. Defendant pointed his gun directly at the boys, began firing, and hit Carl, with whom he had had no contact before the shooting started. Defendant continued firing his gun after Carl was shot, firing about seven shots in total. Both Carl and Christopher testified that defendant fired in the direction of the boys, attempting to hit at least one of them. Soon after the shooting, defendant fled to Wisconsin where he was eventually arrested. Although defendant told the police that he fired the gun only to scare the boys, that explanation did not entitle him to a reckless-conduct instruction. See, *e.g.*, *Green*, 2016 IL App (1st) 134011, ¶ 36; *Eason*, 326 Ill. App. 3d at 209.

Rather, " 'Illinois courts have consistently held that when the defendant intends to fire a gun, points it in the general direction of his or her intended victim, and shoots, such conduct is not merely reckless.' " *Green*, 2016 IL App (1st) 134011, ¶ 34 (quoting *People v. Jackson*, 372 Ill. App. 3d 605, 613-14 (2007)).

¶ 19 Given the facts here, we must conclude that defendant was not entitled to a reckless-conduct instruction. As the trial court found, defendant's actions established that, when he shot Carl, he did not act recklessly. Accordingly, defendant has failed to establish that, had he asked for a reckless-conduct instruction, the court would have exercised its discretion and given that instruction. Because defendant was not entitled to a reckless-conduct instruction, counsel cannot have been ineffective for failing to seek such an instruction. See, *e.g.*, *People v. Phillips*, 383 Ill. App. 3d 521, 544 (2008) ("[B]ecause defendant was not entitled to an instruction on the lesser-included offense of criminal damage to property, we find that counsel was not ineffective for failing to request such an instruction.").

¶ 20 Defendant's reliance on *People v. Upton*, 230 Ill. App. 3d 365 (1992), is misplaced. There, the court found that the defendant, who called the police immediately after shooting at a tow truck that he believed was being used to steal his car, was entitled to a reckless-conduct instruction. *Id.* at 375-76. Here, defendant fired at the boys, who had done nothing to defendant or his property, as they were leaving the area. And, rather than call the police after the incident, defendant fled the area, which casts serious doubt on any claim that defendant acted recklessly. See *People v. Trotter*, 178 Ill. App. 3d 292, 299 (1998).

¶ 21 Defendant claims that the fact that he hit only one boy after firing several shots from 25 feet away or less means that defendant was attempting only to scare the boys, not injure them. Defendant likewise claims that, if he had intended to harm the boys, he would have walked right

up to them while Carl was on the ground and fired point blank at them. Those assertions are beside the point. Regardless of whether defendant actually intended to hit one or more of the boys, the evidence was essentially undisputed that he pointed a gun in their direction and repeatedly fired. As noted, this was not merely reckless conduct. Even if he intended only to scare them, he had to have known that it was "practically certain" that someone would be shot. 720 ILCS 5/4-5(b) (West 2012).

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we affirm the judgment of the circuit court of Lake County. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 24 Affirmed.