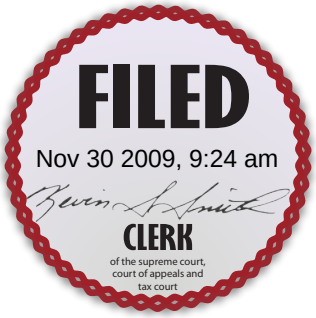

ATTORNEY FOR APPELLANT:

JOHN PINNOW
Greenwood, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

CASSIDY MILLER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 24A01-0906-CR-277
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE FRANKLIN CIRCUIT COURT
The Honorable J. Steven Cox, Judge
Cause No. 24C01-0809-FC-616

November 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Cassidy Miller[1] appeals his conviction for Battery, as a Class C felony, following a jury trial. Miller raises a single issue for review, namely, whether the trial court abused its discretion when it refused a tendered jury instruction for lesser included offenses.

We reverse and remand.

FACTS AND PROCEDURAL HISTORY

On June 20, 2008, fifteen-year-old D.A., his stepbrother, and some friends were enjoying the Brookville bicentennial festivities. Around seven o'clock, one of D.A.'s friends asked him to point out Miller, who was standing nearby with two other boys. D.A. pointed to Miller, who became upset and told D.A. not to point at him.

D.A. and his friends encountered Miller again several times that evening. Shortly before ten o'clock, D.A. and his group walked to the Shell gas station to buy something to drink. As they were leaving the station, they saw Miller and two of his friends sitting on the curb. D.A.'s group started walking on the sidewalk back to the festival from the gas station, with D.A. leading the way. As the group passed some bushes, Miller jumped from behind a bush and began hitting D.A. in the face.

D.A. asked Miller "what his problem was[.]" Transcript at 43. Miller "faked at" D.A. a few times, laughed, and kicked D.A. in the side. Id. While hitting D.A., Miller said he was going to "kill [his] hillbilly ass." Id. at 92. D.A. attempted to defend himself. Defense witnesses testified that Miller and D.A. stepped back from each other, without fighting, before D.A. fell backward off the curb and under the trailer of a moving

[1] Miller was seventeen years old when the offenses occurred.

semi-truck. The State's witnesses testified that there was no break in the fighting, and some testified that Miller pushed D.A., who fell against the trailer and then under it. When D.A. fell under the trailer, the trailer wheels ran over his midsection. D.A. sustained severe injuries, including a broken pelvis and a punctured lung, and he suffered severe pain. He was hospitalized for twelve days and spent the summer in a wheelchair.

Miller, a minor, waived jurisdiction to the Franklin Circuit Court, and the State charged him as an adult with battery, as a Class C felony. The case was tried before a jury. At the close of the trial, Miller tendered a proposed final jury instruction on battery, as a Class A or Class B misdemeanor, as lesser included offenses. The trial court refused to give the tendered instruction, stating as follows:

> [T]he State has objected to the lesser included [offense instruction] under [Markley v. State, 421 N.E.2d 20 (Ind. Ct. App.1981)], which is a 1981 case from the Indiana Court of Appeals and the case in summary states that where serious bodily injury is not in dispute, lesser included [offense instructions] are not appropriate. The Defense has argued that the causality or the break in connection between the time of the or the ending of the instigated altercation is sufficient time to break the chain in Markley and is two separate events and should not be considered. [T]he Court has ruled that Defendant's testimony that had he not instigated or provoked the altercation in his testimony that the victim could not have or would not have ended up under the wheels of a semi-trailer are [sic] sufficient to allow the jury to consider that the cause of events or the chain of events are close enough in proximity to have precluded any lesser included [offense] so the only charge that the jury can consider is that which has been filed by the State, the C [felony]. And so the Court will decline to give the lesser included [instruction.]

Transcript at 295-96. The jury returned a verdict convicting Miller of battery resulting in serious bodily injury, a Class C felony, as charged. Miller now appeals.

DISCUSSION AND DECISION

Miller contends that the trial court abused its discretion when it refused to instruct the jury on the lesser included offenses of battery, as a Class A misdemeanor, and battery, as a Class B misdemeanor. Specifically, he argues that he was entitled to instructions on lesser included offenses because there was a serious evidentiary dispute as to an element distinguishing the greater from the lesser offenses. In support he cited Wright v. State, 658 N.E.2d 563 (Ind. 1995). But the trial court did not consider the test in Wright when it refused to instruct the jury on lesser included offenses. Thus, we first consider the propriety of the basis for the trial court's ruling.

The trial court cited the holding in Markley v. State, 421 N.E.2d 20 (Ind. Ct. App. 1981), as the basis for its refusal to instruct the jury on lesser included offenses. In so doing, the trial court summarized Markley as holding that "where serious bodily injury is not in dispute, . . . lesser included [offenses] are not appropriate." Transcript at 295. But Markley contains no such holding. In that case, Markley argued that the trial court had erred in refusing to give part of a jury instruction where, in fact, the court had refused to give the entire instruction. Without discussing the subject matter of the instruction, we concluded that Markley agreed the trial court had properly refused to give the instruction as it was tendered because he had not appealed the trial court's refusal to give the instruction in its entirety. Markley, 421 N.E.2d at 21. The jury instruction issue in Markley does not provide guidance in this case.

But Markley does address the serious bodily injury element of battery, as a Class C felony, in the context of a claim that the evidence was insufficient to support the conviction. Markley was convicted of battery, as a Class C felony, which required the

State to prove that the battery resulted in serious bodily injury. Markley argued that the State had failed to prove that he had intentionally or knowingly caused serious bodily injury. We cited Indiana Code Section 35-41-2-2(d), which provides that the type of culpability required for a conviction applies only to the prohibited conduct. Serious bodily injury is an element of battery, as a Class C felony, but it is not the prohibited conduct. Id. at 22. Thus, we held that the State need not have proved intent with regard to the harm that resulted from the battery. Id.

Markley contains no holding regarding the propriety of jury instructions on lesser included offenses where serious bodily injury is not in dispute.[2] The trial court erred when it refused to instruct the jury on lesser included offenses based on the reasoning in Markley. "'Errors in the giving or refusing of instructions are harmless where a conviction is clearly sustained by the evidence and the instruction would not likely have impacted the jury's verdict.'" Filice v. State, 886 N.E.2d 24, 37 (Ind. Ct. App. 2008) (quoting Ray v. State, 846 N.E.2d 1064, 1070 (Ind. Ct. App. 2006), trans. denied), trans. denied. But an instruction error will result in reversal "when we cannot say with complete confidence that a reasonable jury would have rendered a guilty verdict had the instruction been given." Id. (quoting Ray, 846 N.E.2d at 1070). Thus, we must consider whether the trial court's refusal to instruct the jury on the lesser included offenses of battery, as Class A and Class B misdemeanors, constitutes reversible error.

To determine whether the refusal to instruct on lesser included offenses requires reversal, we consider the three-part test set out in Wright. Parts one and two require the

[2] We also reviewed two other issues in Markley, neither of which is relevant to the issue before us in the present case.

trial court to determine whether the lesser included offense is either factually or inherently part of the greater offense.[3] Brown v. State, 703 N.E.2d 1010, 1019 (Ind. 1998). If so, Wright requires the trial court to determine if there is a "serious evidentiary dispute" as to any element that distinguishes the greater offense from the lesser. Id. "This is shorthand for Wright's full holding that 'if, in view of this dispute, a jury could conclude that the lesser offense was committed but not the greater, then it is reversible error for a trial court not to give an instruction, when requested, on the inherently or factually included lesser offense.'" Id. (citing Wright, 658 N.E.2d at 567). For convenience we will term a finding as to the existence or absence of a substantial evidentiary dispute, a Wright finding. Id. Where such a finding is made we review the trial court's rejection of a tendered instruction for an abuse of discretion. Id. (citing Champlain v. State, 681 N.E.2d 696, 700 (Ind. 1997)).

Here, Miller contends that a serious evidentiary dispute exists as to an element that distinguishes battery, as a Class C felony, from battery, as either a Class A or Class B misdemeanor. Specifically, he argues that there was evidence that the altercation had concluded before D.A. lost his footing and fell under the semi-truck's trailer. He reasons further, therefore, that the injuries sustained by D.A. from being run over did not result from the battery. Thus, he argues, the trial court abused its discretion when it refused to instruct the jury on battery, as Class A and Class B misdemeanors, as lesser included offenses to the offense charged. We must agree.

Battery is a Class C felony if it results in serious bodily injury to another person. Ind. Code § 35-42-2-1(a)(3). Miller testified that he and D.A. were "done fighting. We

[3] The State does not dispute that one of the first two parts of the Wright test has been met.

both backed up and when he backed up he was too close to the curb and tripped off of it." Transcript at 289. Matt Edwards testified that Miller and D.A. "were both throwing punches, you know, and then they stopped and [Miller] kind of backed up a little bit, maybe took a step, a little step forward or a little step back. [D.A.] kept backing up and his foot slipped off the curb." Id. at 249. Other witnesses testified that Miller pushed D.A. into the trailer or that the fight was on-going when D.A. fell under the trailer. But the weight and credibility of evidence is a question for the jury. Considering Miller's and Edwards' testimony, we cannot say with complete confidence that the jury would have rendered a guilty verdict for battery, as a Class C felony, had the trial court instructed them on the lesser included offenses. Filice, 886 N.E.2d at 37.

In sum, the record contains contradictory evidence regarding whether the fight had concluded before D.A. lost his footing, fell, and was run over by the trailer. As such, there exists a serious evidentiary dispute as to whether D.A.'s severe injuries were the result of the battery. Thus, we conclude that the trial court committed reversible error when it refused to instruct the jury on the lesser included offenses of battery, as Class A and Class B misdemeanors. We must reverse Miller's conviction, and we remand for a new trial.

Reversed and remanded.

KIRSCH, J., and BARNES, J., concur.