

Steven Magness appeals his conviction of Battery¹ as a class C felony, presenting the following issue for review: Did the trial court err in refusing to instruct the jury on the lesser-included offense of battery as a class A misdemeanor?

We affirm.

On March 29, 2009, Amanda Henry went to the home of an acquaintance to collect a ten-dollar debt. Traveling with Henry was her daughter and the daughter of her friend, Mychelle Seeman. In addition to the man who owed Henry money, two other men were present in the home, one of whom was Magness. The debtor told Henry he could not repay her. Henry became upset and called Seeman. Seeman and another friend, Stephanie Walker, traveled to the scene. While Henry waited in her car, Seeman and Walker went to the residence and asked for Henry's money. The men inside continued to refuse the request for repayment and eventually exited the house to leave. As Magness walked toward his car, he shouted at Henry to move her vehicle, which blocked his exit route. He told her he would "knock the taste out of [her] mouth." *Transcript* at 63. Henry moved her car. As Magness pulled away, and although there was now room for him to leave, he steered toward Seeman's vehicle. Seeman asked him to stop while she moved her vehicle. Magness ignored her request and continued until he struck her vehicle.

Henry told Magness she was going to call the police. Magness got out of his car, walked to Henry's vehicle, and punched her in the head through the driver's door window. Bleeding from the nose, Henry exited her vehicle. Magness grabbed Henry by the hair, pulled her head down and delivered in rapid succession as many as ten uppercuts to her face.

¹ Ind. Code Ann. § 35-42-2-1 (West, Westlaw through 2009 1st Special Sess.).

Magness then dragged Henry by the hair into the street and kicked her in the ribs. When Henry doubled over, Magness resumed punching her in the face. Henry fell to the ground and Magness kicked her again, got into his car, and left.

Seeman called 911 and followed Magness as he drove away. Officer David Newlon of the Lawrence Police Department responded to the 911 call. When he arrived he found Henry with blood on her clothes, crying, bleeding from the face, and unable to stand or walk without assistance. Her nose was beginning to swell and her lips were already swollen. She had multiple contusions on her face and a black eye. Emergency medical personnel arrived on the scene and administered oxygen. She was transported by ambulance to the hospital, where she received morphine for her pain and stitches in her nose.

Magness was arrested and charged with battery, which was enhanced to a class C felony based upon allegations that Henry suffered serious bodily injury. He was also alleged to be a habitual offender. He was convicted as charged following a jury trial, and determined to be a habitual offender in a separate proceeding.

Magness argues the trial court abused its discretion in refusing his request to instruct the jury on the lesser-included offense of battery as a class A misdemeanor. Our Indiana Supreme Court has set out the following standard for reviewing a decision to refuse a jury instruction concerning a lesser offense than the crime charged:

When a party asks a trial court to instruct the jury on an alleged lesser-included offense of the crime charged, the court must conduct a three-part analysis to determine whether the instruction is appropriate. In the first step, the court must compare the statute defining the crime charged and the statute defining the alleged lesser-included offense. If the alleged lesser-included offense may be established by proof of all of the same or proof of less than all of the same material elements to the crime, or if the only difference between the two

statutes is that the alleged lesser-included offense requires proof of a lesser culpability, then the alleged lesser-included offense is inherently included in the crime charged.

In the second step, if the trial court determines that the alleged lesser-included offense is not inherently included in the charged crime, it must compare the statute defining the alleged lesser-included offense with the charging instrument in the case. If all of the elements of the alleged lesser-included offense are covered by the allegations in the charging instrument, then the alleged lesser-included offense is factually included in the charged crime.

If the trial court has determined that the alleged lesser-included offense is either inherently or factually included in the charged crime, then it must proceed to the third step. In the third step, the trial court must examine the evidence presented by each party and determine whether there is a serious evidentiary dispute over the element or elements that distinguish the crime charged and the lesser-included offense. If it would be possible for a jury to find that the lesser, but not the greater, offense had been committed, then the trial court must instruct the jury on both offenses.

Watts v. State, 885 N.E.2d 1228, 1231-32 (Ind. 2008) (internal citations omitted).

The State concedes that the lesser offense here is factually included in the greater offense. Thus, the only issue to be determined is whether there existed a serious evidentiary dispute concerning the element that distinguishes C-felony battery from A-misdemeanor battery, that is, whether Henry suffered not bodily injury, but *serious* bodily injury, which can consist of either unconsciousness or extreme pain. The State alleged that Henry suffered both, but either one would support a conviction for class-C-felony battery. “If it would be possible for a jury to find that the lesser, but not the greater, offense had been committed, then the trial court must instruct the jury on both offenses.” *Id.* at 1232.

Henry testified that she lost consciousness sometime during or shortly after the attack and regained consciousness in the ambulance. Her trial testimony was consistent with statements she made at the hospital during treatment. Nevertheless, Magness contends that

there is circumstantial evidence that Henry did not lose consciousness as a result of the attack. Indeed, the trial court seems to have acknowledged as much: “the State is proceeding ... with either or both, lack of consciousness and extreme pain as the level of injury that brings us to a class C felony and *if it was only lack of consciousness then I think the Court would be obligated to give the lesser included[.]*” *Transcript* at 212 (emphasis supplied). The court did not, however, harbor similar reservations regarding the evidence of extreme pain.

Officer Newlon testified that Henry was crying and “woozy” when he arrived on the scene. *Id.* at 43. She complained of pain to her head, neck, and ribs. Henry testified at trial that on a scale of one to ten, with ten being the worst, the pain she suffered as a result of Magness’s attack was level ten. Referring to the pain she felt, she stated, “I felt like I was dying” and that the pain was “worse than child birth.” *Id.* at 85. Moreover, she testified that the hospital gave her morphine, a relatively powerful pain medication, for her pain. The description of the beating Magness inflicted upon Henry does not cause one to question whether Henry was exaggerating the pain she experienced as a result of the attack. Moreover, the photo of Henry’s injuries taken shortly after the attack serves, to the extent possible, as objective validation of Henry’s subjective description.

We have held that a victim’s testimony that she was repeatedly struck with a hand and a fist, causing severe pain and leaving marks on her body, was sufficient to support a conviction for battery resulting in serious bodily injury, *see Buckner v. State*, 857 N.E.2d 1011 (Ind. Ct. App. 2006), and that a victim’s testimony that she had never been so painfully injured before was sufficient to show that she suffered extreme pain and thus serious bodily

injury. *See Schweitzer v. State*, 552 N.E.2d 454 (Ind. 1990). We note also the victim’s testimony in *Whitlow v. State*, 901 N.E.2d 659, 662 (Ind. Ct. App. 2009) “that she had never felt anything close to the way those bruises made her feel” was sufficient to show that the victim suffered extreme pain and thus a serious bodily injury. Henry’s description of the level of her pain is easily of the same ilk as those in the foregoing cases in which a finding of extreme pain was affirmed. Moreover, and perhaps more to the point, we can find no evidence in the record that conflicts with the evidence supporting Henry’s claim that she suffered extreme pain. Rather, Magness merely offers argument to the effect that Henry’s claims regarding her pain level were subjective in nature and thus the jury could have concluded they were overstated, i.e., not as bad as Henry claimed. This argument is not evidence at all, much less “meaningful evidence” that created a serious evidentiary dispute at trial and from which the jury could find that Magness committed battery as a class A misdemeanor but not battery as a class C felony. *See Sturgeon v. State*, 719 N.E.2d 1173, 1183 (Ind. 1999). Lacking such conflicting evidence, the trial court did not err in refusing to instruct the jury on the lesser-included offense of battery as a class A misdemeanor.

Judgment affirmed.

KIRSCH, J., and ROBB, J., concur.